

PART 1: The prohibition on “judge made” crimes

1.1 The Authorities of *Knulier* and *Nulyarimma*

The proposition was clearly advanced by some Law Lords, as recently as 1962, in *Shaw v The D.P.P.* [1962] AC 220, that the courts in this country retained the ancient judicial discretion, and indeed residual jurisdiction, as custodians of the public morals, where the statute law was silent on a matter, to so construe and prescribe the common law, as to bring within its ambit, and declare criminal, such conduct outrageous to common decency as they deemed “*prejudicial to the public welfare*”, whether or not that conduct had been specifically previously declared or found to be criminal, see especially for instance the opinion of Viscount Salmon @ p.268.

This power was, however, but merely 11 years later, and I should add thankfully not before time, subsequently declared by the House, in the matter of *Knulier (Publishing, Printing and Promotions) Ltd v the D.P.P.* [1973] AC 435, to be out with the modern constitutional perspective on the proper functions of the judiciary. Take, for instance, the following passage from the opinion of Lord Diplock (@ p.479 G)

“ The constitutional setting in which judges in earlier centuries claimed the power to create new criminal offences has long since passed away. To have reasserted it in 1962 .. [re *Shaw’s* case] .. was, in my view, an unacceptable judicial usurpation of what has now become an exclusively legislative power. “

Equally, there is also the following from the opinion of Lord Simon of Glaisdale on the topic (as @ p.490F) as follows :

“ Thirdly, in this connection, it has been suggested that the speeches in *Shaw v. Director of Public Prosecutions* indicated that the courts retain a residual power to create new offences. I do not think they did so. Certainly, it is my view that the courts have no more power to create new offences than they have to abolish those already established in the law ; both tasks are for Parliament. What the courts can and should do (as was truly laid down in *Shaw*) is to recognise the applicability of established offences to new circumstances to which they are relevant. “

These opinions were fully reinforced by their Lordships, were such needed, only two years later, in the matter of *Reg v. Withers* [1975] AC 842 (HL{E}) - see for instance in the opinion of Viscount Dilhorne (@ p.857 H). Hence, it is now the well established and unquestioned modern rule of the common law, whether or not one considers that change to have occurred at some point in time between 1962 (*Shaw’s Case*) and 1973 (*Knulier’s Case*), namely in consequence of the legalisation of homosexual acts by consenting male adults in virtue of s.1 of the Sexual Offences Act, 1967, that our courts (meaning thereby the judges) no longer have the jurisdiction to so construe or prescribe the scope of the common law so as to effectively thereby create a new criminal offence.

This authority was clearly then the most heavily relied upon legal precedent, given by Lords Bingham (§28), Hoffmann (§61) and Mance (§102) for their finding in the negative on the certified question in the present case, that is to say for their finding that “aggression” is not a crime under the law of England. The previous decision of the House in *Knulier*, on this point, was accordingly specifically cited as, at least in major part, the essential authority relied on in support of the following grounds which then appeared in the judgement of the House, Lord Bingham of Cornhill (@ para.29) as follows :

“29. These reasons, taken together, are very strong grounds for rejecting the appellants' contention, since they reflect what has become an important democratic principle in this country: that 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. One would need very compelling reasons for departing from that principle.”

of Lord Hoffmann, (@ para. 62) as follows :

“62. The same reasoning applies to 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”

and of Lord Mance, (@ para 102) as follows :

“... The expansive former view that the courts had a general residual power to recognise or in effect create new crimes, when the public interest in their view so required, no longer survives: *Knüller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435. The creation and regulation of crimes is in a modern Parliamentary democracy a matter *par excellence* for Parliament to debate and legislate. Even crimes under public international law can no longer be, if they ever were, the subject of any automatic reception or recognition in domestic law by the courts.”

One might therefore be forgiven for supposing that they would have sought to offer some persuasive reasoning as to their general grounds for holding that the judicial recognition of the adoption, into the domestic or municipal law, of a normative rule disclosed under customary international criminal law, amounts to or includes the same, or at least an equivalent, thing as once occurred with the creation, by the judges rather than by the legislature, of a new domestic criminal offence. Such that the logic of the established modern rule against the latter, works then also as a prohibition against the former. In short, the question which most obviously calls out to be addressed is, whether the recognition by a judge of the adoption of an international crime, into the domestic common law, is the equivalent to the creation, by that judge, of a new domestic law crime? It is, therefore, all the more regrettable that not only was little or insufficient explanation or reasoning, addressing this specific issue offered, in point of fact none was offered at all. All three Law Lords apparently approaching the issue on the premise that it was self-evident, at least to them, that the two processes were equivalent, to the point that they didn't address the question of similar logic at all.

I might have wished that this specific issue had been addressed more fully in argument, but none the less their Lordships were made fully aware of what I consider to be the leading (or at least was the leading) judicial expression of opinion in this very limited and technical, but nevertheless vitally important and interesting area of constitutional significance in a common law jurisdiction. In the matter of *Nulyarimma v Thompson* [1999] FCA 1192, Merkel J., sitting in the Australian Federal Court on an appeal from a ruling in a criminal matter in the Supreme Court of the Australian Capitol Territory (the “ACT”), found that this precise argument, based on the principle enunciated in *Knüller*, was not equivalent to the acceptance, into the common law of the ACT, of the customary international law crime of genocide, and hence that it was not a principle which worked against such an acceptance.

In so doing, unlike their Lordships in the present case, he offered extensive grounds for his reasoning. Grounds going to, as one logically ought, an analysis of the underlying first principles, which justify the new or modern constitutional perspective against new judge made crimes, and then applying these principles to the case of the domestic common law adoption of an international customary law crime. In so doing, and although Merkel J., was in a minority in the Federal Court on the overall question as to whether (customary law) genocide is a crime in Canberra, justices Wilcox and Whitlam being against him on that, those other judges did not express clearly contrary views on this specific topic, let alone considered views. Consequently, especially since Merkel's J. judgement was not a dissenting one on the outcome of the judgement, his view remains of persuasive authority. Certainly, in my respectful submission, the rationale of his extensive, and in my view persuasive, judicial analysis on this topic, was worthy of, and ought to have been, dealt with by their Lordships in the present case. Accordingly, I shall now offer, as best I am able, a synopsis of Merkel's J. analysis, such that the reader is able to make up their own mind as to this all import issue.

The principle of certainty.

The “Merkel analysis” of first principles, identifies two fundamental aspects. Firstly, there is “*the principle of certainty*”. This is in reference to the common law principle, now bolstered by virtue of the jurisprudence on the application of Art.7 of the European Convention on Human Rights (1950), that a man shall not be found guilty of a crime in respect of his conduct, unless the legal definition of that crime is sufficiently clear and certain at the time he acted, so that he would, or ought, to have known, when he embarked upon it, that he was, or at least was at serious risk of, committing an offence.

The principle has been but recently thus described in the House in terms of the foreseeability of criminal consequences. In the matter of *R. -v- Rimmington, R -v- Goldstein* (2005) 3 WLR 982, Lord Bingham himself, in his leading opinion, held in relation to the common law offence of creating a public nuisance, as follows (at para 36):

“I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases (other than *R v Soul* 70 Cr App R 295) referred to in paras 13 to 22 above is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.”

In so doing he had earlier cited a speech by Judge LJ in the Court of Appeal (Criminal Division) in *R v Misra and Srivastava* [2005] 1 Cr App R 328, paras 29-34, where, in a lengthy passage, that judge in turn quoted (amongst many other authorities in a similar vein) Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at p.279 where he had earlier stated the principle, in the House, thus:

“Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.”

Clearly then this principle is engaged, in relation to the wider issue of the bar on new judge made crime, in the sense that a man can hardly be expected to have been able to foresee that the course of conduct upon which he proposes to embark is capable of, let alone likely to, comprise in the commission of a criminal offence, if, at the time when he acted, no court had as yet established that, as a question of the common law, conduct of such a general character as that which he proposes, comprised in the commission of an offence at all. Clearly, the common law authorities do not require the case law to have contemplated every specific possibility of criminal ingenuity, but rather that they are required to have criminalised the general character of the conduct proposed.

Merkel J. himself, having thus identified this as one of the two fundamental principles engaged by the issue of the acceptance of the international customary law crime of genocide, into the common law of the Australian Capitol Territory, concluded in judgement in *Nulyarimma* that it was not breached by such an acceptance, @ para.178, as follows :

“ Neither the creation of uncertainty nor the imposition of a value judgment are involved in determining whether genocide, as a crime of universal jurisdiction under international law is to be adopted as part of municipal law. As pointed out earlier, the requirement of certainty creates no difficulty in the present case as the definition of the crime and procedures for its prosecution and punishment in the domestic courts are sufficiently certain. The evolution of the prohibition against genocide to the status of *jus cogens* and its adoption in the common law does not involve the creation of a new standard leaving potential offenders uncertain as to whether they have, or have not, engaged in criminal conduct. In that regard international criminal law refuses to countenance retrospectivity (*Polyukhovich* at 575 per Brennan J.) “

We need not, however, now speculate as to how their Lordships might have treated this aspect of the “Merkel analysis”, had they engaged upon it, in relation to the customary law crime of aggression instead. This is because the application of the “principle of certainty” in relation to that crime was an issue in the case, in its own right and was one which was addressed by their Lordships directly, all be it as a free-standing issue. The simple reason for this was that lack of certainty was the sole and precise ground, given by the Court of Appeal below, for rejecting the defence under s.3 of the CLA 1967 in the decision appealed from, and thus was the reason for bringing the matter before the House in the first place.

Latham L.J., when giving the leading judgement in the Court of Appeal (Criminal Division), see now *Jones et al v the Glos. C.P.S.* [2005] QB 259, having referred to what he determined to be the highly significant fact that the States members of the Assembly of States Party to the Rome Statute for the Establishment of an International Criminal Court (1998), the I.C.C., had not as yet agreed amongst themselves upon a definition of the crime of aggression, for the purposes of the future exercise of the jurisdiction of that court in relation to it, then went on to state (@ para. 43) as follows :

“ 43. It is difficult to see in these circumstances how it can be said that there is, accordingly, a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law, where there is no consensus as to an essential element of the crime. It follows that, whatever other effects the international rules as to the crime of aggression may have, they cannot constitute a crime for the purposes of Section 3 of the Criminal Law Act, and the judge was right to rule accordingly.”

However, this reasoning of the Court of Appeal, for rejecting the defence which the Appellants in *Jones et al* are seeking to advance, when the matter was before them, was in turn expressly rejected in terms by both Lord Bingham and Lord Hoffmann in the further appeal before the House. Lord Bingham in his opinion in the House said (@ para 19) as follows :

“ It was suggested, on behalf of the Crown, that the crime of aggression lacked the certainty of definition required of any criminal offence, particularly a crime of this gravity. This submission was based on the requirement in article 5(2) of the Rome statute that the crime of aggression be the subject of definition before the international court exercised jurisdiction to try persons accused of that offence. This was an argument which found some favour with the Court of Appeal (in para 43 of its judgment). I would not for my part accept it. It is true that some states parties to the Rome statute have sought an extended and more specific definition of aggression. It is also true that there has been protracted discussion of whether a finding of aggression against a state by the Security Council should be a necessary pre-condition of the court's exercise of jurisdiction to try a national of that state accused of committing the crime. I do not, however, think that either of these points undermines the appellants' essential proposition that the core elements of the crime of aggression have 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 is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.”

Lord Hoffmann said (@ para 59 in his opinion) as follows :

“... I should say that I do not rely upon the reason given by the Court of Appeal, namely that the elements of the offence are too uncertain. It is true that there is at present no consensus about the circumstances in which the International Criminal Court should exercise its jurisdiction to try the crime of aggression and in particular whether the imprimatur of the Security Council should have to appear on the indictment. But I think that upon analysis it will be found that these disputes are not about the definition of the crime but about the circumstances in which the International Criminal Court (as opposed to some domestic or ad hoc international tribunal, such as the International Military Tribunal at Nuremberg) should try someone for committing it. Of course the definition of a crime so recent

and so rarely punished will have uncertainties. But that is true of other crimes as well. If the core elements of the crime are certain enough to have secured convictions at Nuremberg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international or domestic law.”

Accordingly, therefore, I submit then we can be clearly satisfied that, had their Lordships turned their minds to the issue of the first principles, under-pinning the modern rule barring new judge made crimes, then, on the first element of the “Merkel analysis” at least, namely the “principle of certainty”, they would have been bound to have found that there was in fact no similarity or continuity of logic applying, as between, on the one hand, the adoption by the municipal common law of a crime, from international customary law, with a sufficiently certain and well established core, such as “aggression”, and on the other hand, the effective creation by the judges of a new domestic criminal offence. That consideration, of itself, demanded an explanation from their Lordships, which alas was not forthcoming.

Public policy against judicial discretion.

The second aspect of the fundamental or first principles, under-pinning the modern bar on judge made crimes, as identified by Merkel J. encompassed the public policy against granting to judges such a judicial discretion in this area, which, in his words, entailed their having to make a “value judgment” on a legislative, as opposed to, a judicial basis. He puts this matter thus in para.176 of his judgement in *Nulyarimma* as follows :

“176. For present purposes I accept that *Knüller* and *Withers* establish that in municipal law the function of creating new offences now rests with Parliament and that such residual power as the courts may have retained to create new criminal offences has now lapsed. Plainly, strong policy considerations support that conclusion. The declaration of acts as criminal where they have not been seen to be so before usurps the proper role of Parliament. The exercise of courts' power to create a new offence will also introduce an unwarranted uncertainty into the criminal law. Certainty as to the law, which enables individuals to know which actions are criminal and which actions are not criminal is an essential element of the criminal law. Further, any change in the criminal law requires a value judgment that is better left to Parliament. As Brennan J stated in *Dietrich* at 320:

"Changes in the common law are not made whenever a judge thinks a change is desirable. There must be constraints on the exercise of the power, else the courts would cross `the Rubicon that divides the judicial and the legislative powers'." (to adopt Lord Devlin's phrase in his memorable paper "The Judge as Lawmaker", in The Judge (1979)). "

This is plainly a consideration which, as it seems to me, chimes very closely with the nature of those sentiments which in the event were expressed by the three Lord Lords in the present case, and as already quoted above, as explaining their resistance to the adoption of the crime of aggression into our municipal common law. May I say that as a statement of public policy it is one with which this commentator fully acknowledges and affirms. The creation of law, that is the legislative function, be it in the criminal or for that matter the civil jurisdiction, is, as it appears to me, manifestly one which should, in the ordinary course or events, be reserved to Parliament, as the legislature, and in all events should never be one properly exercisable by the judges, as representing rather the judiciary.

The question here in issue, however, as previously identified, is not whether that policy consideration is valid, or even valid in this particular case, but rather whether or not it is applicable to the present case, where the judges are not being asked ‘to create a new crime’, but rather to recognise ‘the adoption by the municipal common law’ of a crime, already established as a sufficiently well defined crime, existing in customary international law. Merkel’s J. response to that question, as follows immediately after the passage quoted directly above, is as follows :

“ 177 However, the authorities are concerned with the "creation" of new offences under municipal law and not the adoption into municipal law of offences under international law. In my view the latter situation was not considered in, and is not governed by, the decisions in *Kneller* or *Withers*.

178. Also, as explained above, there is no value judgment, as such, involved in the common law adoption process; adoption of a universal crime, such as genocide, into the common law will occur because established criteria for adoption of customary international law into municipal law have been satisfied rather than because it is "desirable" to do so. “

179 That leaves only the primary policy consideration being that, by adoption, the courts are usurping the role of the legislature. The reasons discussed earlier for not requiring that there be legislative adoption in respect of customary international law generally, and in particular in respect of universal crimes, in my view afford an answer to this consideration. The courts are not creating a new offence by reference to the courts' view of public policy; rather the courts are determining, by reference to criteria established by the common law, whether by adoption, municipal law is to recognise and therefore receive that which has evolved into a crime of universal jurisdiction in international law. “

(emphasis added)

This is the reasoning of Merkel J. and to my mind it is fully sound. Neither the “principle on certainty”, nor the public policy considerations against affording “value judgements on legislative matters” to the judiciary are engaged by consideration of the adoption issue posed in the present case, as it was also posed in relation to the crime of genocide in *Nulyarimma*. It was certainly wholly insufficient and inadequate for their Lordships to treat the issue as if the two processes, judge made crimes and the adoption of customary law crimes, were logically comparable, without at the very least setting out their grounds for so treating them, and in the absence of such grounds being proffered, I respectfully submit that they were plainly wrong to so treat the issue. There is, however, one further rationale going to this question of principle, allegedly mitigating against the adoption of customary international crimes, and which is expressly referred to by both Lords Bingham and Hoffman, and thus I shall now turn to deal with that next.

The executive role in the “creation” of customary crime.

The modern exposition and entrenchment of understanding on the so-called principle on “the separation of powers” is too well known and explored to require of any further reference here by me. Suffice to say that as an aspect of the application of this principle, the courts today will be alert to ensure that, as much as they eschew any trespass by the judiciary itself into the legislative role, they will equally decry any attempt by the executive to assume a legislative function, without prior Parliamentary authority. Accordingly, as a part of their rationale for rejecting the adoption of the crime of aggression into the common law, Lords Bingham and Hoffmann both expressly relied upon the contention that to do so would be to allow the executive to legislate without consent of Parliament, contrary to the latter’s constitutional supremacy.

In particular, Lord Bingham relied upon a passage from *Asserting Jurisdiction: International and European Legal Perspectives* (ed M Evans and S Konstantinidis, 2003 @ p 11) by Sir Frank Berman, in which the following passage appears (as to which see para. 23 of Bingham’s Opinion) :

“ ... 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. ... “

Equally, in the passage from his opinion (@ para 62), which I have already quoted above, Lord Hoffmann refers, without further exposition, to his objection to new domestic offences “*creeping into existence as a result of an international consensus to which only the executive of this country is a party.*”, and which I take to be a further reference, all be it an oblique one, to this third issue of principle. But I ask whether it is correct, indeed in the least bit accurate, to describe the establishment of an affirmative norm or rule of customary international law, as opposed to the enactment of a conventional or treaty law provision, as having been created as the sole result of an act of the executive of our Government ? (all be it acting in consensus with the executives of other governments around the world).

I make the all important distinction as between the establishment of a customary normative rule, on the one hand, and the enactment of a conventional or treaty law provision, on the other, most deliberately ; since we know already that, it is in regards for this constitutional principle, respecting the legislative supremacy of Parliament, that a conventional law provision, whilst of full effect and value on the international law plane, will none the less have no legal or binding effect in our municipal law, unless and until expressly incorporated by means of statute. Authority for this proposition was establish as long ago as the case in admiralty of “*The Parlement Belge*” (1878-79) 4 PD 129 @ pp.154-55 per Sir Robert Phillimore. It has been affirmed more recently in “the Tin Council” cases re *Maclaine Watson v. the Department of Trade* [1988] 3 AllER 257 (CA) see esp. @ p.349a-e per Ralph Gibson LJ ; and on the appeal see now *J.H. Rayner Ltd. v. the Department of Trade* [1989] 3 W.L.R.969 (HL-E.) @ p.1002d per Lord Oliver of Aylmerton ¹. So the question then becomes - does the same logic, as explains the rule on the lack of municipal effect of un-incorporated treaty (conventional) law, apply equally to a rule of customary international law ? That answer, of course, depends upon the truth of the assertion, as made above, that the establishment of a customary law normative rule is every bit as much the result of an act of the executive alone, at least so far a concerns the municipal law of this country, as is the case for the enactment of a conventional or treaty law provision.

The answer is, of course, that this assertion is wholly false, so that the logic of the similar result contention falls entirely away. As every first year student of international law knows, there are two elements or constituents which must combine together compatibly in order to create, or to put it more accurately “establish”, any normative rule of customary international law. The first is a well established and widely shared “*states’ practice*”, the evidence for which may, and often will, derive from the observance of a widely adopted and ratified conventional (that is treaty) law provision, which has been consistently and faithfully observed in practice by the states party. It is, I accept, a not unreasonable point to claim that, in so far as the evidence of the states’ practice element is concerned, the executive of any particular nation state is likely to have a far greater influence and or control over what the international practice of that particular state is, than is say the case for its judiciary or its legislature.

That said, however, at least from the point of view of international law, the practice of a particular state on the international plane is not to be attributed to be the responsibility of a particular element or constituent part of the government of that state. The state is regarded as an indivisible whole. The degree of control or influence exerted over that practice, by the judiciary or legislature within a particular state, will naturally differ considerably from state to state, and other states are not likely, in practice, to draw any political distinction between, on the one hand, the practice of the executive of a state’s government and on the other the pronouncements of that state’s judiciary.. This truism has indeed been fully recognized by our own courts. For example in the matter of *C.N.D. v the Prime Minister et al* [2002] EWHC 2759 QB (unreported) in the judgment of Richards J., @ para.55 of the judgment he observed :

“ In any event I think it obvious that a judgment of the court would be liable to cause damage of the same kind as, on the evidence before the court, would be liable to be caused by a definitive statement of the legal position by the Government itself. I accept that other states are not likely to draw a clear distinction between the Government and a national court and that it would be very difficult for the Government in practice to dissociate its own position from the judgment of the court. “

¹ See now further on this topic under “the treaty law principle” in Part 2 below.

In any event, states' practice is not the end of the story, for without the concomitant of a compatible "*opinio juris*" the evidence of states' practice alone is as useful for establishing a normative customary law rule, as a bicycle without its wheels. It is only the confirmatory coincidence of states' practice, taken together with a consistent *opinio juris*, that is the very well spring of customary international law. Accordingly, the question becomes what particular, and exclusively predominant influence or control, over the expression of *opinio juris*, as a source of international customary law, does the executive of the government of a state possess, as opposed to any of the other elements of the government, and the answer is, of course, none whatever.

The classic exposition for the sources of customary international law are set out in sub-clauses (b),(c)&(d) of Article 38(1) of the Statute of the International Court of Justice, and they cite as follows :

- "(b) international custom, as evidence of a general practice accepted as law ;
- (c) the general principles of law recognised by civilised nations; and
- (d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Such a list bears every bit as much evidence of the common influence of the judicial decisions of the many and various differing judiciaries throughout the civilised world, upon the establishment of *opinio juris*, as it does of the influence of the policies and practices of their respective executives.

Indeed, if there were any substance to the radical contention that as a rule of general application, the adoption of international customary law into the municipal common law cannot be permitted to result in the establishment of new crimes, on the premise that to do so would be to usurp the constitutional supremacy of Parliament, then why should such a proposition be limited only to the creation of new criminal offences ? Why would it not apply logically also so as to prohibit any new change in the law, be that in the criminal or the civil jurisdiction ? Would it not be just as constitutionally wrong for the judges now to try to create new torts, or amend the old ones, as it would be for them to create new crimes ? In which event the entire long established history of the acceptance of customary law rules into the municipal common law, including especially new rules establishing a change in that law, see for instance the decision in *Trendtex Trading Corporation v. the Central Bank of Nigeria* [1977] QB 529 (per pp. 554-5), on the introduction of the "new" rule of limited state immunity in international commercial transactions, would be now repudiated by this new logic, save that Lord Bingham expressly cites this well travelled line of authorities with approval (see for instance para 11 of his Opinion).

But what in practice we should be asking ourselves in relation to the particular analysis here in issue, is what is the evidence on the balance of influences in this particular case, as between the respective roles for judicial versus executive influence, in the case of the establishment of the crime of international aggression / crime against peace ?

The answer to that question is naturally to be found in a single place name – Nuremberg. The establishment of "a crime against peace" as an undoubted customary normative rule of international criminal law, carrying the weight of the *jus cogens* and applying without distinction upon all states (*erga omnes*) owes its existence more to the authority of the judgement of the International Military War Crimes Tribunal delivered at Nuremberg in 1946, than from any other source. Save with the exception that it was finally the declaration, of the first General Assembly of the United Nations, by unopposed consensus on resolution 95, taken on the 6th November 1946, affirming the very principles upon which that judgement was based, as being declaratory of international law, which finally established the most well respected and accepted normative rules of the whole body of customary international criminal law.

To then describe the involvement of the government of this country, and indeed of the people of this country, in that historic affirmation, as comprising nothing but a purely executive act, undertaken entirely at the discretion of the diplomatic functions of the executive government, is not merely to deny the pre-eminent role played by our judiciary in the Nuremberg tribunal process, and

of the many subsequent confirmatory and affirmatory speeches of our greatest Parliamentarians offered universally acclaiming that process ; but moreover it ignores to the blood and lives of the flower of the youth of this nation state, given up in two World Wars, given in the hope and belief that such conduct as the waging of wars of aggression should in future be condemned and resisted by the community of states comprising the civilised world, as not merely politically objectionable but more especially as criminal behaviour, and that such repudiation represents the conscience of the common desire of the peoples of the world for peace. That such an historically acclaimed common affirmation should now be labelled unworthy of adoption by the municipal common law of this nation state, because it is suggested that it bears the attributes of nought else but an unapproved diplomatic act of the executive government acting alone, is not merely a monumental distortion of history but moreover is a colossal travesty of justice.

It ill behoves the Law Lords of the 21st Century to make a liar of His Majesty's Attorney-General in 1946, Sir Hartley Shawcross (later himself Lord Shawcross of Friston) when, in the immediate aftermath of the second outrage of global war to scourge humanity in the span of a single generation, he stated in his closing argument before the tribunal at Nuremberg [Session 187 (26 July 1946) pp.427 *The Trial of German Major War Criminals sitting at Nuremberg, Germany* (Blue Book Transcripts)], that :

“ States only, it is said, and not individuals, are the subject of International Law. But there is no such principle of International Law. One need only mention the case of Piracy or Breach of Blockade, or the case of Spies, to see that there are numerous examples of duties being imposed by International Law directly upon individuals. War crimes have always been recognized as bringing individuals within the scope of International Law. In England and the United States our Courts have invariably acted on the view that the accepted customary rules of the Law of Nations are binding upon the subject and the citizen, and the position is essentially the same in most countries. In Germany itself, Article 4 of the Weimar Constitution laid it down that generally recognized rules of International Law must be regarded as an integral part of German Federal Law, and what can it mean in effect, save that the rules of International Law are binding upon individuals? Shall we depart from that principle merely because we are here concerned with the gravest offences of all - crimes against the peace of nations and crimes against humanity. The law is a living, growing thing. In no other sphere is it more necessary to affirm that the rights and duties of States are the rights and duties of men and that unless they bind individuals they bind no one. “

(emphasis added)

In conclusion, on this part, I am content to say that, as respects their reasoning for ruling that the customary international law crime of “aggression” is not such as should be considered capable of, or appropriate for, adoption into, or acceptance by, the municipal common law of this country, the logic of their Lordships', in so far as to the limited degree they have seen fit to offer it, is found to be greatly lacking. The rationale for the unquestionably sound rule enunciated in *Knulier*, proscribing in future any jurisdiction in the courts to effectively create new crimes, is based on the application of the under lying fundamental principles of (a) “certainty” and (b) public policy against judges making legislative “value judgements”. However, it is equally true that neither of these underlying principles are transgressed by the process of the common law adoption of certain and undoubted elements of customary international criminal law, having the force of the *jus cogens*.

Equally and finally, the proposition that such adoption is a breach of the constitutional principle on the supremacy of Parliament, because the establishment of such peremptory normative rules of customary law is a solely executive act, even so far as the perspective of this country alone is concerned, is also a mistaken and flawed understanding of the processes engaged by the establishment of such a customary rule of international criminal law. Most especially so in the case of the international crime of “aggression”, as was originally incorporated into the Nuremberg Principle establishing the “crime against peace” and accordingly this judgement is not merely wanting but plainly wrong on this aspect..