HIGH COURT RULES TONY BLAIR CANNOT BE PROSECUTED OVER IRAQ WAR

- 03.08.2017

Huffington Post 02/08/2017

Sheryn Omeri

On Monday, the High Court of England and Wales refused to give permission for the review of a decision of the Westminster Magistrates Court not to allow the commencement of a private prosecution of former British Prime Minister, Tony Blair for (allegedly) having committed the crime of aggression. Regardless of ones support or disdain for Mr. Blair, the court ruling - a mere seven pages long - and its implications for future decisions to go to war merit some consideration.

The crime of aggression, as set out in the Rome Statute which established the International Criminal Court (ICC), is defined as the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, that is, the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.

The High Court held that Mr. Blair could not be prosecuted for this offence in the English courts for at least two reasons, namely: in an earlier case (Regina v Jones), decided by the House of Lords in 2006, it was held that although there was a crime of aggression in customary (non-treaty-based) international law, there was no such crime in domestic English law;

> there is no prospect that the UK Supreme Court would overturn Jones because:
>
> just as now, when Jones was decided, the crime of aggression was not incorporated into domestic criminal law;
>
> according to the 1972 case of Regina v Knuller a new criminal offence could only be created by Act of Parliament; and
>
> when Parliament enacted the International Criminal Court Act 2001 to give domestic effect to the Rome Statute, it did not include the crime of aggression in the list of offences under the Act, thereby making a deliberate decision not to incorporate it into English law.

While these reasons may seem superficially attractive, upon closer examination they appear far less so. In October 2002, 5 months before the start of the war in Iraq, advice was sought from government legal advisers

on the practical consequences of the UKs acting without international legal authority in using force against Iraq, including possible legal consequences in domestic law, in the International Criminal

Court, and in the International Court of Justice...

The advice which was subsequently provided was made public by the Iraq Inquiry chaired by Sir John Chilcot. In a document, dated 15 October 2002, then Foreign Office Legal Adviser, Sir Michael Wood (now member of the United Nations International Law Commission) set out legal advice which he had prepared with the assistance of Dame Elizabeth Wilmshurst (now Professor of International Law) in which he stated of a domestic prosecution for aggression:

...since there is such a crime in international criminal law, it is just conceivable that there could be an attempt in our domestic courts to launch a private prosecution for the crime of aggression...individuals may seek to rely on the well-established doctrine that the common law accepts international customary law.

The High Court, in the decision concerning Mr. Blair, referred to the related submission that then British Attorney General, Sir Hartley Shawcross QC had made clear in his famous address to the Nuremberg Tribunal that the crime of aggression had existed in international law well before the 1940s.

Against such background, the decision in the Jones case changed the understanding of the place of the crime of aggression in English law. In that case, the defendants were charged with criminal damage to an operational military airbase. By way of defence, they argued that the UKs actions in preparing for, declaring and waging war in Iraq were unlawful acts of aggression which they were justified in attempting to prevent through their actions causing the damage. The House of Lords held that the defendants could only rely on their desire to prevent domestic crimes as a defence and that although the crime of aggression was recognised in customary international law Parliament had not enacted it into domestic law and the court no longer had power to create new criminal offences.

But aggression was not a new criminal offence. According to highly experienced British government lawyers, it had existed in international law since well before the 1940s and had therefore been accepted by the English common law well before 2006 when Jones was decided.

A number of domestic criminal offences are crimes because the court has declared them to be such. To take but one example, the offence of misconduct in public office is a common law offence. It is not defined in any statute and yet it carries a maximum penalty of life imprisonment. An early authoritative statement of it can be found in law reports from 1783. However, it fell into disuse from then until the early 21st century, yet its continued existence is well-recognised.

The previous court decision upon which the High Court relied as preventing it from creating a new domestic offence of aggression (Regina v Knuller) was decided in 1972, well after aggression had been recognised as an international crime and therefore, accepted into English common law. Part of the House of Lords consideration in that case concerned a criminal offence which had been previously created by the common law and which the House said could not now be modified other than through Act of Parliament.

By continuing to recognise it today, the English courts would not be creating a new criminal offence of aggression, just as they do not create a new offence by continuing to recognise the crime of misconduct in public office. As a result, the High Courts points about the importance of the need for certainty in the criminal law fall away. Indeed, in the particular case of Mr. Blair, he was specifically advised by government lawyers of the risk of a prosecution for the crime of

aggression. As the Chilcot Report makes clear, Mr. Blair was determined to pursue the course of action he had decided upon, not because he lacked information about its implications, far from it, but because he did not wish to concern himself with the potential adverse consequences.

In relation to the UK Parliament not having made provision in the 2001 Act for a domestic crime of aggression, the reason for this is obvious. As the High Court itself noted, the 2001 Act was aimed at giving domestic effect to the Rome Statute. In 2001, the Rome Statute did not contain a prosecutable crime of aggression. It was not until 2010 when the international community adopted a resolution setting out a definition of the crime of aggression for insertion into the Rome Statute and then not until 2016 that it was ratified by the requisite number of States party to the Rome Statute to come into force prospectively. None of this affected the status of aggression as a crime in customary international law.

The High Court also stated, somewhat surprisingly, that:

There is no reason, let alone a compelling reason, for departing from the decision in Jones. Indeed the fact that the invasion of Iraq was held not to be a crime in domestic law in 2006 provides a compelling reason why Jones should not be departed from.

This passage ignores the point that it was the decision in Jones which was the departure from the established position as set out by Sir Hartley Shawcross in the late 1940s and by Sir Michael Wood in 2002. In so far as the second part of this passage suggests that the House of Lords found that the invasion of Iraq in fact did not amount to a crime in domestic English law (which the House of Lords in Jones expressly said it would not do), it must be borne in mind that such a finding pre-dated the Iraq Inquiry. That all of the evidence is finally in the public domain (where it always belonged) must surely be a compelling reason why Jones should be departed from and the English common law recognise aggression as a criminal offence as it had always previously done. A court could still decide, upon examination of all of the evidence, that the commencement of war in Iraq did not amount to aggression.

While the High Courts decision is effectively the, somewhat perfunctory, end to the attempted prosecution of Mr. Blair for aggression, it does not necessarily eliminate the possibility of other legal action in respect of the invasion of Iraq or indeed in respect of future acts of aggression which may be committed by a British head of state. The High Courts decision says nothing of the merits of a possible civil claim for compensation against Mr. Blair which may be brought by the families of British soldiers killed in the Iraq war. In relation to future British heads of state, the High Court has merely placed the ball squarely in Parliaments court. If the current Attorney General, Jeremy Wright QC was sincere in his recent remarks on International Justice Day (celebrating the 15th anniversary of the ICC) that Britain will pursue war criminals vigorously where there is the evidence to do so we should expect a proposal to amend the International Criminal Court Act 2001 to include the crime of aggression to appear before Parliament shortly.

Kaynak/Source: