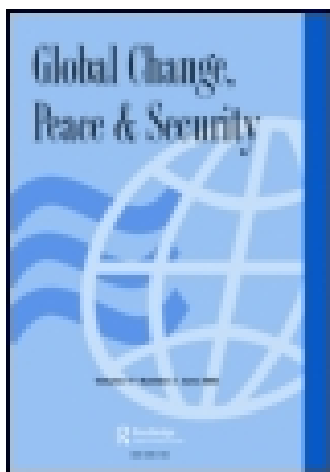


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COMMUNICATION

The case for an Iraq War inquiry in Australia

Paul H. Barratt*

Former Secretary, Department of Defence (Australia)

This article examines the background to the March 2003 invasion of Iraq with a view to identifying when and by what process Australia committed itself to the invasion. It provides evidence and assessments from a variety of sources that the Australian Government was effectively committed long before it announced a decision on 18 March 2003, the eve of the invasion. Many questions about the decision making process remain; in the absence of a properly constituted inquiry there is little solid evidence that the Government considered the matter of entering into armed hostilities with the diligence that the Australian public might expect. It is the thesis of this paper that one of the key lessons from the Iraq War is that the current system of decision making in relation to the deployment of the Australian Defence Force (ADF) into international armed conflict contains insufficient checks and balances, and needs to be changed.

Keywords: Iraq War; Australian foreign policy; international relations; war making powers

Introduction

We now know a great deal about how Australia became involved in the war in Iraq, but the knowledge we have raises more questions than answers about how the Government of the day took that gravest of decisions, a decision to participate in the invasion of another sovereign state. The two inquiries which have been held to date¹ looked only at the performance of the Australian intelligence agencies; neither of them had a brief to look at the more important question of how the Government itself performed. We still need a properly constituted enquiry with the powers to find authoritative answers to questions like whether the Cabinet formally sat down for a calm and considered assessment of all the issues, whether it ignored the flaws in the intelligence presented to it, and whether it gave objective consideration to the legal issues surrounding the proposed invasion.

Looking back at the invasion from the perspective of 11 years on, it is evident that the current situation in which the Prime Minister, with or without the advice and consent of his/her colleagues and their departmental advisers, can commit Australian forces to war or warlike operations in circumstances short of a direct attack on Australia's homeland can have a range of undesirable consequences. These include misleading, overstated or over-certain claims to the Australian Parliament and people, patently absurd claims of self defence against a real and imminent threat to Australia, a lack of clarity as to what the mission is and what success would look like, and vexed questions of United Nations authority and of legality in relation both to customary international law and to the provisions of the UN Charter.

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1 Commonwealth of Australia Parliament, *Intelligence on Iraq's Weapons of Mass Destruction*, Parliamentary Joint Committee on ASIO, ASIS and DSD, December 2003 (the 'Jull Report'); and Commonwealth of Australia, *Report of the Inquiry into Australian Intelligence Agencies*, 2004 (the 'Flood Report').

The implications are profound. Clearly the current situation in which the decision to commit the Australian Defence Force (ADF) to international armed conflict is in the hands of a very small circle of people is insufficiently robust, and there is a need to ensure that Parliament is formally involved in any such decision in the future. It is possible to establish parliamentary control without compromising national security or the timeliness of our responses to emerging situations which may require the use of armed force.

Going to war with ease

Most Australians would probably be surprised how easy it is under current arrangements to commit the ADF to armed international conflict. Many would imagine that the Governor-General would be involved in some way – the executive power of the Commonwealth is exercised by the Governor-General on the advice of the Executive Council and the Governor-General is Commander-in-Chief of Australia's military forces.²

Those who expected that the Governor-General would be involved in the decision are in good company. Sampford has written of the disappointed expectations of Governors-General Hayden and Hollingsworth, each of whom expected to be consulted about a deployment that took place during their term, and says that:

In 2003, most constitutional lawyers expected that the political decision would be taken by cabinet as a whole or the security cabinet but legally authorised by the governor-general on advice from the prime minister either exercising the prerogative [of the sovereign] or through the Federal Executive Council.³

In fact the Governor-General was not involved, and the Government appears to have relied simply upon the statutory power vested in the Minister for Defence under a 1975 amendment to the Defence Act which provides at Section 8 that the Minister shall have general control and administration of the defence force.⁴ This particular section does not read like a delegation to the Defence Minister of the power to make war, and Sampford states that there is no hint of such an intention in the Tange Report which recommended the change, or in the debate that accompanied it – including assurances that the Governor-General's powers would be unaffected.⁵ Nevertheless, it appears that as matters now stand, for a Prime Minister prepared to ignore the traditional role of the Governor-General, the legal requirement for the ADF to be deployed into international armed conflict is no more than a written direction from the Minister for Defence to the Chief of the Defence Force (CDF). Such a direction would require no more behind it than a request from the Prime Minister to the Defence Minister. In effect the 'War Powers' are in the hands of just two people, one of whom is beholden to the other for his or her position.

Unfortunately, what can be done so easily can be done without due care. The decision by the Australian Government to participate in the invasion of Iraq in March 2003 does not appear to have been attended by the diligence that might be expected in relation to such a serious matter as committing the nation to war.

A war long planned

The March 2003 invasion of Iraq was presented to the Australian public as a regrettable necessity resulting from the dire threat presented by Iraqi possession of Weapons of Mass Destruction

2 Australian Constitution, Sections 61, 62, 68

3 Charles Sampford, 'A Better Westminster Way to War?', in *Why Did We Go to War In Iraq? A Call for an Australian Inquiry*, ed. Alison Broinowski (Melbourne: Iraq War Inquiry Group, 2012), 57–8.

4 Commonwealth of Australia, Defence Act 1903, s. 8.

5 Sampford, 'A Better Westminster Way to War?', 59.

(WMD), a threat rendered more dire by the impression that was created in the United States and Australia that these WMD might fall into the hands of terrorists. In fact, for anyone paying attention there was abundant evidence in the late 1990s that in the event of a Republican being elected in 2000 to succeed President Bill Clinton, the overthrow of Saddam Hussein by military force would be very much on the cards. Accordingly, the foregoing representation of the threat from Iraq was part of a calculated strategy to market a war which had long been planned. Paul R. Pillar, the CIA's national intelligence officer responsible for the Middle East in 2000–2005 states:

The chief purpose of forcibly removing Saddam flowed from the central objectives of neoconservatism. At the core of this ideology is the proposition that the United States should use its power and influence to spread its own freedom-oriented values, including open politics and free-enterprise economics.⁶

Pillar traced this to the emergence of the 'unipolar moment' that emerged in early 1990 in the immediate aftermath of the Cold War, and stated that 'Iraq became for neocons a sort of test case for their much larger ideas about U.S. power and leadership worldwide'.⁷

Pursuit of this agenda saw the establishment in 1997 of the neoconservative-dominated Project for the New American Century (PNAC) to promote 'a Reaganite policy of military strength and moral clarity'. Among its founding principles was the 'need to accept responsibility for America's unique role in preserving and extending an international order friendly to our security, our prosperity, and our principles'.⁸ Several leading members of PNAC, such as Donald Rumsfeld, Paul Wolfowitz, John Bolton and Richard Armitage, were to become prominent members of the defence and foreign policy establishment in the Bush Administration.

In January 1998 PNAC published an open letter to President Bill Clinton calling for a new strategy to remove Saddam Hussein from power; the letter made explicit that this meant a willingness to undertake military action.⁹ In September 1998 Paul Wolfowitz testified to the House National Security Committee in favour of the use of American military power to liberate 'ourselves, our friends and allies in the region, and the Iraqi people themselves, from the menace of Saddam Hussein'.¹⁰ On 31 October 1998 President Clinton signed into law the Iraq Liberation Act, the central purpose of which was regime change.¹¹ This legislation provided almost \$100 million in military assistance to anti-Saddam forces in Iraq.¹²

In November 1998 PNAC Project Director Robert Kagan editorialized in *The Weekly Standard* that it was time to complete the unfinished business of the 1991 Gulf War and get rid of Saddam. He outlined the thinking behind the Iraq Liberation Act – to establish a 'liberated

6 Paul R. Pillar, *Intelligence and U.S. Foreign Policy: Iraq, 9/11 and Misguided Reform* (New York: Columbia University Press, 2011), 16.

7 *Ibid.*, 18.

8 Project for the New American Century, *Statement of Principles*, June 3, 1997, <http://www.newamericancentury.org/statementofprinciples.htm> (accessed August 22, 2013 – account now suspended). An archived copy of the page may be found at <http://web.archive.org/web/20070810113753/http://www.newamericancentury.org/statementofprinciples.htm>.

9 Project for the New American Century, *Open Letter to President Clinton*, January 26, 1998, <http://www.newamericancentury.org/iraqclintonletter.htm> (accessed August 22, 2013 – account now suspended). An archived copy of the page may be found at <http://web.archive.org/web/20070810113947/www.newamericancentury.org/iraqclintonletter.htm>.

10 Paul Wolfowitz, 1998 Statement Before the House National Security Committee, <http://www.newamericancentury.org/iraqsep1898.htm> (accessed August 22, 2013 – account now suspended). An archived copy of this page may be found at <https://web.archive.org/web/20131011003421/http://www.newamericancentury.org/iraqsep1898.htm>.

11 William Clinton, Statement on Signing the Iraq Liberation Act of 1998, October 31, 1998, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=55205>.

12 Robert Kagan, 'How to Attack Iraq', *The Weekly Standard*, November 16, 1998, 17–18 <http://www.newamericancentury.org/AttackIraq-Nov16,98.pdf> (accessed August 22, 2013 – account now suspended). An archived copy of this page may be found at <http://www.resisttyranny.com/pnac/web.archive.org/web/20030321070617/www.newamericancentury.org/AttackIraq-Nov16,98.pdf>.

zone' in southern Iraq that would provide a safe haven where opponents of Saddam could rally and organize a credible alternative to the present regime. The liberated zone would have to be protected by US military might, both from the air and, if necessary, on the ground. Kagan concluded, 'Unless we are prepared to live in a world where aggressive dictators like Saddam Hussein wield weapons of mass destruction then the time has come to take the necessary risks to prevent it'.¹³

Not surprisingly against this background, the preoccupation with Iraq and the removal of Saddam Hussein was high on the agenda of the incoming George W. Bush Administration. Ten days after becoming president in 2001, Bush met for the first time with his national security principals, with 'Mideast policy' as the advertised subject. The principal outcome of the meeting was that Secretary of Defense Rumsfeld and the Chairman of the Joint Chiefs of Staff, General Hugh Shelton, were to examine 'our military options' and 'how it might look' to use US ground forces to challenge Saddam Hussein.¹⁴

When the principals reconvened at the end of February, Rumsfeld cut into a discussion about sanctions against Iraq to say 'Sanctions are fine, but what we really want to think about is going after Saddam'.¹⁵ Treasury Secretary Paul O'Neill, who was at the meeting, said later:

From the beginning, we were building the case against Hussein and looking at how we could take him out and change Iraq into a new country. And, if we did that, it would solve everything. It was all about finding a way to do it. That was the tone of it. The President was saying, 'Fine. Go find me a way to do this'.¹⁶

Thus, as Pillar observed, policymakers were not choosing an objective in response to dangers and demands being made known to them regarding WMD or anything else, they were 'building the case' for an objective upon which they had already decided, the ousting of Saddam Hussein.¹⁷ Top officials knew what policy they intended to pursue and selected intelligence assessments to promote that policy based on their political usefulness, not their credibility.¹⁸

That the case for war against Iraq was a concocted one became abundantly clear fairly quickly: a year into the war Kaufmann was able to observe:

By now there is broad agreement among U.S. foreign policy experts, as well as much of the American public and the international community, that the threat assessments that President George W. Bush and his administration used to justify the war against Iraq were greatly exaggerated, and on some dimensions wholly baseless.¹⁹

Pillar went further, saying that in the wake of the Iraq War it had become clear that official intelligence analysis was not relied on in making even the most significant national security decisions. What is most remarkable about pre-war US intelligence on Iraq, he said, is not that it got things wrong and thereby misled policymakers; it is that it played so small a role in one of the most important US policy decisions in recent decades.²⁰

Constructing the case for war

In the first eight months of the Bush Administration the case for war against Iraq had not yet been adequately built, and in the assessment of Pillar there would not have been sufficient support

13 Ibid., 18.

14 Pillar, *Intelligence and U.S. Foreign Policy*, 24.

15 Ibid.

16 Ron Suskind, *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neil* (New York: Simon and Schuster, 2004), 86.

17 Pillar, *Intelligence and U.S. Foreign Policy*, 25.

18 Chaim Kaufmann, 'Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War', *International Security* 29, no. 1 (Summer 2004): 9.

19 Ibid., 5.

20 Paul R. Pillar, 'Intelligence, Policy and the War in Iraq', *Foreign Affairs* 85, no. 2 (March/April 2006): 15–16.

among the American public for the drastic step of launching an offensive war. All that changed abruptly on 11 September 2001, not because Iraq was working with those responsible for the terrorist attack, but because 9/11 drastically changed the mood of the American public.²¹

Even so, a proposal to topple Saddam Hussein forthwith, brought forward by Deputy Secretary of Defense Paul Wolfowitz, was rejected. Other senior members of the Bush Administration realized that, even in the suddenly more militant climate in America, an invasion of Iraq would have been seen as a very contrived response to a terrorist attack by a group based in Taliban-ruled Afghanistan. A year-long effort to condition public opinion, based on the notion that invading Iraq would be part of a global 'war on terror', would be needed to make the Iraq War sellable. The rhetorical themes for selling the war (terrorism and WMD) were established by President Bush in his January 2002 State of the Union Address, with its famous reference to the Axis of Evil consisting of Iraq, Iran and North Korea, the latter two being added to the draft on the recommendation of Condoleezza Rice to reduce the chance of planning for the war against Iraq being discovered.²²

For the purpose of this campaign administration officials sought during 2002–03 to redefine Hussein as not an ordinary regional despot careful to protect his power, but an evil madman bent on the destruction of the United States and willing to run virtually any risk to himself or his country to fulfil this goal.²³ The Bush Administration used its control of intelligence information to present to the public and the world a false picture of US information about Iraqi threats. Analyses that supported the administration's inflated claims were publicized, while those that contradicted pro-war claims remained classified. Further, at least some of the favourable analyses were produced by coercion of intelligence agencies and analysts.²⁴

Covert preparation for war

While publicly constructing the case for war, throughout 2002 President Bush maintained the deception that he was not preparing for it, saying repeatedly in press conferences and in private conversations with members of his Cabinet that there were no war plans on his desk.²⁵ By mid-year, however, America's British allies were well aware of what was afoot. The head of the British Secret Intelligence Service, Sir Richard Dearlove, told Prime Minister Tony Blair and his senior national security advisers at a meeting on 23 July, 'Military action [is] now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD'. He went on to say that 'the intelligence and facts were being fixed around the policy', the Bush Administration 'had no patience with the UN route', and 'there was little discussion in Washington of the aftermath after military action'.²⁶ On this latter point, Pillar observed, 'If the entire body of official intelligence analysis on Iraq had a policy implication, it was to avoid war – or, if war was going to be launched, to prepare for a messy aftermath'.²⁷

What did the Howard Government know?

In any examination of the specifics of how, when and on what terms Australia became committed to the invasion of Iraq, the central question is whether John Howard was, like Tony Blair, an 'eyes open' participant in the Bush Administration's machinations, or whether he was duped by them.

21 Pillar, *Intelligence and U.S. Foreign Policy*, 25.

22 *Ibid.*, 26–8.

23 Kaufmann, 'The Selling of the Iraq War', 10.

24 *Ibid.*, 37.

25 Pillar, *Intelligence and U.S. Foreign Policy*, 29.

26 *Ibid.*, 28

27 Pillar, 'Intelligence, Policy and the War in Iraq', 16

In either case, the unwisdom of leaving the power to commit the ADF to armed conflict in the hands of just one or two people is plain.

If the Howard Government did not know what the Blair Government knew, it should have, both directly from the Americans and indirectly from the British. That is the reason Australia maintains diplomatic missions abroad, and why it has very senior and well-connected people at the helm in the most important of them.

In fact there is good reason to believe that the Howard Government was in on the game. Woodard says the Australian Government would have seen most of the neocons' aspirations as legitimate, if they could be achieved at acceptable cost.²⁸ Howard was in Washington at the time of 9/11, would most likely have been briefed on the possibility of war with Iraq, and was a paid-up member of the war club from that point. His ambassador and former senior adviser (international) Michael Thawley (ambassador to the United States 2000–2005) is often paid the compliment of having been as close as any ambassador to the neocons.²⁹

Woodard observed also that at the very heart of the view that the US should go on from Afghanistan to eliminate Saddam Hussein's regime in Iraq was Vice President Dick Cheney, whose past political positions and business interests had brought him into close contact with Australia's conservative politicians.³⁰ In the late 1990s senior members of the Howard Government were in close contact with the senior Republicans who were expecting to come to office in 2001. Cheney visited Canberra in 1998 and dined at Duntroon House with Defence Minister Ian McLachlan, other guests being the Defence Secretary and CDF, and other senior members of the Australian defence establishment.³¹ It is reasonable to suppose that the matters of mutual interest between Cheney and the Australian Defence Minister had more to do with the future Republican national security agenda than with Cheney's then position as Chief Executive of Halliburton.

On 14 September John Howard said that Australia 'stands ready to cooperate within the limits of its capability concerning any response that the United States may regard as necessary in consultation with her allies'. Given the likely state of Howard's knowledge of US intentions, use of the word 'any' might signify that he had by that time given the Americans an indication that Australia would join them in an assault on Iraq if they decided to proceed with it.

It is the view of other well-informed observers that Australia committed itself to participate in the war at an early stage. White argued that the decision to invade Iraq was taken not in early 2003 as represented by the Government, but the year before:

In the weeks after George Bush put the invasion on the agenda with his 'axis of evil' speech in January 2002, Australia clearly indicated it would be willing to join. Of course no formal commitments were made until the eve of battle – they never are. But the key political decision had already been taken.³²

Woodard says it is acknowledged publicly that Australia participated actively in the war planning from July 2002, and cites Thawley as stating that on Iraq we set out clearly what forces we were prepared to provide and what we were prepared to do.³³

The question of legality

The problem with this manner of going to war (committing to armed conflict in the absence of a clear and compelling case) is that it raises questions about where the proposed conflict might stand

28 Garry Woodard, *We Now Know About Going to War in Iraq* (Melbourne: Melbourne University Press, 2007), 5. Monograph originally posted on Melbourne University Press website, now available on Nautilus Institute website at http://nautilus.org/apsnet/we-now-know-about-going-to-war-in-iraq/#_edn30 (accessed March 21, 2014).

29 *Ibid.*, 10–12.

30 *Ibid.*, 3.

31 The author attended this dinner.

32 Hugh White, 'Why Howard Took Us to War', *The Age*, February 26, 2004.

33 Woodard, *We Now Know*, 14.

in relation to international law, and it almost certainly will involve inadequate consideration of the consequences of military action and of the critical factors required for success. Since the establishment of the United Nations in 1945 there have been only two lawful bases for one state to take military action against another: either the action is authorized by a resolution of the UN Security Council, or it is taken pursuant to the inherent right of individual or collective self-defence.³⁴ Regarding the first of these, Prime Minister Howard told a media conference on 18 March 2003 that a resolution was not put to the Security Council ‘because they didn’t think it would win’.³⁵

The right of self-defence can extend to a pre-emptive action, the settled international case law being drawn from the 1837 *Caroline* case involving an incursion into the United States from Canada. The criteria which derive from the *Caroline* case are that the necessity of self-defence must be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’.³⁶ These criteria can hardly be said to have been fulfilled in the case of any ostensible threat from Iraq.

Sir Richard Dearlove had reported that the Bush Administration ‘had no patience with the UN route’,³⁷ but UN authorization was a much more important matter in London. Prime Minister Tony Blair wanted to be part of the war but the issue was a matter of great controversy in Britain’s official legal circles. Less than two months before the war began Sir Michael Wood, then the Foreign Office’s legal adviser, told ministers there was ‘no doubt’ that Britain could not lawfully use force against Iraq because it could not claim it was acting in self-defence, that it was trying to prevent a humanitarian catastrophe or that it had the authorization of the UN.³⁸ This advice represented the views of all 27 senior legal advisers in the Foreign Office.³⁹ Now declassified secret documents presented to the Chilcot Inquiry show that Sir Michael first recorded his concerns in March 2002.⁴⁰

Declassified UK Government documents also show that UK Attorney-General Lord Goldsmith was initially clear that there was no sufficient legal basis for military action. After being summoned for last-minute talks with Mr Blair and Mr Straw – who warned against overly ‘dogmatic’ legal advice – he eventually ruled the conflict was lawful.⁴¹

Lord Goldsmith’s convenient change of heart was not enough to keep the matter under wraps. In her resignation letter submitted on the eve of the war, Elizabeth Wilmshurst, Deputy Legal Adviser to the Foreign Office, described military action in Iraq as ‘an unlawful use of force’ that ‘amounts to a crime of aggression’.⁴²

Back in Australia John Howard had his own problems – problems which he insouciantly swept aside. On 26 February 2003, 43 academic experts on international law and human rights published in the *Sydney Morning Herald* (SMH) an open letter stating that, ‘The initiation of a

34 United Nations Charter, Chapter VII, <http://www.un.org/en/documents/charter/chapter7.shtml> (accessed July 7, 2013).

35 ‘PM Fields Questions from Journalists’, *The Age*, March 18, 2013, <http://www.theage.com.au/articles/2003/03/18/1047749753387.html> (accessed August 15, 2013).

36 Yale Law School, *British-American Diplomacy: The Caroline Case* (New Haven, CT: Lillian Goldman Law Library, 2008) – see August 6, 1942 letter from Daniel Webster to Lord Ashburton at http://avalon.law.yale.edu/19th_century/br-1842d.asp (accessed March 23, 2014).

37 Pillar, *Intelligence and U.S. Foreign Policy*, 27.

38 James Chapman, ‘Iraq War Was a War of Aggression: The Damning Verdict of Top Whitehall Lawyers which No. 10 Refused to Accept’, *Mail Online*, January 27, 2010, <http://www.dailymail.co.uk/news/article-1246312/Chilcot-inquiry-Iraq-war-The-damning-verdict-Whitehall-lawyers-invading-Iraq-ministers-refused-accept.html> (accessed March 28, 2014).

39 Carl Herman, ‘All 27 UK Foreign Office Lawyers: Iraq War Unlawful. Obama, Politicians, US Media: No Response’, *examiner.com*, January 28, 2010, <http://www.examiner.com/article/all-27-uk-foreign-affairs-lawyers-iraq-war-unlawful-obama-politicians-us-media-no-response> (accessed March 28, 2014).

40 Chapman, ‘Iraq War Was a War of Aggression’.

41 Ibid.

42 Ramesh Thakur, ‘Why an Inquiry, and Why Now?’, in *Why Did We Go to War In Iraq?* (see note 3), 17.

war against Iraq by the self-styled “coalition of the willing” would be a fundamental violation of international law’.⁴³ On 18 March 2003 Howard tabled in the House of Representatives legal advice to the effect that the coming war would be legal: it asserted that there was existing authority for the use of force which ‘would only be negated in current circumstances if the Security Council were to pass a resolution that required member states to refrain from the use of force against Iraq’.⁴⁴ This is a difficult proposition to sustain, and it is notable that the advice was prepared by two departmental officers; the document was signed by neither the Attorney-General nor the Solicitor-General. At the time of tabling the legal advice John Howard must have known of the controversy that was raging within the British Government in the lead-up to the war.

The fiction that the war was legal was not able to be sustained. On 15 September 2004 UN Secretary-General Kofi Annan told the BBC that the invasion ‘was not in conformity with the UN charter’ and that ‘from the charter point of view, it was illegal’.⁴⁵ Philippe Sands QC, Professor of Law at University College London, told the House of Commons Select Committee on Foreign Affairs:

[M]y clear view was and remains that the use of force by the United Kingdom and the United States was unlawful and that both states are internationally responsible for all the consequences of their unlawful actions.⁴⁶

Thakur says the war was illegal:

Only the United Nations, not individual states, had the right to decide if Iraq was in breach of UN resolutions. Security Council Resolution 1441 did not use the key phrase ‘all necessary means’ to enforce it, hence the need for a second UN resolution that never came.⁴⁷

This was recognized by key players at the time. Reliance on Resolution 1441 as the basis for the invasion is contrary to the statements of US Ambassador to the UN John Negroponte and UK Ambassador Sir Jeremy Greenstock at the time it was passed.⁴⁸

Selling the war in Australia

The commitment to participate in a ‘war of choice’ in Iraq required the Australian Government to perpetrate deceptions on the Australian Parliament and public similar to those with which the Bush Administration was deceiving the Americans. Like President Bush, John Howard maintained throughout 2002 that no decision had been taken, a fiction he maintained right up to the eve of war. Facing a censure motion on 5 February, he characterized the forward deployment of military forces as part of a process ‘supporting diplomatic pressure being put on Iraq through the United Nations process’ and insisted that no final decision had been taken.⁴⁹ Similarly, he had to market to the Australian public the notion that Saddam Hussein had WMD and that these constituted an unacceptable threat. On 4 February 2003 he told the House of Representatives:

43 Don Anton et al., ‘Coalition of the Willing? Make That War Criminals’, *The Sydney Morning Herald*, February 16, 2003, <http://www.smh.com.au/articles/2003/02/25/1046064028608.html> (accessed March 28, 2014).

44 Bill Campbell QC and Chris Moraitis, ‘Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq’, *Melbourne Journal of International Law* 4, no. 2, <http://www.law.unimelb.edu.au/files/dmfile/downloadd18c1.pdf> (accessed March 30, 2014).

45 BBC News, ‘Iraq War Illegal, Says Annan’, September 16, 2004, http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (accessed March 30, 2014).

46 Philippe Sands, ‘2004 Memorandum to the House of Commons Select Committee on Foreign Affairs’, June 1, 2004, <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcaff/441/4060805.htm> (accessed March 30, 2014).

47 Thakur, ‘Why an Inquiry, and Why Now?’, 17.

48 Herman, ‘All 27 UK Foreign Office Lawyers’.

49 House of Representatives Parliamentary Debates, *Hansard*, February 5, 2003 (Commonwealth of Australia), 10956.

The Australian government knows that Iraq still has chemical and biological weapons and that Iraq wants to develop nuclear weapons. We share the view of many that, unless checked, Iraq could, even without outside help, develop nuclear weapons in about five years.⁵⁰

More generally, as summarized by the December 2003 Report of the Parliamentary Committee which inquired into intelligence on Iraq's weapons of mass destruction:

The case made by the government was that Iraq possessed WMD in large quantities and posed a grave and unacceptable threat to the region and the world, particularly as there was a danger that Iraq's WMD might be passed to terrorist organisations. This is not the picture that emerges from an examination of all the assessments provided to the Committee by Australia's two analytical agencies.⁵¹

John Howard dealt with that lamentable disconnect between the sober assessments of the Australian intelligence agencies and what he needed to justify the war by reference to the much more aggressive UK and US assessments, to the effect that Iraq had a useable chemical and biological weapons capability, that it continued to work on developing nuclear weapons, that it had extended-range Scud ballistic missiles, and that Iraq's military planning specifically envisaged the use of chemical and biological weapons.

This enabled him to conclude:

The intelligence material collected over recent times, to which Australia has contributed, points overwhelmingly to Saddam Hussein having acted in systematic defiance of the resolutions of the Security Council, maintained his stockpile of chemical and biological weapons and sought to reconstitute a nuclear weapons program.⁵²

The use of the phrase 'the Australian Government knows' was a cardinal sin from the viewpoint of both Australian parliamentary procedure and professionalism in the treatment of intelligence material. It admits of no doubt – this was not just an *assessment*, the best judgement we could make with the information available at the time, it was *knowledge*. We should not expect a subsequent inquiry to find that the evidence was 'thin, ambiguous and incomplete', which was the finding of the inquiry led by former DFAT Secretary Philip Flood.⁵³

Commencement of military operations

A further deception involved the timing of the commencement of military operations. On 18 March 2003 Howard told Parliament that he had that morning announced 'that Australia had joined a coalition, led by the United States, which intends to disarm Iraq of its prohibited weapons of mass destruction'. He went on:

The government has now authorised our defence forces, which were predeployed to the Gulf to acclimatise and contribute to the campaign to persuade Saddam Hussein into compliance, to take part in coalition operations. There is no more serious decision for any government than to commit its forces to military conflict abroad. Under our system this decision lies with the executive of government: the cabinet. Nevertheless it is appropriate that the Parliament, at the first opportunity, have the chance to debate this motion ... Around midday today, Australian Eastern Standard Time, President Bush delivered an ultimatum to the Iraqi leadership: Saddam Hussein and his sons must leave Iraq within 48 hours *or face military conflict*.⁵⁴

50 *Hansard*, February 4, 2003, 10644.

51 Commonwealth of Australia Parliament, *Intelligence on Iraq's Weapons of Mass Destruction* ('Jull Report'), Parliamentary Joint Committee on ASIO, ASIS and DSD, December 2003, 93.

52 *Hansard*, February 4, 2003, 10645.

53 Commonwealth of Australia, *Report of the Inquiry into Australian Intelligence Agencies* ('Flood Report'), Canberra, 2004, 34.

54 *Hansard*, March 18, 2003, 12505–6; emphasis added.

What he did not tell the Parliament, and give it an opportunity to debate, was the fact that some 30 hours before the expiry of President Bush's ultimatum and the first US bombing of Baghdad, Australia's Special Air Services Regiment (SAS) would initiate combat with Iraqi forces in Western Iraq.⁵⁵ Parliament's opportunity for debate was based on the wilfully false premise that whether or not hostilities commenced would turn on Saddam Hussein's response to the ultimatum. The coalition was determined to invade Iraq whatever the outcome, and prior to the expiry of the ultimatum, Australian forces were engaged in lethal operations against Iraqi soldiers who were entitled to believe that their country was still at peace.

Lack of due diligence

With all of its energies apparently directed to creating the pretext for a war of choice and bringing the Australian public to a state of mind in which it would be prepared to countenance a significant deployment of Australian military forces, the Government has left behind little solid evidence of having undertaken the due diligence that the Australian public would be entitled to expect. We are left with a variety of questions that demand definitive answers. Did the Government really think through the issues independently and consider the implications for our standing with Asian neighbours? Did it evaluate the intelligence presented to it and ignore its flaws? Did the Government consider the legal issues surrounding the proposed invasion objectively, or was it not really interested? What were the objectives, and how was success to be defined? Which of the many NGO predictions of widespread and severe civilian suffering, including by children, did the Government consider, and if none, why? Did the Cabinet formally sit down and consider all the issues calmly and clearly and make a determination based on that, or did it allow the Prime Minister effectively to pre-empt the deliberative process and commit Australian armed forces to the proposed US actions regardless of these considerations? To what extent were the statements made to Parliament and the public consistent with all the available relevant assessments? Most important of all, is this how decisions about the commitment of our armed forces to foreign campaigns should be made now and in the future?

The information we do have is not reassuring. Kelly asserts, on the basis of interviews with participating ministers and key officials, that the Howard Government actively discouraged official advice on whether Australia should commit to the Iraq War and was given no such advice.⁵⁶ White says that the Government did not sufficiently weigh the diplomatic, military and political risks of America's proposal to invade Iraq before giving a de facto commitment, and that little thought was given to the aftermath in Iraq itself, 'beyond a Micawberesque assumption that America would make it work somehow'.⁵⁷ A corollary of this approach was a failure to ask the right questions. White commented that when our views were first sounded in March and April 2002 Australia would have done better to start asking questions: what are the long-term objectives in Iraq? How are they going to be achieved? How will diplomatic support be built? How long will the occupation of Iraq have to last?⁵⁸ Former UN weapons inspector Rod Barton commented that the possession by Iraq of WMD is not the point. 'Before a decision to go to war in 2003, the question that should have been asked is: did Iraq pose a threat either to neighbouring countries or to the wider international community, including Australia and its allies?'⁵⁹

55 Tony Kevin, 'Australia's Secret Pre-emptive War against Iraq, 18–20 March 2003', *Australian Journal of International Affairs* 58, no. 3 (2004): 318–36, <http://dx.doi.org/10.1080/1035771042000260101> (accessed April 7, 2014).

56 Paul Kelly, 'John Howard Ministers Took No Advice Before Joining Iraq War', *The Australian*, September 4, 2009, <http://www.theaustralian.com.au/news/nation/john-howard-ministers-took-no-advice-before-joining-iraq-war/story-e6f9g6nf-1225769329559> (accessed April 8, 2014).

57 White, 'Why Howard Took Us to War'.

58 Ibid.

59 Rod Barton, 'What Evidence Was Available?', in *Why Did We Go to War In Iraq?* (see note 3), 35.

Perhaps there are alternative explanations that will cast the actions of the Howard Government in a different light. Only a properly constituted inquiry with appropriate terms of reference and powers will provide definitive answers to these questions.

On the face of it, however, we have a problem – we remain exposed to the risk of ill-considered and capricious decisions to deploy the ADF into international armed conflict for reasons that have more to do with the political interests of the party in power than a sober assessment of where Australia's national security interests lie.

Proposed solution

An important part of the solution to this problem is to involve the Parliament in any future decision to deploy the ADF into international armed conflict. The right of the Executive, rather than the Parliament, to decide to send troops to war is in the Australian constitutional context a legacy of the Royal Prerogative, which in turn has its roots in the pre-democratic notion that the power to make war is an attribute of the sovereign rather than of the people. In any society founded on the belief that power flows from the people to the state rather than from the state to the people, it is both an anachronism and an anomaly.

A Private Member's Bill to this effect, the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008* [No. 2], was introduced into the Senate by Senator Scott Ludlam, but it was treated with scant respect by the major parties.

Four principal arguments against parliamentary involvement are raised by those who wish to preserve the status quo: the minor parties might block the necessary resolution in the Senate; the process of obtaining parliamentary approval could delay deployment; the Government might have access to intelligence or information which it cannot reveal; and the process might prove nugatory as parliamentarians will vote on party lines. Barratt rebuts each of these arguments, on the grounds that any resolution supported by both major parties will pass; any significant deployment will take time to mobilize; in a Westminster system the Government must be prepared to share classified information with the Opposition leadership, who could be called upon to form a Government at short notice; and if Parliament becomes the locus for decision making about military engagements, MPs might be less inclined to vote along party lines.⁶⁰

Sampford warns against expecting too much from parliamentary processes, noting that much depends upon the quality of information Parliament receives.⁶¹ He proposes a range of options which Westminster Parliaments might consider for obtaining legal advice, and these would no doubt strengthen the process.⁶²

If we persist with the current system we will continue to face the inherent risks of small group decision making. These were set out eloquently by distinguished military historian Robert O'Neill in his submission to the Senate Foreign Affairs, Defence and Trade Committee on the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008* [No. 2]. In this submission he observed that the small group setting makes it easier to believe faulty intelligence reports, or even to dismiss them where they are inconvenient for the Government's preferred policy, and broader issues of the morality of the commitment are relatively easy for the Government to ignore or set aside.⁶³

60 Paul Barratt, 'War Powers: Why not Parliamentary Control?', Australian Observer Blog, posted August 28, 2013, <http://aussieobserver.blogspot.com.au/2013/08/war-powers-why-not-parliamentary-control.html>.

61 Sampford, 'A Better Westminster Way to War?', 59.

62 Ibid., 60–1.

63 Robert O'Neill, 'War Powers and the Australian Parliament in the 21st Century', *Submission to the Senate Standing Committee on Foreign Affairs Defence and Trade Inquiry on the Defence (Parliamentary Approval of Overseas Service) Bill 2008*, 2009, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2008-10/dapaosb08/submissions (accessed April 14, 2014).

The Australian public needs to be much more vigilant about the circumstances in which the Australian Government deploys the ADF and for what purpose. This vigilance is unlikely to become habitual while a decision to send troops remains the prerogative of the Executive – that is, Cabinet, meaning in practice the Prime Minister and a very small group of key ministers – an arrangement which means that a decision, once taken, can be acted upon without significant debate. Vigilance is much more likely to develop if we embrace the notion that the power to make war should be vested in the legislature.

It is not good enough for the citizens of any modern democratic state to accept from their politicians deceitfulness about the state of affairs we face, or the deployment of the nation's youth on ill-defined missions for reasons that have more to do with party-political advantage than protection of the nation's security, either in the short or the long run. If the public does not insist upon higher standards from its politicians, it will have only itself to blame if the sad experiences of Vietnam, Afghanistan and Iraq are repeated in some future conflict.

We must avoid the dangers of small group decision making inherent in the current situation in which the power to deploy is the prerogative of the Executive, and place this power firmly in the hands of the Parliament. The requirement to submit a case to Parliament would have the additional benefit to the quality of Australian governance that it would impose on the Government of the day the discipline of putting on the record a clear statement of what the purpose of the deployment is, on what premises it is based, what the nature of Australia's involvement will be, and how long it is expected to last.

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