

Inquiry on the Iraq War: Who is Accountable?

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Legality and Conduct of Iraq War

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1. Legality

As Baroness Helena Kennedy QC explained in her Remembrance Day lecture (Imperial War Museum, 2007), 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 rightly described by Lord Steyn as 'scraping the bottom of the legal barrel'.¹ It was for the UN Security Council to decide whether those obligations had been met; and if not, what the consequences should be. The UN Charter's prohibition of the use of force is so fundamental (*jus cogens*) that the exceptions to it must be very narrowly interpreted.

Since the war was illegal, 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

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¹ The Times, October 19 2005.

² Para 34 of the AG's advice.

The crime of aggression'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, senior Law Lord, 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

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.

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 a brand new crime. Lord Bingham accepted that the crime of aggression has existed since at least 1945. Moreover, it is a leadership crime – one which can only be committed by a State’s leaders. This is linked to the human rights issue. Some 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 foreseeability. 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 defined clearly enough for political and military leaders to regulate their conduct? I have no doubt that it was. Their Lordships thought so to 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 and unfortunately no one can be prosecuted for it in our courts, however flagrant the violation.

2. Conduct

Before the Iraq War started, the media reported that Iraq would face a barrage of 800 cruise missiles in the first 48 hours of war under a Pentagon plan codenamed ‘Shock and Awe’. US military strategist Harlan Ullman was quoted as saying: ‘We want them to quit not to fight. You have this simultaneous effect, rather like the Hiroshima nuclear weapons, not taking weeks but minutes. You’re sitting in Baghdad and, all of

⁶ *Jones, loc cit*, paras 29-30.

a sudden, you're the general and 30 of your division headquarters have been wiped out. *You can also take the city down. By that I mean get rid of their power and water. In two, three, four, five days they are physically and psychologically exhausted.'*

In the event, things did not materialise as planned because the US attempted an opportunistic air strike against Saddam Hussein on 19 March while he was reportedly at a farm on the outskirts of Baghdad. The attempt failed and, tactical surprise having been lost, land forces were ordered into Baghdad. It later emerged that the UK had blocked the US plan for up to six days of 'Shock and Awe' bombing and that British lawyers and military advisers had adopted a 'tighter' interpretation than Washington as to what constituted a legitimate target.

International law permits belligerents to carry out proportionate attacks against military objectives,⁷ even when it is known that some civilian deaths or injuries will occur. A war crime occurs only if there is an intentional attack directed against civilians or civilian objects or if an attack is launched on a military objective in the knowledge that the incidental civilian injuries or damage would be clearly excessive in relation to the anticipated military advantage.

There is evidence that some targets of the Coalition's military action were not legitimate and/or that excessive incidental civilian damage was caused. Civilian objects, including elements of Iraq's civilian infrastructure, were damaged or even destroyed. In Baghdad, bombs were dropped on markets and media outlets, a hospital and a university. Electricity supplies were targeted in Baghdad and Basra, with severe implications for water supplies. There is a case to answer. According to Human Rights Watch, whose 2003 report 'Off Target: The Conduct of the War and Civilian Casualties in Iraq'⁸ is a detailed assessment of that case, pre-planned targets included 'certain dual-use infrastructure elements (such as electrical power, media, and telecommunications facilities)'. HRW found that although '[a]ttacks on these facilities generally did not result in civilian casualties or extensive damage to civilian property

7 i.e. those objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage: Art 52 of Additional Protocol I, 1977.

⁸ <http://hrw.org/reports/2003/usa1203>

... air strikes on civilian power facilities in al-Nasiriyya caused serious civilian suffering and the legality of the attacks on media installations is questionable'. Other legally questionable incidents or tactics include the market bombings and the use of cluster munitions.

The Office of the Prosecutor of the ICC received over 240 communications from the public concerning the situation in Iraq, including many allegations relating to civilian deaths, injuries and damage during the Coalition's military operations between March and May 2003. The communications were subjected to an initial review to determine whether they provided a possible basis for further action. The Chief Prosecutor concluded that the available material was characterised by (1) a lack of information indicating clear excessiveness in relation to military advantage; and (2) a lack of information indicating the involvement of nationals of States Parties to the Rome Statute. He indicated that most of the military activities had been carried out by non-states parties and did not provide a reasonable basis for believing that a crime within the jurisdiction of the ICC had been committed.

The Prosecutor's decision not to open a formal investigation in respect of the Iraq War was based on the perceived lack of gravity rather than on the complementarity principle,⁹ so there was no question of complementarity being used as a shield to try to thwart international justice. Nonetheless, complaints about the war were lodged by individuals with the UK police in an attempt to ensure accountability through the domestic courts, and investigations were undertaken. In some cases the complaints were followed up by requests under the Freedom of Information (FOI) Act 2000 for information concerning the actions taken by the police. In September 2003, for example, Dorset Police were asked to investigate the Prime Minister and other members of the British government with a view to their prosecution for war crimes and crimes against humanity. The petitioner subsequently wanted to know what action the police had taken and, following an FOI request in January 2005, was informed that a similar allegation made to Scotland Yard by 'Legal Action Against the War' had been investigated by the Metropolitan Police. The file had been submitted to the

⁹ The ICC can act only when States do not undertake proceedings or do not do so properly. It is a court of last resort.

Crown Prosecution Service (CPS), which had concluded that there were no grounds for bringing proceedings in the English courts on the material disclosed. The response continued: ‘The effect of that decision was that the investigation, and future generic ones, were not to be proceeded with or prosecutions undertaken’.

While some British soldiers have been court-martialled as a result of the Iraq War and the ensuing occupation, there are considerable obstacles to prosecuting UK government Ministers or military leaders for war crimes in British courts since under both the Geneva Conventions Act 1957 (as amended) and the International Criminal Court Act 2001, no prosecution can be initiated without the consent of the Attorney-General. In principle, a refusal to consent could be challenged by way of judicial review, but the chances of success are virtually non-existent.

It is disappointing—but hardly surprising—that the Coalition’s conduct during the Iraq War has not been examined by any court. The ICC Prosecutor’s first duty is to observe the Rome Statute, under which the ICC’s jurisdiction is limited to ‘the most serious crimes of international concern’ and is ‘complementary to national criminal jurisdictions’. But the ICC does not have the resources to investigate all situations that appear to fall within its jurisdiction. Within the limits of his resources, the Prosecutor must necessarily select the most serious and urgent ones. His policy is to focus investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for the gravest crimes. The Prosecutor has warned that a case-driven approach, implying that the Court should act in every situation involving crimes apparently falling within its jurisdiction, would mean taking on multiple situations, including those of comparatively lesser gravity, thus expanding the Court’s reach and reducing the role of states, possibly leading to ‘ICC fatigue’ and a diminishing of support. It would also require a much larger budget.

It is tempting to see the Prosecutor’s response to the communications concerning the situation in Iraq as an example of deference to certain permanent members of the UN Security Council. However, I think it would be unfair to accuse him of deference. Indeed, he was considerably more transparent than the CPS in detailing the reasons for not taking things further.

At national level there has been a degree of accountability via the jury system. Since September 2006, for example, five people have been tried at Bristol Crown Court in connection with their activities at RAF Fairford on the eve of the Iraq War. Charged with, inter alia, conspiracy to cause criminal damage, and prevented by the House of Lords' ruling in *Jones* from arguing that they had been trying to prevent the crime of aggression, the defendants argued that they had been seeking to prevent war crimes, that they had a lawful excuse for damaging property because they had sought to prevent damage to the property of Iraqis and that they had acted under duress of circumstance or necessity. At least two of them testified that they had been driven to act by their anticipation of 'Shock and Awe' and the expected use of cluster bombs. Defence witnesses included a cluster munitions expert and individuals who had been in Baghdad and seen civilians fleeing the city or witnessed the destruction caused by the bombing. All five defendants were re-tried after 'hung juries' at their original trials. Three of them were eventually acquitted and two were convicted. After the first two hung juries, George Monbiot observed: 'It is true that such verdicts (or non-verdicts) impose no obligations on the government. They do not in themselves demonstrate that its ministers are guilty of war crimes. But every time the prosecution fails to secure a conviction, the state's authority to take decisions which contravene international law is weakened.'¹⁰

Even though two of the Fairford Five were ultimately convicted, the acquittals in the other two cases (and the original hung juries) surely detract from the Coalition's dubious claim to have had international law on its side. Either we have the rule of law or we do not. As Lord Bingham, now retired, said in his November 2008 Grotius Lecture at the British Institute of International and Comparative Law (of which he is President), in which he described the invasion of Iraq as a serious violation of international law: 'If the daunting challenges now facing the world are to be overcome, it must be through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order.'

¹⁰ The Guardian, 17 October 2007, p 31.