how a court, as "*bouche de la loi*", may choose to apply international law *qua* law does not depend on the court's function, but to what extent international law is recognised as legitimate and valid law. The separation of powers doctrine is thus better understood as outlining constitutionally prescribed sources of legitimacy for law and law-making.

National courts may refer to customary international law and use it in three distinct ways, in their capacity as gatekeepers to the entrance of customary international law into domestic law.[22] First, and at its highest, customary international law may be treated as binding law determining the issue before the courts. And as such, it may be regarded as having a normative status either equivalent to domestic law (legislation and common law) or paramount thereto. Secondly, customary international law may be referred to as a persuasive authority, among others, but without binding character. For example, the customary international law of sovereign and diplomatic immunity may provide persuasive reasoning and examples by which to interpret domestic sovereign immunity legislation. The courts may nevertheless deviate from or disregard it in favour of binding law or in preference of other authorities and reasons. Thirdly, and at its lowest, the courts may treat customary international law as merely instructive in their interpretation of domestic law, guiding them in one direction or other. Neither binding nor persuasive, customary international law acts as supporting reasons for a particular way of understanding and presenting the law and facts. Its use is discretionary, not mandatory, and the court's reasons for judgment may just as easily stand with any reference to customary international law excised. This third category resembles the use by courts of foreign law and judgments as an aid for interpreting or expressing concepts of domestic law. It stands to reason that these three options available to a court are, in some way, determined by certain rules, and are not simply invoked or observed in arbitrary and inconsistent fashion. Presumably, whether a court treats a particular norm of customary international law as binding, persuasive, or as merely instructive, has to have some foundation in the constitutional and legal order.

Looking at this more abstractly, the use of customary international law to urge a specific interpretation of law and justify a particular result depends upon arguments from authority and from similarity. Under the first, the court is obliged to treat customary international law as determinative of the issues simply because of a constitutionally sanctioned rule of law, legislation or common law as the case may be, prescribing it so. Under the second, the court is encouraged to treat customary international law as determinative because similar (legal) results ought to flow from similar situations. The state is a part of a wider community of legal systems, and participates thereby in a wider consensus on points of law. The courts of all the various states are engaged in a similar exercise with similar objectives, in determining and applying just norms of conduct. Accordingly, the consensus and commitments evidenced in customary international law supplement or elaborate on domestic norms. The results desired are beneficial in and to, as well as

[22] borrowing from Capps 2007.

derivable from, the particular domestic legal system. Deviating from, or ignoring, that consensus represents a breach of the state's commitments in participation to the other states, and may jeopardise not only political, economic, and social interests, but may isolate the state and its legal order.

It might be rather perfunctory and perhaps misleading simply to distinguish the arguments from authority and from similarity because of express rules having some legislative or constitutional fiat. In the second stream, the presumptions on the character of law—implicit in the first—are laid open: the concept of law ought not be bound to a particular constellation of sovereign social power. Legal norms cut across fortuitous and transitory political boundaries and institutions, and inhere in the deep core of human society whatever its present instantiations. It should come as no surprise, of course, that natural law doctrine rises up once more, in the premise of transnational, enforceable norms of good and acceptable behaviour. Quite clearly, all this raises constitutional questions of legislative authority and supremacy, of the prerogative and political questions, as well as the rule of law. But as such, then, the enquiry has drawn us well beyond a mere institutional conception of the separation of powers. This is no mere matter of invoking the separation of powers through another portal. More than with treaties, where the discussion naturally focussed on the constitutional provisions concerning foreign policy and treaty-making powers, customary international law can draw us immediately into a broader consideration of the concept of law, the rule of law, and the relation between law and politics. All this transcends a simpler instrumental view of the separation of powers, a typology of functions, without explicit attention being paid to the very calculus of that typology. Whether, and to what extent these observations might have a foundation in actual practice, is a matter to which I turn next.

4.3 The United Kingdom and Constitutional Presuppositions

The separation of powers doctrine rarely creates controversy in cases dealing with customary international law sufficient to merit any lengthy judicial address. Inasmuch as the doctrine does receive any attention, it is generally indirect, by a mere declaration of the legislative role and supremacy of Parliament, or the Crown prerogative in certain foreign affairs matters exempting them from judicial review. The lack of direct consideration does not appear problematic. The deeper structures of the doctrine, and its articulation in the present constitutional settlement seemingly enjoy a clarity and stability unimpeded or unchallenged by questions arising from the application of customary international law in the domestic legal order.[23]

This might be seen to be consistent with a dualism where international law and national law each represent separate systems of law, such that issues are limited to how the one might be effectively transposed into the other at the points of

[23] See generally the capacious review article of O'Keefe 2008.

intersection. Significant, therefore, is the absence of any consideration how the creation and status of customary international law as the result of purely executive acts, without any supervening parliamentary approbation, might conform to the doctrine. International law, customary international law in particular, being a separate, non-integrated legal system, is thus arguably not subject to the similar constraints and restraints pertaining to the legitimacy and validity of domestic law. Likewise, the courts have relied on customary international law to limit the international, extra-territorial scope and range of Parliament's legislative powers, but only absent a clear expression of parliamentary intent to the contrary. As a state co-existing with others, its own particular articulation of legal rules is presumed to carry only up to where its territorial and political existence abuts against that of other states. Each system of law, the international and the national, address different spheres of action.

Defining two separate, exclusive legal systems, each with their own spheres of operation and criteria of legality and legitimacy allows dualism to feed off of and support the doctrine of the separation of powers. Dualism relies on the separation of powers to separate in particular the legislative function from the executive, allowing the government a freer hand in conducting foreign policy. And dualism also safeguards the separation of powers by preserving its stability and consistency, reiterating that the legislative function is secured in and for Parliament, or as may be delegated by it to the other branches. In all of this, the specific, national constitutional settlement is what determines the nature, scope, and reach of international legal norms, including in the national legal system.

4.3.1 The Internal Perspective: Constitutional Powers in Check

Neither Parliament nor the government may arrogate powers greater or different than those allocated by the Constitution or through a constitutionally sanctioned process, such as legislation: *The Zamora.*[24] This prize case is first and foremost a decision on constitutional law. It reiterates that the Crown has no prerogative power, unless conferred by legislation, to prescribe or alter the law, or rights and duties thereunder. Put more broadly, it is a settled constitutional principle that the Executive Branch has no general, original powers to create, interfere with, or abrogate rights and duties established under the law. Any such power must be conferred (in no uncertain terms) by an Act of Parliament. In the present case, where a statute confers jurisdiction on a tribunal to administer the law of prize, the Crown cannot by prerogative act, or by Order in Council—in effect by administrative regulation—directly or indirectly amend the substantive law of prize.

The Swedish steamer "Zamora", with a cargo of copper originating in the US and destined for a Swedish port and Swedish consignee, was stopped in 1915 in

[24] *The Zamora* [1916] 2 AC 77 (PC Prize).

British waters and taken to a British port, where both ship and cargo were claimed as prize. The British government then requisitioned the copper for the war effort. Sweden was a neutral country. The cargo owners objected to the forfeiture of the copper and the prize claim more generally. The issues turned on the possible justifications for the forfeiture without right of return, albeit with a possible claim for recompense on the appraised value. Only two of three grounds offered were seriously considered. The first required a reading of the relevant requisition rules which made it mandatory to comply with the Crown's request for requisition, without a prior hearing of the prize claim and the possibility of a return of property; the second, the prerogative right of the Crown (right of angary).The House of Lords (Lord Parker) rejected the first grounds, as inconsistent with constitutional principle and international law. He accepted the second, as given by international law, but found that the conditions for its legitimate exercise had not been met. Because the copper had already been disposed of, the Swedish cargo owners were given leave to claim damages (against the Crown)[25] should their objection to the prize claim ultimately be successful at trial.

Regarding the first, Lord Parker held that executive regulation, not otherwise authorised by Act of Parliament, could not create or interfere with rights and duties given by law. Regulations inconsistent with their empowering statute were also of no effect in that regard. The statutory framework establishing the Court of Prize did not empower the Crown to alter the settled law of prize by Order in Council. Presumably, this ensured those objecting to the prize claim the opportunity of recovering ship and cargo. Moreover, while the Prize Courts may have been established (like the other law courts) by prerogative power and commission under municipal law, and accordingly were in some sense municipal courts, they were charged with administering international law, not national law. Because they must adjudicate claims as between belligerent powers, Prize Courts must be seen to be independent of any particular sovereign. To the extent they could be required to apply municipal law affecting prize claims, this would impede, or be inconsistent with, their authority as Prize Courts. Thus legislation might well affect the law of prize, and the courts would be obliged to apply the law as such, but this would undermine their authority and standing. Regarding the second, Lord Parker derives from his summary review of US cases and practice, English cases and practice, some further instances in the Franco-German War of 1870, and six textbooks on international law, the rule that a belligerent sovereign may, by international law, requisition ships or cargo held in custody pending final determination in prize, subject to three conditions of 1) urgency, 2) a real issue as to the prize claim, and 3) judicial approval of the exercise of angary in the circumstances.

Setting aside the peculiar nature of prize law,[26] two notable features of this judgment, relevant to the separation of powers, deserve comment. The first is the

[25] Presumably by way of a petition of right: see *Re a Petition of Right* [1915] 3 KB 649 (CA).

[26] Recognising that it has, since World War 1, fallen into desuetude: accord Trimble 2008, p. 685, n. 71, and Goldsmith and Posner 2005, pp. 46ff, 73.

concept of international law, as a system of law both independent of, and transcendent over, national law. This is fed no doubt by the strong undertone of an Austinian concept of sovereignty. There can be only one sovereign, whose commands backed by sanctions prevail above and over all others.[27] Nothing in principle, however, militates against having separate, but equal, sovereigns, each supreme in their own sphere of influence, and yet having a common sphere of action among them where neither prevail. Extrapolating from the person of the sovereign to state power, we arrive quite quickly at an idea of the dualism between municipal law and international law. And from which it would appear to follow that domestic law cannot claim any inherent precedence or supremacy over international law.

Secondly, it is nevertheless of considerable—albeit unappreciated—irony that, notwithstanding the transcendental character attributed to international law, the Law Lords proceeded to derive their customary international law doctrine from an examination of (in addition to passing reference to textbooks) practical instances and cases. These were the practices and select cases of English courts, and certain international examples whereby foreign nations adopted positions and claims to press forward their respective interests. Hence, Lord Parker noted Prussian objections to eighteenth century English practice, and resultant English concessions, as well as critiqued US practice in light of English objections. This, of course, reflects simply the unavoidable recognition that international law cannot be divorced from the national legal system and national courts, not from situating the substance of international law in daily, national, local, practices.

Concerning the separation of powers, then, we have in the first place the issue of the courts' authority regarding the other two branches of the *trias*. Positing international law as a separate sovereign authority enables the courts to apply it with national law, and interpreting the latter accordingly, but without bringing into question their allegiance to the national sovereign and legislator. Hence, the reiteration that the courts are obliged to apply national legislation even if inconsistent with customary international law. of course, the courts rarely—if ever—discuss whence the authority derives to apply international law. Reference may be made to the community of nations, and common morality, but this cannot detract from the question's primarily constitutional nature. Neither of the two foregoing create nor authorise a court to do anything. In the second place, we have the issue of the relative powers of the executive and legislative branches. The separateness and the accompanying transcendence claim together allow the courts to ignore the precise way in which international law is created. Hence, it obscures the question of its provenance. Transcendence would suggest that the sources of customary international law are not reducible in whole or in part to executive act. On the domestic level, such a fundamental constitutional question would hardly be left unattended.

The Crown may nevertheless draw upon state powers recognised in customary international law, so long as those powers fit within the settled constitutional order

[27] Austin 1995.

of roles and functions: *Commercial and Estates Company of Egypt v Board of Trade*.[28] The owners of cargo aboard a British ship, requisitioned for war service from a neutral port, claimed compensation for their cargo by consequence landed at the British port, also purportedly requisitioned for the war effort. The cargo owners were neutral during the war, World War I, and never had consented to their cargo coming to the UK. The principal question was the amount of compensation to be paid them, as astutely recognised by Scrutton JA. The Crown contended that the requisition occurred in the ordinary course under the relevant regulations—with the advantage of a more qualified and limited calculation of compensation payable. The cargo owners argued that the requisition, if at all justifiable, was not regular, and entitled them to a higher sum by way of damages against the Crown. The Court of Appeal held that the purported requisition of the cargo was justifiable under the Crown prerogative of angary, and did not fall under requisition rights conferred by statute and regulation.[29] The regulations could not support, without more express terms, so wide a reading as to permit seizure without consent of a neutral's property and without full compensation. With the right of angary, being a legitimate exercise of the Crown's powers, there was also a corresponding and enforceable right to compensation. In national law, this translated into a right against the Crown to pay damages, covered by the more liberal calculus under the Indemnity Act 1920.

Not unsurprisingly, the dualist undertone remains, tracing out two separate planes of law, the international and the national. This was perhaps due to the Crown's argument that angary and any right to compensation existed solely at an international level, as between sovereigns and via diplomatic channels. Both Bankes and Atkin JJA emphasised that English law had recognised the right in its municipal legal system. They both relied on *The Zamora*, obviating the immediate necessity of expressing afresh how and why the right became transposed onto the national plane. And in justifying transposition, they acknowledged thereby (implicitly at the very least) the dualism between customary international law and national law. Indeed, Atkin JA emphasises the dualism by stating that international law may not, does not, confer any enforceable rights save and insofar as municipal law recognises and adopts them. He finds an enforceable right to compensation not because the law of angary has been mapped directly into English law, but rather in the context of, and by analogy to, domestic law concerning requisition/expropriation and rights against the Crown.

Of significance here for the separation of powers doctrine is the constitutional optic to transposing international law norms into the national legal order. When municipal law transposes international law, it would fit those norms into established,

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[28] *Commercial and Estates Company of Egypt v Board of Trade* [1925] 1 KB 271 (CA) (Bankes and Atkin JJA, Scrutton JA dissenting—Scrutton JA considered that the regulation was drafted sufficiently to cover this type of instance, and did not consider it necessary to express any view regarding the right of angary).

[29] Confirming the cryptically short judgment of Bailhache J, without added reasons: *Commercial and Estates Company of Egypt v Ball* [1920] LLR 70.

constitutionally prescribed, legal categories. Hence, the Court's attention to the Crown's prerogative powers (representing the residuum of executive regulatory powers[30]), and money claims against the Crown. And the act of transposing itself too requires a basis in established, constitutionally prescribed, legal categories. Judicial precedent, concessions by the Executive Branch, established national practice, and so on, seemingly trace out the legitimating process by which international norms might be domesticated. The established (internal) regulatory machinery of the constitutional order must be engaged to validate those norms.

This conception of a constitutionally motivated dualism we are beginning to trace out is most clearly exemplified in *In re Piracy Jus Gentium.*[31] Chinese pirates attacking a Chinese cargo ship on the high seas were captured by British warship and brought to Hong Kong (British territorial jurisdiction) for trial. They were found guilty subject to the question of law whether actual robbery was a necessary element of the crime of piracy on the high seas. Only this purely legal issue was before the Privy Council. In language strongly reminiscent of *The Zamora*, Sankey LC for the Court reiterated that the recognition of piracy on the high seas as a crime, and its prosecution and punishment, were matters for domestic legal systems. International law functioned in general to confine the jurisdiction of a state to its own territory. But in cases of piracy on the high seas, it allowed states a wider jurisdiction, suspected pirates having placed themselves thereby outside the normal protections of a state. Accordingly, Sankey LC examined English practice and academic opinion in detail, and then considered US practice, as well as a limited selection of foreign textbooks. Although no settled, certain answer was discernible from this material, it did evidence a trend not to restrict the concept of piracy to require actual robbery.

The significance of the decision extends beyond its support for the idea of dualism advanced herein. More importantly, it reveals a signal aspect of the interaction between the national legal order and the international, one often overlooked in the debates on applying international law in the domestic legal order. Indeed, we might neatly characterise it as the "other side" to dualism. Together, both sides demonstrate that the normative traffic between the two legal orders runs both ways. International law serves to moderate the jurisdictional assertions of a state as against other states. In so doing, it would coordinate the legal principles, rights and duties emanating from particular domestic legal orders, to ensure their peaceable coexistence and that of their states. Any appreciation of (customary) international law must necessarily consider the decisions of foreign courts. The work of coordination work proceeds largely at the hands of the judiciary, by way of determining how far those charged with making and implementing law have pressed their claims, and accepted those of others. In other words, it is a form of "transjudicial communication", with the focal points remaining the national legal orders. We will leave the more detailed treatment of

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[30] *Commercial and Estates Co. v Board of Trade,* pp. 295–296, Atkin JA citing Dicey.

[31] *In re Piracy Jus Gentium* [1934] AC 586 (PC).

this constitutional dualism hypothesis to Chap. 5, and continue here to gather evidence from the practice relating to customary international law.

In support of a constitutionally motivated dualism, we see that notwithstanding *Commercial and Estates Company of Egypt v Board of Trade*, the mere existence of rights or powers in customary international law cannot legitimate Crown or judicial action *simpliciter* without having passed through the constitutional optic: *R v Keyn, The Franconia*.[32] In fine, customary international law cannot confer on, or empower, the Crown or courts to enforce UK law beyond the territorial limits expressly prescribed by statute or precedent. The territorial jurisdiction of the UK is defined, pursuant to the constitution, by statute and by precedent. In the case of *R v Keyn*, the Crown sought to establish territorial jurisdiction in the criminal prosecution of the master of the German steamer "Franconia" which had collided with an English one, the "Strathclyde", resulting in the drowning death of an English passenger on the "Strathclyde". The collision occurred some 2 miles from Dover pier and 2.5 miles from Dover beach, well beyond the low-water and high-water marks. The relevant statutes and precedent defined territorial jurisdiction as extending up to the low-water mark. No authorities existed showing the Courts of Admiralty to have jurisdiction on the high seas involving foreigners on non-British ships. The Court divided narrowly, 7 to 6, quashing the conviction of Keyn, the master of the "Franconia". The two principal issues before the Court were (1) whether the offence (of causing the death of a British subject) occurred on the "Strathclyde" so as to ground jurisdiction, and (2) whether the territorial limits of Britain extended to within the three nautical miles recognised then in customary international law. Only two judges (Coleridge CJ and Denman J) agreed that the offence occurred on the "Strathclyde". These two, together with Brett and Amphlett JJA, and Grove and Lindley JJ, considered that international law set the limits of the realm, absent any express prescription by Parliament.

The majority (Cockburn CJ, Kelly CB, Bramwell JA, Lush, Field JJ, Pollock B, and Sir R. Phillimore), on the other hand, held that territorial jurisdiction not conferred by or assumed under national law could not be extended implicitly or automatically—without further legislative enactment—to the territorial limits presently recognised in customary international law. The following passage from the reasons of Cockburn CJ summarise the point, and the separation of powers aspect, elegantly:

> It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the Courts of the local state can proprio vigore so apply it. The one position does not follow from the other; and it is essential to keep the two things, the power of Parliament to legislate, and the authority of our Courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct, which, it is evident, is not always done. It is unnecessary

[32] *R v Keyn, The Franconia* (1876–77) LR 2 Ex D 63.

> to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that that law can be applied to them.[33]

The necessity of transliterating through the constitutional optic could not be clearer. While customary international law may offer certain powers, such as to broaden full territorial jurisdiction, the Crown or Parliament (as the case may be) cannot draw upon those powers outside or in disregard of their constitutional position. Municipal law could only give effect to those international norms in and through the existing constitutional framework establishing jurisdiction. Here, the established, constitutionally prescribed, legal categories regarding the substance of norms, and the mechanics of recognition, all pointed to an Act of Parliament.

Yet the apparent simplicity of this determinative point belies the extensive excursions into the limits of national boundaries under the then existing international law which many of the judges undertook, Cockburn CJ included. Canvassing a whole range of academic opinions and judgments offers the possibility of discounting any settled "common assent of nations" to a three mile limit, or of qualifying what state powers might be exercisable therein so as to exclude ordinary criminal law jurisdiction. But it certainly would not settle whether a state has duly assumed jurisdiction to the outer limits thus allowed. That remains a question of internal law, of the transposition through the constitutional optic. We must of course recognise that these observations benefit from the majority opinion, which also carries the dualism undertone. By narrowly rejecting the constitutionally unmediated application of international law, the Court in *R v Keyn* also approved by like narrow margin the idea of dual legal systems. Although running parallel in certain matters, the substantive rules of the international one could not simply be applied, without more, in the domestic one.

The determinative character of the constitutional optic is confirmed in *Post Office v Estuary Radio Ltd.,*[34] also a territorial jurisdiction case. The issue there turned upon the extent of British territorial waters as defined under regulation (more precisely, an Order in Council), and thus whether an unlicensed radio station was transmitting within them so as to be in breach of licensing requirements, or merely from the "high seas" of the Thames estuary. It just so happened that the Crown had thereby claimed a wider territory than previously, on the basis of and implementing the Convention on the Territorial Sea and Contiguous Zone 1958. The legislation on broadcasting licenses did not control the limits of territorial jurisdiction. Instead, as the Court of Appeal reiterated, this continued to reside in

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[33] *R v Keyn,* 207–208.

[34] *Post Office v Estuary Radio Ltd.* [1968] 2 QB 740 (CA), and see an earlier instantiation *R v Kent Justices ex p. Lye* [1967] 2 QB 153 (Div Ct) (without introducing questions of international law).

the prerogative powers of the Crown. It was within the constitutionally sanctioned prerogative powers of the Crown to extend or contract[35] its territorial jurisdiction without Parliamentary consent, which the relevant Order in Council had accomplished. Moreover, inasmuch as the Crown asserted a territorial claim by means of ratifying the Convention in a matter within its constitutional powers, the courts were constitutionally bound to comply and give effect thereto (even without the accompanying regulations).[36] Hence to put clear the contrast with *R v Keyn*, the assertion of territorial jurisdiction in criminal matters was not within the constitutionally recognised (prerogative) powers of the Executive Branch acting without the Legislative.

The House of Lords affirmed the constitutional principle articulated in *R v Keyn* in the decision of *R v Jones* et al.[37] Inasmuch as a crime of aggression may be established in customary international law, it does not automatically become part of the law of England. Only Parliament holds the constitutional power required to establish criminal offences. Accordingly, defendants accused of trespass upon, and (attempted or actual) criminal damage to, certain military bases could not rely on the State perpetrating such a "crime of aggression" as a substantial defence. Specifically, s. 3 of the Criminal Law Act 1967 permitted the use of reasonable force to prevent a "crime". The trespass charge under s. 68 of the Criminal Justice and Public Order Act 1994 would not be made out if the activities on those bases were "unlawful", committing the "offence" of aggression. No statutory definitions delimited the nature and scope of the terms "crime" and "offence". The defendants had gained unauthorised access to certain US and UK military installations in the UK with the intent of causing, or having actually caused, damage to military property in protest of the US and UK invasion of and war with Iraq.

The Law Lords unanimously dismissed the defendants' appeal on three grounds.[38] First, crimes created under customary international law do not automatically become part of English law.[39] Under the current constitutional settlement, only Parliament could exercise the power to create new offences effective in domestic law. This was particularly the case where the crime of aggression drew the courts into charges against the state itself, the field of international relations between states, the conduct of foreign and defence affairs, all being areas where the courts were reluctant and prudently slow to intervene. Second and following, the courts no longer had a power to create new criminal offences at common law

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[35] See *The Fagernes* [1927] P 311 (CA) (Crown not actively asserting sovereignty in part of Bristol Channel).

[36] *Post Office v Estuary Radio Ltd.*, 756–7 (per Sellers LJ).

[37] *R v Jones (Margaret)* et al. [2007] 1 AC 136.

[38] Lords Bingham and Hoffmann delivered the leading speeches. Lords Rodger and Carswell concurred with both without additional reasons. Lord Mance agreed with the conclusions of Bingham and Hoffman, and reiterated the existence of a crime of aggression in public international law.

[39] And see O'Keefe 2002, p. 294.

where none had existed before.[40] Hence the crime of aggression could not thus indirectly be assimilated into domestic law. Third, the statutes at issue could not reasonably be construed to extend to or cover crimes constituted at international law. Nothing therein suggested that Parliament had intended to go beyond purely domestic circumstances and catch international law. As to the point of customary international law, only two of the five Law Lords, Bingham and Mance, expressly canvassed—albeit very briefly—whether the crime did properly exist. Lord Hoffman may be read simply as presuming it to exist without more, or more fairly as accepting its existence for the purpose of the appeal.[41]

It may well be undeservedly harsh to characterise what discussion there was on the international law crime of aggression as superfluous or cosmetic. *R v Jones* was decided upon national constitutional grounds. Whether or not the crime of aggression in customary international law could be made out, the absence of the constitutional requirement of clear Parliamentary intent (through some legislative instrument) to incorporate that crime into the domestic legal order precluded any attempt to rely substantively on it. Only where the potential nevertheless existed (constitutionally) for the customary international law crime to be recognised and given effect within the domestic legal order, would it be necessary to determine whether the necessary criteria to establish such a crime were sufficiently made out. Yet even Lord Bingham's short review of other international crimes received into English law, such as war crimes and piracy, made clear that they were accompanied by legislation or legislative instrument under Crown prerogative.[42]

That said, the attention paid by Lord Bingham to customary international law suggests a significant difference of opinion, one relevant to the separation of powers doctrine, between Lords Bingham and Hoffman. Both agree that the current constitutional order does not allow the courts to recognise new crimes at common law, that power now being possessed by Parliament. But Bingham qualifies his statement of the proposition with an exception. Unlike Hoffmann's version, his would envisage the possibility of departing from the "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" given "compelling reasons".[43] Nevertheless, he gives compelling reasons for not departing from the principle in the instant case, for the reason already sketched out above, and forming the primary rationale for Hoffmann. In effect, we can read Bingham to suggest that there remains a residuum of power in the courts to decide what conduct ought to constitute an offence, or (at its highest) that the constitutional allocation of that power is subject to an override.

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[40] Relying on *R v Knuller Publishing* [1973] AC 435.

[41] Capps 2007, pp. 465–466 treats Lord Hoffmann's mere recitation of Blackstone 1979, Bk. 4 Ch. 5 (part of the appellants' argument) as Hoffmann's own "unequivocal" position.

[42] *R v Jones*, 158–159.

[43] *R v Jones*, 162.