THE JUDGE AND INTERNATIONAL CUSTOM

LE JUGE ET LA COUTUME INTERNATIONALE

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The law of international custom in the case law of the House of Lords and the United Kingdom Supreme Court

The Supreme Court of the United Kingdom was established in October 2009, when it took over the functions of the House of Lords Appellate Committee as the highest court in the United Kingdom. It is because the UK Supreme Court has been functioning for only 4 years that it will be necessary to refer also to the practice of the House of Lords (and in one important case, to a decision of the English Court of Appeal).

By way of preface it is necessary to outline the constitutional position of international law in the United Kingdom. The United Kingdom, as is well known, has no formal or written constitution. But that does not mean it has no constitution. The constitution consists in part of the relationship between the government, the legislature, and the judiciary, and of certain fundamental principles of law, many of which pre-date, and are now embodied in, the European Convention on Human Rights as given effect by the Human Rights Act 1998.

In that constitutional framework, traditionally a distinction has been drawn between the treatment of treaties, on the one hand, and customary international law, on the other hand. The traditional view has been that for treaties to become the law, they have to be transformed into domestic law by legislation. Customary international law is sometimes said to be part of the law of the land, and so automatically incorporated without the need for legislation. But the traditional view has been questioned and is still a matter of controversy. It is for that reason that this contribution must begin with an account of the constitutional position with regard to treaties.

Treaties

In the United Kingdom, the conclusion and ratification of treaties are within the royal prerogative, which in modern terms means that treaties are negotiated and concluded by the Government without the need for the consent and approval of the legislature (Parliament).

But because the Government cannot change the law without the consent of the legislature, if a treaty requires a change in national or domestic law, it is necessary for the treaty, or the relevant terms of the treaty, to be incorporated in United Kingdom law by legislation. Perhaps the most striking examples are the incorporation of the terms of the Treaty of Rome by the European Communities Act 1972 when the United Kingdom joined the EEC, and the very late incorporation of the European Convention on Human Rights by the Human Rights Act 1998, which the United Kingdom had ratified nearly 50 years before. Other well-known

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examples include the Diplomatic Privileges Act 1964 (Vienna Convention) and the Child Abduction and Custody Act 1985 (Hague Convention).

Thus, save to the extent that they are incorporated, the courts of the United Kingdom, including the Supreme Court, have no power to enforce rights and obligations deriving from treaties. As Lord Oliver of Aylmerton put it in the *International Tin Council* case[3]: "[a treaty] is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant".[4]

In one of the series of controversial decisions of the Judicial Committee of the Privy Council on the relationship between the constitutions of various countries in the West Indies and the Inter-American Human Rights system (which had not been incorporated into domestic law) and the orders of the Inter-American Court of Human Rights Lord Hoffmann said in *Higgs v Minister of National Security*[5]

> "The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th century. And on no point were the claims of the prerogative more resented in those times than in relation to the establishment of courts having jurisdiction in domestic law. There have been no prerogative courts in England since the abolition of Star Chamber and High Commission. But the objection to a prerogative court must be equally strong whether it is created by the Crown alone or as an international court by the Crown in conjunction with other sovereign states. In neither case is there power to give it any jurisdiction in domestic law."

In the *International Tin Council* case, creditors claimed several hundreds of millions of pounds from the United Kingdom in its capacity as a member state of the International Tin Council. The ITC was an organisation established by treaty. The ITC was recognised under English law by a statutory order, which gave it the legal status of a body corporate. However, the order did not incorporate the treaty under which the ITC was constituted. One of the bases on which the creditors sued the United Kingdom was that the treaty imposed liability on member states because under the treaty the ITC acted as an agent for the member states. That argument was rejected because the question whether the ITC was an agent for the member states was not justiciable by the United Kingdom courts. The treaty was not incorporated and to decide that the treaty imposed liability on the United Kingdom would have been to confer on the Crown a power to alter the law without the intervention of the legislature.[6]

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[3] *J.H. Rayner Ltd v Department of Trade* [1990] 2 AC 418.
[4] At 500.
[5] [2000] 2 AC 228, at 241-242.
[6] Lord Oliver of Alymerton at 512. This decision has been criticised. See *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, where Lord Steyn (at [49] et seq) referred to criticism of the decision, especially by Sir Robert Jennings and Dame Rosalyn Higgins, each of whom were Presidents of the International Court of Justice, and to the view of one of the authors of the present piece that the actual result, although not the reasoning, of the decision of the House of Lords could be justified by the principled analysis of Kerr LJ in the Court of Appeal that the issue of the liability of member states under international law was justiciable in the national court, but that under international law the member states were not liable for the debts of the international organisation: Collins, *Foreign Relations and the Judiciary* (2002) 51 ICLQ 485, 497.

Customary international law

In *Re McKerr*[7] Lord Steyn said (at [52])

> "The impact of evolving customary international law on our domestic legal system is a subject of increasing importance."

It used to be said that international law was in its full extent part of the law of England.[8] But Lord Bingham has warned that 'customary international law is applicable in the English courts only where the constitution permits'."[9]

The most extensive exposition of the relationship between United Kingdom law and customary international law was made by Lord Denning MR in the English Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria*.[10] But, as will be seen, it cannot be taken literally, and the whole subject remains controversial. This was a case which involved the question whether a state was immune from the jurisdiction of the English courts in respect of commercial transactions (the restrictive theory) or whether the English court (under the English doctrine of precedent) was bound to apply earlier decisions made at a time when the absolute theory of immunity prevailed in international law. Lord Denning MR said[11]

> "*The general picture*
> The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.
> To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. …
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> (i) *The two schools of thought*
> A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of *incorporation*. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of *transformation*. It says that the rules of international law are not to be considered as part of English law

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[7] [2004] UKHL 12, [2004] 1 WLR 807, at [52].
[8] Below.
[9] *R. v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 at [23], citing O'Keefe, Customary International Crimes in English Courts (2001) 72 BYIL 293, at 335.
[10] [1977] QB 529.
[11] At pp 553 et seq.

except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.

(i) *The doctrine of incorporation* . The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut* (1736) 3 Burr. 1481; 4 Burr. 2016; sub nom. *Barbuit's Case* in Chancery (1737) Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C.J. in *Triquet v. Bath* (1764) 3 Burr. 1478 :

> ‘Lord Talbot declared a clear opinion - 'That the law of nations in its full extent was part of the law of England, ... that the law of nations was to be collected from the practice of different nations and the authority of writers.' Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject.’

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(ii) *The doctrine of transformation* . The doctrine of transformation only goes back to 1876 in the judgment of Cockburn C.J. in *Reg. v. Keyn* (1876) 2 Ex.D. 63 , 202-203:

> ‘For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. ... Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature.’

To this I may add the saying of Lord Atkin in *Chung Chi Cheung v. The King [1939] A.C. 160*, 167-168:

> ‘So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.’

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(iii) *Which is correct?* As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: ‘But it does move.’ International law does change: and the courts have applied the changes without the aid of any Act of Parliament. .. The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts - of our country and of theirs - have given effect to them, without any legislation for the purpose, notably in the decision of the Privy Council in *The Philippine Admiral [1977] A.C. 373* .

(iv) *Conclusion on this point* . Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act

of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court - as to what was the ruling of international law 50 or 60 years ago - is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it."

But this remains controversial outside the scope of traditional, easily applied and almost universally applied principles such as state immunity. Doubt has been cast in the House of Lords on what Lord Denning MR said. In *R v Jones (Margaret)*[12] Lord Bingham said:

"The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general truth of this proposition, for which there is indeed old and high authority … I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ('International Law in England' (1935) 51 LQR 24, 31) …that international law is not a part, but is one of the sources, of English law. There was, however, no issue between the parties on this matter, and I am content to accept the general truth of the proposition for present purposes since the only relevant qualification is the subject of consideration below.

Lord Hoffmann said,[13] speaking of the incorporation into domestic law of new crimes in international law

"The law concerning safe conducts, ambassadors and piracy is very old. But new domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party. In *Sosa v Alvarez-Machain* (2004) 159 L Ed 2d 718, 765, Scalia J recently said: 'American law-the law made by the people's democratically elected representatives-does not recognise a category of activity that is so universally disapproved by other nations that it is automatically unlawful here …' At least so far as the criminal law is concerned, I think that the same is true of English law."

There are now many decisions of the House of Lords and the UK Supreme Court dealing with the application of customary international law.

State immunity

Most aspects of state immunity are now dealt with the State Immunity Act 1978, and it is no longer necessary in most cases to refer to customary international law except as an aid to interpretation of its provisions.

But in cases where the Act did not apply, either because the relevant events occurred before it came into force, or because the litigation was involved with a subject matter with which it

[12] [2006] UKHL 16, [2007] 1 AC 136, at [11].
[13] At [62].

was not concerned, the House of Lords accepted that the restrictive theory of immunity had become part of English law by virtue of developments in international law.

There are two cases in the House of Lords involving the application of the restrictive theory of immunity under customary international law.

In the *I Congreso del Partido*[14] the 1978 Act did not apply because the relevant facts had taken place before the Act came into force, but, applying principles of international law, it was held that the Republic of Cuba was not entitled to immunity because the transactions were not jure imperii. Lord Wilberforce said[15]

> "… it is clear that international law, in a general way, in 1978, gave support to a 'restrictive' theory of state immunity, we do not need the statute to make this good. On the other hand, the precise limits of the doctrine were, as the voluminous material placed at our disposal well shows, still in course of development and in many respects uncertain.
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> …Until 1975 it would have been true to say that England, almost alone of influential trading nations (the United States of America having changed its position under the Tate letter in 1952) continued to adhere to a pure, absolute, doctrine of state immunity in all cases. … In 1977 there were reported two landmark cases - *The Philippine Admiral* [1977] A.C. 373 and *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] Q.B. 529. In *The Philippine Admiral* the Judicial Committee of the Privy Council, in an appeal from Hong Kong, declined to follow *The Porto Alexandre* [1920] P. 30 and decided to apply the 'restrictive' doctrine to an action in rem against a state-owned trading vessel. In the comprehensive judgment which was delivered on behalf of the Board, it was said that to do so was more consonant with justice. It was further commented that it was open to the House of Lords to move away from the absolute rule of immunity in actions in personam. Sitting in this House I would unhesitatingly affirm as part of English law the advance made by *The Philippine Admiral* [1977] A.C. 373 with the reservation that the decision was perhaps unnecessarily restrictive in, apparently, confining the departure made to actions in rem. ..
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> The other landmark authority (*Trendtex* [1977] Q.B. 529), a decision of the Court of Appeal, establishes that, as a matter of contemporary international law, the 'restrictive' theory should be generally applied. In that case what was involved was not a claim relating to a trading ship, but one based on a commercial letter of credit arising out of a purchase of cement. The case was not appealed to this House, and since there may be appeals in analogous cases it is perhaps right to avoid commitment to more of the admired judgment of Lord Denning M.R. than is necessary. Its value in the present case lies in the reasoning that if the act in question is of a commercial nature, the fact that it was done for governmental or political reasons does not attract sovereign immunity.
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> I have so far discussed this matter upon such English decisions as are relevant, and upon principle. But since, in this area, English courts are applying, or at least acting so far as possible in accordance with, international law, it is necessary to see what assistance can be gained. If the determination of the character of the relevant act has

[14] [1983] 1 AC 244.

[15] At 260 et seq.

> to be made by municipal courts, they should do so, so far as possible, in conformity with accepted international standards. For this purpose we are entitled to consider judgments of foreign courts of authority, and writings of reputed publicists. We have been invited also to consider affidavits of a number of eminent professors, filed on either side. As to these I must strike a note of caution. In so far as they express opinions as to how the present case should or would be decided in the courts of their country, the reservation must be made that these opinions are based upon a statement of facts which is controversial and in some respect incomplete. They had not the benefit of the much more detailed and complete examination made by the trial judge, upon which our decision must be based. Leaving this aside, I have, myself, derived much assistance from the reasoning and learning contained in these affidavits and for the explanations which their deponents give of decisions of their courts, direct resort to which may be hazardous."

In *Holland v Lampen-Wolfe*[16] the plaintiff was a citizen of the United States and a professor at a United States university that provided courses at a number of United States military bases in Europe. In 1991, as part of her employment by the university, she taught at a military base in England that was operated and maintained by the United States government as part of its functions as a member of NATO. The defendant, who was also a United States citizen, was employed by the United States government as education services officer at the base with responsibility for planning, development and implementation of educational and training programmes. The plaintiff complained that a memorandum written by the defendant defamed her and commenced libel proceedings in the United Kingdom against the defendant. The 1978 Act did not apply to proceedings relating to "anything done by or in relation to the armed forces of a state."

The House of Lords decided that the provision within a military base of education and training for military personnel was part of a state's sovereign function of maintaining its armed forces, and so the publication of the memorandum in the course of the defendant's supervision of such provision was itself an act within the sovereign authority of the United States so as to attract immunity. Lord Millett applied what he described as "an established rule of customary international law that one state cannot be sued in the courts of another for acts performed jure imperii."[17]

There are, of course, numerous decisions of the European Court of Human Rights on the compatibility with the application of state immunity with the European Convention, Article 6. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*[18] (in which an application is pending before the ECHR) the House of Lords decided that although international law condemned and prohibited the practice of torture and had established a universal criminal jurisdiction over alleged torturers that operated as an exception to state immunity, no such universal jurisdiction had yet been recognised in respect of civil proceedings that would allow a victim of torture to seek compensation in the United Kingdom courts in respect of acts committed elsewhere. Both Lord Bingham and Lord Hoffmann referred to a wide body of international material, including the decisions of the International Court of Justice in *Democratic Republic of Congo v Belgium (Case concerning Arrest Warrant of 11 April 2000)*,[19] of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v*

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[16] [2000] 1 WLR 1573 (HL).
[17] At 1583.
[18] [2006] UKHL 26, [2007] 1 AC 270.
[19] 2002 ICJ Rep 3.

Furundzija,[20] and of the ECHR in *Al-Adsani v United Kingdom*[21] and *Kalegoropoulou v Greece and Germany*.[22]

The well-known decision in *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*[23] denying General Pinochet head of state immunity for acts of torture depended, in the view of the majority, not on customary international law, but on the prohibition of torture by international convention. But Lord Millett and Lord Phillips of Worth Matravers (two of the six judges in the majority) considered that the systematic use of torture was an international crime for which there could be no immunity even before the Convention came into effect and consequently there was no immunity under customary international law for the offences relating to torture alleged against the applicant.

The act of state doctrine and the non-recognition of internationally unlawful acts

It was for many years controversial in many countries whether foreign legislation, which was otherwise applicable by the rules of private international law, could be disapplied by a national court on the ground that it was contrary to international law. In a famous article on "International Delinquencies before Municipal Courts"[24] Dr F A Mann argued that when the conflict rule of the forum refers the court to a foreign law (lex causae), the court will not apply the latter if and in so far as it expresses or results from an international delinquency and the substance of this view was accepted in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)*,[25] which concerned a claim for unlawful confiscation with a number of Kuwaiti aircraft seized during the Iraqi invasion of Kuwait in 1990. One of the issues was whether the fact that the confiscation was lawful under Iraqi law prevented a claim, or whether the Iraqi law could be disregarded on the basis that it was contrary to international law. The House of Lords decided that in principle foreign law could be disregarded if it was contrary to international law. The Iraqi law was not recognised because it was a gross breach of international law, especially since the UN Security Council had declared the annexation of Kuwait as being of no legal effect and authorised military action against Iraq.

The law of war

There has been a strong reluctance on the part of the House of Lords to become involved with issues relating to the law of war even where it is claimed that what is involved is a rule of customary international law. It is in this area that the traditional notion that international law is part of the law of the land has come under the greatest strain.

In *R (Gentle) v Prime Minister*[26] the claimants were the mothers of two servicemen who were killed while serving with the British armed forces in Iraq between March 2003 and June 2004. Although inquests were to be held (and were subsequently held) which would investigate the circumstances surrounding the deaths, the claimants sought judicial review of the defendants' refusal to hold a separate independent inquiry to examine the wider question, which would not be considered at the inquests, whether the United Kingdom Government had

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[20] (1998) 38 ILM 317.
[21] 34 EHRR 273.
[22] (2003) 42 ILM 1030.
[23] [2000] 1 AC 147.
[24] (1954) 70 LQR 181, reprinted in Studies in International Law (1973), p 366.
[25] [2002] UKHL 19, [2002] 2 AC 883.
[26] [2008] UKHL 20, [2008] 1 AC 135.

taken reasonable steps to be satisfied that the invasion of Iraq was lawful under the principles of international law. It was decided (inter alia) that the legality of an invasion in international law had nothing to do with the state's obligations under Article 2 of the European Convention to protect service personnel within its jurisdiction.

The most important decision is *R v Jones (Margaret)*,[27] which was concerned with the circumstances in which international *criminal* law may form part of English law. The defendants, opposed to the UK's military action in Iraq, were charged with criminal offences at an operational military airbase, and wished to rely on an alleged defence of preventing the international law crime of aggression. The House of Lords accepted that the crime of aggression was established in customary international law but, on the interpretation of the domestic legislation, had not been assimilated into domestic law.

Lord Bingham accepted that the core elements of the crime of aggression had been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It was unhistorical to suppose that the elements of the crime were clear in 1945 but had since become in any way obscure. He also accepted that crimes recognised in customary international law were (without the need for any domestic statute or judicial decision) recognised and enforced by the domestic law of England and Wales. He referred to Blackstone, *Commentaries*,[28] who listed the "principal offences against the law of nations, animadverted on as such by the municipal laws of England" as violation of safe conducts, infringement of the rights of ambassadors and piracy. He considered it at least arguable that war crimes, recognised as such in customary international law, would now be triable and punishable under the domestic criminal law of this country irrespective of any domestic statute. But it was not necessary to decide that question, since war crimes were something quite distinct from the crime of aggression.

He accepted the view of Sir Franklin Berman,[29] the former Legal Adviser to the Foreign and Commonwealth Office, that

> "Looking at it simply from the point of view of English law, the answer would seem to be no; international law could not create a crime triable directly, without the intervention of Parliament, in an English court. What international law could, however, do is to perform its well-understood validating function, by establishing the legal basis (legal justification) for Parliament to legislate, so far as it purports to exercise control over the conduct of non-nationals abroad. This answer is inevitably tied up with the attitude taken towards the possibility of the creation of new offences under common law. Inasmuch as the reception of customary international law into English law takes place under common law, and inasmuch as the development of new customary international law remains very much the consequence of international behaviour by the executive, in which neither the legislature nor the courts, nor any other branch of the constitution, need have played any part, it would be odd if the executive could, by means of that kind, acting in concert with other states, amend or modify specifically the *criminal* law, with all the consequences that flow for the liberty of the individual and rights of personal property. There are, besides, powerful reasons of political accountability, regularity and legal certainty for saying that the

[27] [2006] UKHL 16, [2007] 1 AC 136.
[28] Bk IV, ch 5, p 68.
[29] *Asserting Jurisdiction: International and European Legal Perspectives*, ed Capps, Evans and Konstantinidis (2003), p 11.

> power to create crimes should now be regarded as reserved exclusively to Parliament, by statute."

Lord Bingham concluded that it was 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. A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either 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.
Similarly Lord Hoffmann accepted[30] that the crime of aggression, the unlawful use of war as an instrument of national policy, was a recognised crime in international law. But aggression had not become a domestic crime. First, there was a democratic principle that it is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence. Second, in the absence of statutory authority, the prosecution of that particular crime in a domestic court would be inconsistent with a fundamental principle of the British constitution: aggression was a crime in which the principal is always the state itself, and the making of war and peace and the disposition of the armed forces had always been regarded as a discretionary power of the Crown into the exercise of which the courts will not inquire.

Extra-territoriality

There have been many cases in the ECHR and in the House of Lords and the Supreme Court on the territorial scope of the European Convention and especially of the meaning of the expression "within their jurisdiction" in Article 1. These cases depend on the interpretation of the expression "jurisdiction" against the background of the use of that expression in general international law. The fullest discussion is in *R (Smith) v Oxfordshire Assistant Deputy Coroner*[31] and *Smith v Ministry of Defence*.[32] The former case decided by a majority that British armed forces were not within the jurisdiction of the United Kingdom for the purposes of the European Convention. But the latter case decided that, in the light of the decision of the ECHR in *Al-Skeini v United Kingdom*,[33] that armed forces were within the jurisdiction of the United Kingdom.
In *R (Purdy) v Director of Public Prosecutions*[34] the claimant suffered from primary progressive multiple sclerosis for which there was no known cure. She expected that she would want to travel to a country where assisted suicide was lawful. Her husband was willing to help her to make the journey, but she was concerned that he might be prosecuted for an offence under the Suicide Act 1961 if he did so. It was decided that the effect of Article 8 of the European Convention was that the Director of Public Prosecutions was under a duty to

[30] At [44] et seq.
[31] [2010] UKSC 29, [2011] 1 AC 1.
[32] [2013] UKSC 41, [2013] 3 WLR 69.
[33] (2011) 53 EHRR 18.
[34] [2009] UKHL 45, [2010] 1 AC 345.

clarify his position as to the factors which he regarded as relevant for and against prosecution in such a case and he would be required to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding whether a prosecution should be brought.

Customary international law and statute

But customary international law cannot take precedence over legislation. In the course of the *Purdy* decision there was discussion of the question whether the Suicide Act 1961 had extra-territorial effect and whether it applied to UK citizens assisting suicide abroad. Although international law is relevant in determining whether legislation is intended to have extra-territorial effect, it is not conclusive.
Lord Hope referred to what Lord Wilberforce had said in *R v Doot*,[35] where the defendants were charged with conspiracy to import dangerous drugs into the United Kingdom. Lord Wilberforce pointed out, at p 817, that there could be no breach of any rules of international law if the defendants were prosecuted in this country as under the territorial principle the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law:

> "The position as it is under international law is not, however, determinative of the question whether, under our municipal law, the acts committed amount to a crime. That has to be decided on different principles. If conspiracy to import drugs were a statutory offence, the question whether foreign conspiracies were included would be decided upon the terms of the statute. Since it is (if at all) a common law offence, this question must be decided upon principle and authority."

Thus in *R v Treacy*[36] the accused had been convicted on a charge of blackmail, where his letter demanding money with menaces was posted in England to a recipient in West Germany, was dismissed. Lord Diplock said:[37]

> "There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom."

Conclusions

The traditional, but by no means universal, view that customary international law is part of the law of the land has come under increasing strain, not least because modern international law is wider, and faster changing than ever before. It has been said that it increasingly differs from traditional customary international law in several fundamental ways, because it is less tied to state practice, it can develop rapidly, and it increasingly purports to regulate a state's treatment of its own citizens.[38]
It is true that the decision of the House of Lords in *R. v Jones (Margaret)* does represent a retreat from the wholesale incorporation of international law. But that decision is based on a

[35] [1973] AC 807.
[36] [1971] AC 537.
[37] At pp 561–562.
[38] Bradley and Goldsmith, Customary International Law as Federal Common Law: a Critique of the Modern Position (1997) 110 *Harvard Law Review* 815 at 842. See Sales and Clement, International law in Domestic Courts (2008) 124 LQR 388; O'Keefe, The Doctrine of Incorporation Revisited (2008) 79 BYIL 7.

rule of constitutional law that a new criminal offence can only be created by Parliament. In other respects the application and influence of international law remains exceptionally strong in United Kingdom courts in general and in the UK Supreme Court in particular.