

## PART 2 : Incorporation by statute versus adoption by the common law

In this Part, I propose to critically review one of the further principle aspects, given by Lord Bingham, for his finding that the customary international law crime of “aggression” is not a crime capable of, or appropriate for, adoption into our domestic or municipal common law. It concerns, the claim that the established mechanism for the transformation of a customary international law crime, into our domestic or municipal law, is incorporation via statute instead. At paragraph 28 of his opinion Lord Bingham cites a list of six statutes, which he asserts as evidence of the proposition, as he states at the outset, that “... *when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate.*” I will now examine Lord Bingham’s list *per seriatim*, in order to examine in detail the truth of that assertion.

However, before doing so, I propose first to set out, what I submit are the two reasons of principle which not usually, but invariably, explain when and why incorporation by statute is used, rather than relying upon adoption into the common law. In so doing, I will state that “statutory incorporation” and “common law adoption” are in truth not, as Lord Bingham’s stance suggests, true alternatives to one another ; but rather that in the respective case of each international law crime considered, incorporation by statute *or* adoption by the common law, is the only appropriate method as the case may be.

### The treaty law principle

The first consideration of principle has already been mentioned in Part 1. This is simply the point that with respect to a crime disclosed by virtue of a conventional international law, that is to say enacted by means of an international treaty law instrument or provision, then incorporation by means of statute is the only available mechanism for the transformation of the international law crime into the municipal law. This is because were the courts otherwise able to uphold rights enjoyed by, or equally enforce duties imposed upon, the subjects of the Crown, which derived exclusively from the terms, as set out in, or the principles established by, an international treaty provision, without having first been incorporated by a statute ; then in effect, by acceding to and ratifying that treaty, on the international plane, the Crown would then have effectively legislated for the subject without the consent of Parliament, which would be in defiance of the constitutional supremacy of Parliament<sup>1</sup>.

It is to be recalled that, subject to the “Ponsonby Convention”, requiring that a treaty be left on the table in Parliament for 21-days prior to ratification, such ratification in the UK, unlike in most every other state, is an executive prerogative power and not a Parliamentary function. Hence, it follows, that in the case of conventional law crimes, statutory incorporation is a *sine qua non* of constitutional municipal transformation. For convenience, I shall refer to this principle as the “*treaty law principle*”.

### The extra-territoriality principle

The second consideration of principle concerns the ordinary territorial criminal jurisdiction of the courts in this country. The territorial limit of that jurisdiction was settled, though not I think in much previous doubt, by the judgement of Lord Morris of Borth-y-Gest in the case of *Treacy v. the DPP* [1971] AC 537 (HL[E]) where he said @ pp.552-3 as follows :

“ My Lords, the general principle of the common law of England is that the exercise of criminal jurisdiction does not extend to cover acts committed on land abroad. In general, therefore, acts committed out of England, even though they are committed by British subjects, are not punishable under the criminal law of this country. But, as Parliament is supreme, it is always open to Parliament to pass an enactment in relation such acts. ...

“ Without further elaboration it will suffice to quote the words of Viscount Simonds in *Cox v. the Army Council* [1963] AC 48 @ p.67, viz. :

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<sup>1</sup> “*The Parlement Belge*” (1878-79) 4 PD 129 @ pp.154-55 per Sir Robert Phillimore. See also *Maclaine Watson v. the Department of Trade* [1988] 3 AllER 257 (CA) 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.

*“apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.”*

Consequently, if it is desired that, as respects a particular criminal offence, whether or not originally disclosed under international law, the ordinary territorial jurisdiction of the courts in this country be enlarged, so as to enable them to entertain prosecutions in relation to persons, whether British citizens or otherwise, who have acted abroad, then, to enable them to do so, that jurisdiction must be granted by statute. It is merely the case that the desire to so enlarge our ordinary territorial jurisdiction is naturally likely to occur more often with respect to international law crimes than with respect to more “run-of-the-mill” domestic crimes. I shall for convenience refer to this principle as the “*extra-territoriality principle*”.

### **Distinguishing *Keyn & Hutchinson***

Most significantly this simple proposition, on extra-territoriality, also fully explains and distinguishes both of the authorities upon which Lord Bingham relied earlier in his opinion in order to oppose or reject the present Appellants’ contention that crime, recognised in customary law, ought generally to be assimilated into the domestic criminal law. He refers firstly (@ para 23) to the infamous judgement of Cockburn CJ in the case of the sinking of the “*Franconia*”: *R v Keyn* (1876) 2 Ex D 63 @ 203 as follows:

"Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize 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. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas."

In this infamous case the German ship “*the Franconia*” whilst steaming through the English Channel off Dover, and as a result of the negligence of its Captain, collided with a British ship “*the Strathclyde*” inside the 3 mile limit and thus inside recognised British territorial waters, sometimes described at the time as “the littoral sea”. The British ship sank and a passenger was drowned. The German Captain, Herr Keyn, was indicted for manslaughter at the Central Criminal Court, and following his conviction for that offence, the question for the opinion of the Court for Crown Cases Reserved was whether the Old Bailey, as successor in law to the jurisdiction of the Admiral, had jurisdiction to try the case. In a Court of 13 it was decided, by a majority of one, that there was no jurisdiction to try the case, the main ground for this opinion being that no English statute conferred jurisdiction to try offences committed by foreigners whilst on board foreign ships, whether within or outside of territorial waters<sup>2</sup>. Cockburn CJ, in his long (80page) judgement, concludes that the “littoral sea” beyond low water is not a part of British territory according to the English common law. It is then in this context that he then goes on to make the observations in the passage from his judgement quoted by Lord Bingham (as above).

Accordingly, it is I submit, manifest that, the objection which Cockburn CJ raises in his notorious judgement, goes to an issue fully covered by the ‘extra-territoriality principle’, as set out above. Namely, in that case, his reluctance to recognise a common law jurisdiction in the criminal courts of this country extending over the territorial waters or “littoral sea”. His problem with Kapitan Keyn’s conviction, was not as respects the crime with which he was charged, after all he was accused of manslaughter plain and simple, and not some special breed of maritime homicide derived from international law ; but rather with the territorial jurisdiction of the criminal courts to deal with it, absent the specific conferment of such a territorial jurisdiction by an Act of Parliament. It is not authority instead for the quite different question as to whether statutory authority is required to recognise a crime originating or sourced from customary international law, but rather for the common law territorial limits on the jurisdiction of criminal courts.

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<sup>2</sup> The decision in *R. v. Keyn* was much criticised, even at the time, and caused some not inconsiderable consternation. It led very shortly, thereafter, to the enactment of the Territorial Waters Jurisdiction Act, 1878.

The next authority misinterpreted by Lord Bingham in this regard (again see @ para.23) is that of Buxton L.J. in the more recent matter of *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499. In that case, counsel for the appellant, had advanced a radical contention, which he had formulated in terms, that a vague and un-specified policy to threaten the use nuclear weapons for the continuing purpose of maintaining an international nuclear deterrent, was contrary to customary international law (@ p.506 paras. 36 & 37). Buxton L.J. addressed that issue in part as follows :

"36. It is agreed that a rule of international customary law, if it is sufficiently agreed in international law to be such, is translated automatically into English domestic law. The question however is how it should be characterised once it arrives here?

37. Mr Mercer contended, after some hesitation, that the rule that he had formulated was in English law a rule of substantive criminal law, making conduct by the Crown or British Government in contravention of it a criminal act. That is a very striking submission in view of the contents of the rule and its terms. I say nothing in passing as to susceptibility of the Crown to criminal process. It is also in my view impossible to reconcile that contention with the debate in *Pinochet (No 3)* which concluded, illuminatingly subject to the specific dissent on this point of Lord Millett, that although State torture had long been an international crime in the highest sense (to adopt the formulation of Lord Browne-Wilkinson [2000] 1 AC page 198F) and therefore a crime universally in whatsoever territory it occurred, it was only with the passing of Section 134 of the Criminal Justice Act 1998 that the English criminal courts acquired jurisdiction over 'international', that is to say extra territorial, torture."

In so far as Buxton's LJ reference is to English criminal courts having acquired jurisdiction over "*extra-territorial torture*" as having only been conferred by means of the 1988 Act, then it is entirely consistent and explicable under the extra-territoriality principle, as above. However, the sense in which Buxton LJ is in fact proposing to rely upon his appreciation of the reasoning in *Pinochet (No.3)* is, alas like much else of his judgement, unclear to me. It depends, I assume, in large measure as to whether he regarded the asserted crime of "nuclear deterrence" as being extra-territorial or not, which is a point he doesn't deal with. However, in so far as his observations are capable of being read, as implying that the international customary law crime of torture, as distinct from the treaty law crime created by virtue of the 1984 UN Convention, was, prior to 1988 or otherwise, outside of the juridical (legal) jurisdiction of English criminal courts, even if and when committed within the ordinary territorial jurisdiction of our courts, then that reasoning is a misapprehension of the debate in *Pinochet (No.3)*.

In that case, *R. v. Bow Street Magistrate, ex p. Pinochet (No.3)* [2000] 1 AC 147 (HL{E}) the issue in contention was the question as to whether torture committed outside of the UK had been a crime within the jurisdiction of our criminal courts, prior to the coming into force of the 1988 Act. The extradition of General Pinochet (a Chilean national) had been sought by the court in Spain, as we all recall, on the basis of his having been accused of having been complicit in the commission of torture committed in Chile. Under the relevant provision of s.2 of the Extradition Act 1989, that was only an "extraditable crime" under UK law where "*the equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom*", as per s.2(1)(b)(i) & 2(2) of that Act (emphasis added). This simple point is fully confirmed by reference to almost any one of the opinions given in the case. Take for instance Lord Browne-Wilkinson, who gave the leading opinion, and who said (@ p.833) :

" No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*" (emphasis by way of underlining added)

Equally, there is the opinion of Lord Hope of Craighead, who performed a quite forensic examination of the Pinochet charges in relation to their “extraditeability” and had this to say (@ p.876) :

“ However, none of these offences, if committed prior to the coming into force of section 134 of the Criminal Justice Act 1988, could be said to be extra-territorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Extradition Act 1989 as there is no basis upon which they could have been tried extra-territorially in this country. “

(emphasis added)

Accordingly, the opinions of the House in *Pinochet (No.3)* are authority in support of the extra-territoriality principle, but are most certainly not authority for the quite different contention that customary law crimes are only capable of domestic application and municipal effect, even when committed within the UK, by virtue of statutory incorporation. It is in that sense that Buxton’s L.J. views in *Hutchinson* must be understood. However, this seems clearly not the sense in which Lord Bingham is attempting to employ it, in his reference to it in the present case, and to that extent once again he is guilty of having misapplied or misunderstood previous authority, as with his use of the judgement of Cockburn CJ in *Keyn*. It is to be recalled that the alleged crime against peace, relied upon by the Appellants in the present case, comprised in the planning of, and preparation for, a war of aggression, which acts they asserted were undertaken completely within the ordinary domestic territorial jurisdiction of the courts.

### **Examples of International crimes being incorporated by statute**

Let me then now move back to Lord Bingham’s list (@ para 28 of his opinion) of six statutory provisions supposedly evidence establishing that “...*when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate*” (emphasis added) and examine it, in the light of these two principles, as follows :

(1) “ *The Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995, dealing with breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977.*”

The only crimes thus incorporated into our municipal law by means of these statutes are naturally “grave breaches”, as defined therein, of the four respective principal conventions and the first of the two additional protocols. All these crimes are conventional law provisions, naturally subject to the “treaty law principle”. Accordingly to refer to them as examples of domestic transformation of customary law crimes instead is merely irrational. I do not expect Lord Bingham will read this sentiment, but if you should my Lord, the clue is in the title “Geneva Convention” !

Just to add insult to the injury, s.1(1) of the 1957 Act also stipulates that “*Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person, of any such grave breach*”(emphasis added) etc . shall be guilty of an offence, thereby making the crime also subject to the “extra-territoriality principle”

(2) “*the Genocide Act 1969, giving effect to the Genocide Convention of 1948*”

– see per (1) above re the engagement of the treaty law principle.

(3) “*the Criminal Justice Act 1988, s.134 giving effect to the Torture Convention of 1984*”

– again re the treaty law principle see per (1) above, the extra-territoriality principle being equally engaged in this instance by virtue of the language of the section which provides that “*A public official .. whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain ... on another in the performance ... of his official duties.*” (emphasis added)

(4) “the War Crimes Act 1991, giving jurisdiction to try war crimes committed abroad by foreign nationals”.

In point of fact the Act gives jurisdiction to try any homicide crime which constituted a “violation of the laws and customs of war” and “was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation” (s.1(1)(a)). Consequently, the extra-territoriality principle is clearly thereby engaged, all be it in relation to a crime with a manifest customary law element in its definition.

(5) “and sections 51 and 52 of the International Criminal Court Act 2001, giving effect to the Rome statute by providing for the trial here of person accused of genocide, crimes against humanity and war crimes, but not, significantly, the crime of aggression.”

The “Rome statute” here referred to is, of course, in reference to the 1998 Rome Statute for the Establishment of an International Criminal Court, which is naturally an international treaty, whose internal or municipal application is fully subject to the treaty law principle.

In addition, s.51(2)(b) of the Act specifies that the offences of committing a crime against humanity and a war crime, and the crime of genocide, applies to acts committed “*outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction ...*” thereby, once again, engaging the extra-territoriality principle.

Interestingly, the proper question which is most clearly raised by this latter statute is to ask whether, prior to the engagement of both the treaty law principle and the extra-territoriality principle, which in my submission necessitated its enactment, were the customary law crimes now dealt with by it, namely customary law conduct war crimes and crimes against humanity, offences under our domestic common law, if committed within the ordinary territorial jurisdiction ?

An insight into the answer to that question was, I submit, offered by the explanatory note produced by the Foreign and Commonwealth Office to assist the reader of the Act, paragraph 91 of which states in relation to s.51(1) as follows :

“ *Subsection (1) establishes domestic offences of genocide, war crimes and crimes against humanity. Almost all of the acts falling within these definitions would already have been crimes if committed in the UK, although attracting different penalties from those provided for in this Act, but would generally not have been crimes if committed by UK nationals or UK residents overseas. “*

Of course, one accepts that the reference to “*acts falling within the definitions*” may be explicable on the basis that the commission of a crime against humanity, for instance, would possibly involve the perpetrator in the commission also of certain ordinary domestic law crimes as well, such as murder, assault and unlawful imprisonment, but on a mass scale. However, I maintain that the point about the need for the statute, in consequence of the application of both the treaty law and the extra-territoriality principles, is fully consonant with this official explanation.

Accordingly, all of the statutes mentioned thus far by Lord Bingham in his list, far from offering examples of where it was sought to give domestic effect to customary international law crimes, are instead largely explicable on the basis that these are statutes incorporating conventional law crimes instead, necessitating statutory authority on the basis of the treaty law principle, and in the few instances where customary law crimes are involved, they are fully explicable on the basis of the application of the extra-territoriality principle instead.

## The case of piracy

(6) The last statute that appears in Lord Bingham's list is as follows "*the Merchant Shipping and Maritime Security Act 1997, s.26, giving effect to the provisions of the United Nations Convention on the Law of the Sea 1982 relating to piracy;*".

I have left consideration of this statutory provision to the last because it raises the most interesting and complicated of considerations. If it were true, as Lord Bingham states, that its consequence is simply to give internal domestic effect to the provisions of the 1982 Convention ("UNCLoS III") in relation to piracy, then it would be a simple further case of an application of the treaty law principle. However, rudimentary examination of the provision in question reveals that such a construction is very far from obvious. For the benefit of the reader here it is in full :

" For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982, that are set out in Schedule 5, shall be treated as constituting part of the law of nations."

Manifestly, far from expressly incorporating the provisions of UNCLoS III on piracy into the domestic law of the UK as Lord Bingham asserts, this provision of this statute, most peculiarly, rather declares that those provisions of that convention "*constitute part of the law of nations*" on the premise that that fact was somehow in need of such statutory affirmation lest there be any doubt on the matter. Consequently, this most unusual language needs I suggest more than a cursory construction.

It is, of course, quite possible and proper for there to be both an international customary law rule and an international conventional law provision dealing with the same subject matter of law, at one and the same time. Indeed, it is the express purpose of much of the treaty law work of the United Nations to "codify" existing customary law, by means of treaty law provisions, precisely in order to bring to that subject area of law the greater clarity, certainty and common assent which it is to be presumed a conventional treaty offers. This is undoubtedly true of UNCLoS III which is the very paradigm of such a codification process. Equally, an international conventional law treaty provision, which is both widely ratified and observed by the community of nation states, comprising in the civilised world, will be cogent "declaratory" evidence of the existence of, an equivalent customary law principle or normative rule. By such means, of course, do the two limbs of international law interact and sustain one another. To date UNCLoS III has been both signed and ratified by 149 states party (notably excluding the US). However, one cannot really suggest that even so it has attained quite yet, fully the universal international acclamation and support that the customary law crime of piracy "*jure gentium*" (or piracy on the high seas contrary to international law) has attained, over the course of at least the past three centuries of international consensual practice in outlawing it. This, despite the fact, that the customary law crime lacks a manifestly clear and certain definition, with especial regard to the application of the principle of certainty, as previously dealt with.

Accordingly, and in order to avoid any future possibility of argument on the subject, the purpose of this unusually worded statutory provisions is, I submit, to declare that in future, and for the purpose of the trial and punishment in the UK of an allegation of a crime of piracy, committed on the high seas (i.e. in international waters), which crime is adopted into our municipal common law from customary international criminal law ; the definition of the crime, for such purposes, shall be that as declared by virtue of the relevant provisions of UNCLoS III (as to which see now esp. Art. 101 thereof) and as are set out in Schd.5 to the 1997 Act.

Therefore, far from this statutory provision being evidence for the statutory incorporation of a customary law crime, it is evidence of quite the reverse, namely of the use of a statute to bolster the definition of a municipal common law crime, adopted from customary law, by means of affirming the declaratory effect of an equivalent conventional law provision, declaratory that is of the equivalent customary law rule from which the municipal common law offence is derived. Thus, there could hardly be a better example of a case undermining Lord Bingham's proposition, on the preferred statutory method, for the municipal application of a customary law crime, than the case of s.26 of the 1997 Merchant Shipping and Maritime Security Act, which he himself mistakenly cites in its support.

As to how it is that a municipal court has territorial jurisdiction under the common law, and absent any enlargement conferred by statute, to try a case of piracy (*jure gentium*) which must by definition be committed outside the ordinary territorial jurisdiction on the “high seas”, is unquestionably an anomaly. That territorial jurisdiction is now enlarged by statute to the 12-mile limit recognised by UNCLoS III and established in the UK now by means of the Territorial Sea Act, 1987, replacing the 3-mile limit previously set by the Territorial Waters Jurisdiction Act 1878 (see fn.2 above). I think the anomaly can only be assessed on the basis that “high sea piracy” is the unusual case of a crime, *sui generis* as it were, with a very long established history going back over centuries, and which brings with it its own territorial jurisdiction.

This explanation, I think, is bolstered by the consideration that, the principle rationale in international law, explaining the reason why states do not generally exercise their internal or municipal criminal law jurisdiction, with respect to crimes committed in each other’s territories, is that, as a feature of the principle of the comity of nations, the doctrine *par in parem non habet imperium*, requires each state to recognize and respect the exclusive sovereignty of the other, most especially with respect to each other’s own territory. However, the exercise of a criminal law jurisdiction over the crime of piracy, when that is committed on the high seas, i.e. in international waters, does not offend against this principle, and instead remains consistent with the notion that, it is in the common interests of all states to police the “high seas” together, which notion clearly does not then involve any one state interfering in, or duplicating, the territorial jurisdiction of any other, in defiance of the doctrine.

However, this finally also raises the especially interesting case of the modern evolution of international law crime of piracy, and as was added to the definition of piracy in Art. 101 of UNCLoS III, and that was the case of so-called “air piracy”.

According to Lord Bingham’s standpoint, when Parliament turned its legislative mind to the case of giving domestic internal effect to this new technological innovation in the ancient crime, it would have done so by means of creating a new statutory crime of “air piracy”, thereby directly incorporating the new conventional law provision, and even though that innovation must now be considered, by international lawyers at least, to also be now reflected in the contemporary customary law as well.

However, let us now examine the terms of s.5 of the Aviation Security Act, 1982, a modern statutory provision noticeable by its absence from Lord Bingham’s list, despite the fact that I was at pains to ensure that he was made aware of it. It states as follows :

"Any court in the United Kingdom having jurisdiction in respect of piracy committed on the high seas shall have jurisdiction in respect of piracy committed by or against an aircraft, wherever that piracy is committed."

This modern statutory section then does not create a new statutory crime of "air piracy " (which is distinct from skyjacking or aerial hijacking and which is dealt with by s.1 of the Act of 1982 instead) but rather merely extends the jurisdiction of courts, already exercising the same with respect to high seas piracy, to cover also air piracy "*wherever committed*". The section neither establishes any particular trial regime (summary or on indictment) nor even specifies any particular penalisation upon conviction, but instead expressly caters simply to the extra-territoriality principle, by enlarging the territorial jurisdiction of the trial court to the unlimited degree. With the exception then of that single statutory territorial jurisdictional distinction, the character of the municipal adoption of the modern customary international law crime of “air piracy”, would be wholly indistinguishable from that applying to an equivalent process for the similar adoption of the crime of “aggression”.

Accordingly, in my submission, far from Lord Bingham’s list illustrating several examples of customary international law crimes being given domestic internal effect by means of statute, there is in point of fact not a single instance of that happening, certainly in the course of the past 200 years or more, such statutes, as have been instanced as giving effect to international law crimes, being fully explicable either on the premise of the treaty law principle, or the extra-territoriality principle, or both as the case may be.