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Why Can't Tony Blair be Prosecuted for the Crime of Aggression?

By Nick Grief
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As Baroness Helena Kennedy QC explained in her Remembrance Day lecture, the 2003 Iraq war was illegal. There were no grounds for a claim of self-defence or humanitarian intervention; regime change has no basis in international law; and the argument that the authority to use force conferred by a previous Security Council resolution had been revived by Iraq's material breach of its disarmament obligations was described by Lord Steyn as 'scraping the bottom of the legal barrel'.[1]

So why can't the former Prime Minister and others be prosecuted for the crime of aggression? After all, in his advice on 7 March 2003, the Attorney General envisaged an attempted prosecution for what the Nuremberg Tribunal described as the supreme international crime. He wrote: 'Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.'[2]

The crime's existence in customary international law was recognised by the House of Lords in R v Jones and others.[3] With reference to Article 5 of the Rome Statute, which states that the International Criminal Court cannot exercise jurisdiction over the crime of aggression until a provision has been adopted defining it and setting out the conditions for exercising jurisdiction, the Crown argued that the crime lacked the certainty of definition required of any criminal offence, particularly a crime of such gravity. But Lord Bingham accepted the appellants' proposition that, since 1945 at least, the core elements of the crime had been understood with sufficient clarity to permit the trial of persons accused of committing it. He said: 'It is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.'[4]

While Lord Bingham accepted that a crime recognised in customary international law may be assimilated into our criminal law, however, he held that in the absence of statutory incorporation the crime of aggression is not a crime in English law. Today, he said, the courts have no power to create new criminal offences and when domestic effect is to be given to crimes in customary international law, the practice is to legislate.[5] This reflects an important democratic principle: 'it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated

as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties.'

There were compelling reasons for not departing from that principle: 'A charge of aggression would involve determination of an individual's responsibility as a leader but would presuppose commission of the crime by his own State or another State. Thus, resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) require a decision on the culpability in going to war of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.'[6]

The House of Lords certainly got the right answer from an international law perspective. There is no doubt that the crime of aggression exists in customary international law. Were they also correct from a constitutional law and a human rights perspective? One cannot argue with the proposition that new criminal offences are for Parliament alone to establish. But is the crime of aggression a 'new' criminal offence? It is not as though their Lordships were being asked to create or recognise a brand new crime. Lord Bingham accepted that the crime of aggression has existed since at least 1945.

As for human rights, some people might argue that the crime of aggression is not defined with sufficient certainty to pass the test used by the European Court of Human Rights when considering whether something is 'law'. That term has a qualitative dimension implying accessibility and forseeability. In particular, it must be possible to ascertain where the limits of acceptable behaviour are so that those affected can regulate their conduct. At the time of the Iraq invasion, was the crime of aggression – a leadership crime – defined clearly enough for a State's leaders to regulate their conduct? Their Lordships thought so as far as customary international law is concerned, but that did not obviate the need for statutory authority on the domestic front. So we are where we are: the crime of aggression does not yet exist in English law, unfortunately, and therefore no one can be prosecuted for it in our courts, however flagrant the violation.

Nick Grief is the Steele Raymond LLP Professor of Law at Bournemouth University and an associate tenant at Doughty Street Chambers

Notes:

1 The Times, October 19, 2005.

2 Para 34 of the AG's advice.

3 (2006) UKHL 16. The case raised the question whether the crime of aggression is a 'crime' for the purpose of s 3 of the Criminal Law Act 1967 or an

'offence' within the meaning of s 68(2) of the Criminal Justice and Public Order Act 1994.

4 Ibid. para 19.

5 See e.g. sections 51 and 52 of the International Criminal Court Act 2001. Lord Bingham observed

that the crime of aggression had obviously been

deliberately excluded from the Act.

6 Jones, loc sit, paras 29-30
