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United Kingdom

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28.1 Introduction

There exists no crime of aggression, whether as agreed in Kampala or in any other form, in any of the bodies of criminal law respectively applicable in the jurisdictions of the United Kingdom (UK).¹ No crime of aggression has been legislatively enacted. Nor has any such crime been recognised judicially; on the contrary, in 2006 the highest appellate court in England and Wales ruled in *R v. Jones (Margaret)* that the crime of aggression as embodied at the time, according to the court, in customary international law did not and could not constitute a non-statutory crime under domestic law.² What is more, the UK shows no sign for now of intending to ratify³ the Kampala amendment on the crime of aggression,⁴ making domestic enactment of the crime unlikely for the foreseeable future.

There is no inherent legal reason, however, why any future statutory crime of aggression in the UK should prove to be unworkable, notwithstanding what might be thought to have been suggested in *Jones (Margaret)*; and the fundamental principles that obtain under at least the law of England and Wales frequently obtain, *mutatis mutandis*, under the laws of a range of states of the common law and Westminster parliamentary traditions.

Nor is consideration of the law of the UK irrelevant to the history of the crime of aggression. What the court said in *Jones (Margaret)* as to the content of the crime as

¹ England and Wales jointly, Scotland and Northern Ireland, while each part of the United Kingdom of Great Britain and Northern Ireland, comprise three separate jurisdictions within it, each with a different system of courts applying a different body of law. The constitutional principles of the United Kingdom as such, however, are common. Reference in this chapter to 'the UK courts' is to the respective courts of England and Wales, of Scotland and of Northern Ireland.

² See *R v. Jones (Margaret) and Others* [2006] UKHL 16, [2007] 1 AC 136.

³ See, for example, the Foreign & Commonwealth Office's strategy paper on the International Criminal Court, 17 July 2013, available at: www.gov.uk/government/publications/international-criminal-court-strategy-paper, in which, among the various outlined policy initiatives aimed at supporting the Court, no mention is made of the crime of aggression. See, similarly, the section 'Criminal Justice and the Rule of Law', including the discussion of the Court, in Foreign & Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report*, Cm 8593 (2013).

⁴ Review Conference RC/Res.6, 'The Crime of Aggression', 11 June 2010, in *Review Conference Official Records*, RC/11, part II, 17.

a putative matter of customary international law retains a degree of interest, even if its enduring value is not great.

28.2 The Current State of the Law

28.2.1 *Aggression not a Statutory Crime*

No legislation establishes the crime of aggression as a crime under the law of England and Wales, under Scots law or under the law of Northern Ireland. While the International Criminal Court Act 2001, an Act of the UK Parliament making legislative provision for England and Wales and for Northern Ireland, respectively, and the International Criminal Court (Scotland) Act 2001, an Act of the devolved Scottish Parliament⁵ making provision for Scots law, enact into domestic law the offences of genocide, crimes against humanity and war crimes over which the International Criminal Court enjoys jurisdiction *ratione materiae* by virtue of article 5 and articles 6–8 of the Rome Statute, neither Act created or has since been amended to create a domestic crime of aggression.

28.2.2 *Aggression not a Common Law Crime*

Nor does the crime of aggression constitute a judicially created or ‘common law’ crime in any of the jurisdictions of the UK. In the criminal case of *R v. Jones (Margaret)*, which first came before the English courts⁶ in 2004, the defence submitted that the crime of aggression alleged to exist under customary international law was cognizable as a crime under the common law of England and Wales. On final appeal in 2006, the Judicial Committee of the House of Lords (better known simply, if imprecisely,⁷ as the House of Lords) – which, despite its potentially misleading name, was at the time the highest appellate court in the UK on most⁸ legal matters – dismissed the defence’s argument, clarifying that the crime of

⁵ A Scottish Parliament – which had not existed since the then-independent kingdoms of Scotland and England united in 1707 to form a single Kingdom of Great Britain, with its sole parliament at Westminster – was created by the Scotland Act 1998, an Act of the UK Parliament. (Note that, on the formal union of the kingdoms of Great Britain and Ireland in 1801, the former was renamed the United Kingdom of Great Britain and Ireland, the name changing once more in 1927 to the United Kingdom of Great Britain and Northern Ireland to reflect the grant of independence to the Irish Free State in 1922.)

⁶ The courts that sit throughout England and Wales and the law applied by them are, as a consequence of the legal absorption of long-conquered Wales into England via the Laws in Wales Acts 1535 and 1542, English courts applying English law, even if today one speaks of ‘the courts of England and Wales’ and ‘the law of England and Wales’.

⁷ The House of Lords is the upper house of the UK’s bicameral legislature, of which the former judicial body also referred to as the House of Lords was formally, since the Appellate Jurisdiction Act 1876, a subsidiary organ. With the coming into force of the Constitutional Reform Act 2005, the Judicial Committee of the House of Lords was abolished and replaced by the Supreme Court of the United Kingdom.

⁸ One field in which the House of Lords was not the court of final appeal was the criminal law of Scotland.

aggression was not and, indeed, could not be a common law crime under English law.⁹ The decision, although formally precedential in relation to English law alone, was reached on the basis of principles shared by both Scots law and the law of Northern Ireland.

28.2.2.1 Domestic Legal Background

Under the constitutional dispensation prevailing in the UK, the legislature is not alone in its authority to make law. The UK constitution¹⁰ admits of judicial law-making, in the sense that rules of decision and broader legal principles enunciated by the courts in the adjudication of cases comprise part of the law of the land.¹¹ The rules and principles laid down or, according to the traditional fiction, ‘declared’ by the courts are known collectively as ‘common law’. The scope allowed for the judicial pronouncement of common law rules has varied over the centuries. Most relevantly, although it was formerly the accepted practice for judges to create crimes, the rise of popular democracy and a growing sensitivity to the more formal aspects of the rule of law led the courts in time to renounce their competence to recognise novel offences.¹²

As regards the status of international law within the respective bodies of domestic law applicable in the UK, this has traditionally been a question for the courts. With regard to customary international law specifically, the position adopted by the judges since the eighteenth century has been that, in contrast to the position in relation to treaties, it is unnecessary for a rule of customary international law to be enacted into domestic law by the legislature before the courts may give effect to it.¹³ Customary international law, it has been said, is part of the common law,¹⁴ with the consequence that the courts may declare and apply its rules in the exercise of their mandate to

⁹ *Jones (Margaret)*, *supra* note 2.

¹⁰ Unlike the constitutions of most states, the UK constitution is not set down in a formal document. Rather, what is frequently referred to, not wholly accurately, as the UK’s ‘unwritten’ constitution consists of a miscellany of statutory and judicially enunciated principles and established practices (or ‘conventions’), which, by virtue of their subject matter and perceived status, are acknowledged by consensus to enjoy a constitutional quality.

¹¹ The same was true under the independent English and Scottish constitutional arrangements that predated the union of the two kingdoms and their respective parliaments in 1707. The pre-union English courts created case law, as did the Scottish courts.

¹² See, for example, *Kneller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions* [1973] AC 435.

¹³ See, for example, *Triquet v. Bath* (1764) 3 Burr 1478, at 1481; *Chung Chi Cheung v. The King* [1939] AC 160, at 167–68; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, at 554. The principles first and most fully propounded in this regard by the English courts and elaborated on by the Privy Council have been judicially adopted in Scotland. See, for example, *Lord Advocate’s Reference No. 1 of 2000* 2001 JC 143, at para. 23. They can be taken to be consonant with the law of Northern Ireland as well.

¹⁴ See, for example, *Triquet*, *supra* note 13, at 1481; *Trendtex*, *supra* note 13, at 554. See, similarly, *Lord Advocate’s Reference No. 1*, *supra* note 13, at para. 23 (‘A rule of customary international law is a rule of Scots law’).

declare and apply the common law. Despite suggestions to the contrary,¹⁵ however, this proposition had never been put to the test in the context of crimes under customary international law, and the hypothetical possibility that the courts might declare punishable at common law a customary international crime sat uneasily with the courts' relinquishment of their former power to enunciate new offences.

As for judicial review of executive action, the courts of the various jurisdictions in the UK have developed principles of administrative law by reference to which they can scrutinise and, in appropriate cases, declare void executive acts. But not all conduct of the executive is justiciable. There remain certain exercises of the royal prerogative¹⁶ wielded on behalf of the sovereign, according to the conventions of the UK's constitutional monarchy, by the executive that the courts acknowledge as beyond their adjudicative purview by virtue of the constitutional separation of powers. Among these so-called 'forbidden' areas are the government's conduct of foreign affairs, its making of war and, to the extent that this may differ from the latter, its deployment of Her Majesty's armed forces.

When it comes to the acts of foreign states, Lord Wilberforce enunciated a broad principle of non-justiciability in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, where his Lordship stated that the English courts will not adjudicate on the legality, under either municipal or international law, of 'the transactions of foreign sovereign states'¹⁷ or, synonymously, 'acts done abroad by virtue of sovereign authority'.¹⁸ The avowed reason for this is a lack of 'judicial or manageable standards'¹⁹ by which to judge such issues. This rule, often referred to as '*Buttes*' non-justiciability, is said to be 'not one of discretion' but, rather, 'inherent in the very nature of the judicial process'.²⁰

It was against this legal backdrop that *Jones (Margaret)* came before the English courts.

28.2.2.2 R v. Jones (Margaret)

The twenty appellant-defendants in the three appeals before the House of Lords, all of them peace activists, had been charged with a range of criminal offences arising out of their unauthorised entry onto military land and disruption of activities

¹⁵ See *Jones (Margaret)*, *supra* note 2, at paras. 20–22 (Lord Bingham), 101 (Lord Mance). For an elaboration on the incorrectness of their Lordship's suggestion, see R. O'Keefe, 'The Doctrine of Incorporation Revisited', *British Yearbook of International Law*, 79 (2008), 7–85, at 29–33.

¹⁶ The royal prerogative, or simply 'the prerogative', is the tightly circumscribed residue of discretionary sovereign power not surrendered by the Crown under the terms of the constitutional monarchy instituted in England in the late seventeenth century and prevailing in the contemporary United Kingdom of Great Britain and Northern Ireland. Under the same terms, at least as they have evolved, the prerogative is exercised on the monarch's behalf by the executive government.

¹⁷ *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] AC 888, at 931.

¹⁸ *Buttes*, *ibid.*, at 932. It can only be assumed that a cognate doctrine would apply under Scots law and the law of Northern Ireland.

¹⁹ *Buttes*, *ibid.*, at 938. ²⁰ *Ibid.*, at 932.

thereon in the immediate run-up to the invasion of Iraq by the United States, the UK and Australia in 2003. The essence of the variety of defences raised in each case was that the defendants had acted as they did in order to prevent a crime, the argument being that the UK's and/or the US's preparation for and participation in the invasion of Iraq constituted the crime of aggression under customary international law – on the part, presumably, of the responsible figures in the respective governments – and, as such, was cognizable as the crime of aggression under the common law of England and Wales, since customary international law was part of the common law. The question put to their Lordships on final appeal by the defendants was whether the crime of aggression formed part of English criminal law in the absence of legislation to this effect and, if so, whether the issues it raised were justiciable.

The House of Lords unanimously dismissed the appeals. Aggression was not a crime under English law. Lords Bingham and Hoffmann gave the leading judgments,²¹ with which Lords Rodger, Carswell and Mance agreed, the last adding a few paragraphs of his own. All three substantive judgments were founded on essentially the same reasoning.

Lord Bingham was willing to accept, as had the Crown,²² the ‘general truth’ of the appellant-defendants’ core contention, for which there was ‘old and high authority’,²³ that customary international law is part of the law of England and Wales, even if he hesitated to embrace the proposition ‘in quite the unqualified terms in which it has often been stated’, sympathising as he did with Brierly’s view that customary international law ‘is not a part, but is one of the sources, of English law’.²⁴ But his Lordship’s reading of the authorities led him to conclude ‘that “customary international law is applicable in the English courts only where the constitution permits”’.²⁵ In this light, since the courts had surrendered their common law power to create crimes, statute was now the sole source of new offences in England and Wales;²⁶ and a raft of Acts showed that, when domestic effect was sought to be given to crimes under customary international law, the practice was to legislate.²⁷ In the latter regard, Lord Bingham noted that Parliament had consciously opted not to legislate for the crime of aggression during the passage of the International Criminal Court Act 2001.²⁸ All this reflected what had become ‘an

²¹ It was the convention in the House of Lords that the respective Law Lords always gave individual judgments (formally referred to as ‘opinions’, rather than ‘judgments’, to reflect the Judicial Committee’s formal status as a committee of the legislature, rather than a court).

²² The convention in the UK is that crimes are prosecuted in the name of the sovereign, hence the standard case name ‘*R v. [defendant]*’ (more fully, ‘*Regina v. [defendant]*’ and, at other times, ‘*Rex v. [defendant]*’).

²³ *Jones (Margaret)*, *supra* note 2, at para. 11.

²⁴ *Ibid.*, citing J. L. Brierly, ‘International Law in England’, *Law Quarterly Review*, 51 (1935), 24–35, at 31.

²⁵ *Ibid.*, at para. 23, quoting R. O’Keefe, ‘Customary International Crimes in English Courts’, *British Yearbook of International Law*, 72 (2001), 293–335, at 335.

²⁶ *Ibid.*, at para. 28, citing *Kneller*, *supra* note 12. ²⁷ *Ibid.*, at para. 28. ²⁸ *Ibid.*

important democratic principle' in the UK, namely, '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 . . . as to attract criminal penalties'.²⁹ One needed very compelling reasons to depart from this principle,³⁰ and, with the crime of aggression, the compelling reasons were to the contrary:

A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by [this] state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.³¹

These considerations were not, 'in the present context', issues of justiciability, to which many of the judicial authorities cited by his Lordship were directed; rather, they were factors to be taken into account in considering 'whether the customary international law crime of aggression ha[d] been, or should be, tacitly assimilated into . . . domestic law'.³² That is, in deciding whether to recognise a common law crime of aggression, it was 'very relevant' that the adjudication of any such crime 'would draw the courts into an area which, in the past, they ha[d] entered, if at all, with reluctance and the utmost circumspection'.³³

Lord Hoffmann also invoked 'the democratic principle' – deferred to by the courts in modern times³⁴ and applicable equally to the incorporation into domestic law of crimes under international law³⁵ – 'that it is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence'.³⁶ New domestic offences 'should . . . be debated in Parliament, defined in a statute and come into force on a prescribed date'.³⁷ Moreover, since aggression was 'a crime in which the principal is always the state itself', the liability of individuals being 'in a sense secondary', the prosecution of aggression in the domestic courts would, in the absence of statutory authority, be 'inconsistent with a fundamental principle of [the] constitution'.³⁸ There was first 'the theoretical difficulty of the courts, as the judicial branch of government, holding not merely

²⁹ Ibid., at para. 29. ³⁰ Ibid.

³¹ Ibid., at para. 30. Lord Bingham's reference to the 'commission of the crime by [this] state or a foreign state' is merely figurative. His Lordship is not suggesting that a state is formally capable of criminal responsibility.

³² Ibid. ³³ Ibid. ³⁴ Ibid., at para. 61. ³⁵ Ibid., at para. 62. ³⁶ Ibid., at para. 60.

³⁷ Ibid., at para. 62. ³⁸ Ibid., at para. 63.

that some officer of the state has acted unlawfully . . . but, as a *sine qua non* condition, that the state itself, of which the courts form part, has acted unlawfully'.³⁹ Then there was 'the practical difficulty that the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not inquire'.⁴⁰ His Lordship thought that to say that these matters are not justiciable 'may be simply another way of putting the same point'.⁴¹ But he did not accept the implication that one could start by determining whether aggression was a crime under English law and then proceed to consider whether the issues it raised were justiciable. Rather, the 'discretionary nature or non-justiciability of the power to make war' was 'simply one of the reasons why aggression [was] not a crime in domestic law'.⁴²

Lord Mance, too, highlighted that the courts' power to recognise new crimes had not survived. The creation and regulation of crimes was, in a modern parliamentary democracy, 'a matter *par excellence* for Parliament to debate and legislate'.⁴³ 'Even crimes under public international law [could] no longer be, if they ever were, the subject of any automatic reception or recognition in domestic law by the courts.'⁴⁴ This was all the more so in the case of aggression, 'a crime committed primarily by the state itself'.⁴⁵ The 'incongruity' of its possible recognition by the courts was underlined by its deliberate exclusion from the International Criminal Court Act.⁴⁶

28.3 Legal Obstacles to Prosecuting a Statutory Crime of Aggression?

Dicta in *Jones (Margaret)* might be taken to suggest that any crime of aggression as may in future be enacted into domestic law in the UK would pose fundamental problems of adjudicative competence for the courts insofar as it would require the latter to scrutinise, on the one hand, the legality of the conduct of the UK as such and of the executive branch of its government and, on the other hand, the international legality of the conduct of foreign states. It might also be thought problematic that adjudging the crime of aggression, whether allegedly committed by a UK official or by a foreign state official,⁴⁷ would compel the courts to have regard to the unincorporated provisions of a treaty, in the form of the Charter of the United Nations. In reality, however, a statutory crime of aggression in the UK would pose no insurmountable obstacles in any of these regards.

³⁹ Ibid., at para. 65. ⁴⁰ Ibid. ⁴¹ Ibid., at para. 67. ⁴² Ibid. ⁴³ Ibid., at para. 101. ⁴⁴ Ibid.

⁴⁵ Ibid., at para. 103. ⁴⁶ Ibid., at para. 104.

⁴⁷ The term 'foreign state official' is used in this chapter to refer to a person who, at the time of the alleged commission by that person of the crime of aggression, was an official of a foreign state. It does not presuppose that the person possessed the nationality of that state at that time or possesses it when prosecuted.

28.3.1 Judicial Scrutiny of the Conduct of the UK and of its Executive

In *Jones (Margaret)*, Lord Hoffmann asserted that, since aggression was ‘a crime in which the principal is always the state itself’, the liability of individuals being ‘in a sense secondary’, the prosecution of a UK official in the UK courts for the crime of aggression would, ‘in the absence of statutory authority’, be ‘inconsistent with a fundamental principle of [the] constitution’.⁴⁸ His Lordship gave two reasons for this: the first, also seemingly advanced by Lord Mance, being the ‘theoretical difficulty’ of the courts’ hypothetical scrutiny of the conduct of the UK; the second, posited also by Lord Bingham and agreed with by Lord Mance, being the ‘practical difficulty’ of the courts’ scrutiny of non-justiciable exercises of the prerogative by the executive. But neither argument is persuasive, even on its own terms, and neither, more to the point, could prevail in the face of the legislature’s statutory enactment of a crime of aggression.

28.3.1.1 The ‘Theoretical Difficulty’ of Scrutinising the Conduct of the UK

Lord Hoffmann argued in *Jones (Margaret)* that the hypothetical prosecution of a common law crime of aggression allegedly committed by a UK official was bedevilled by ‘the theoretical difficulty of the courts, as the judicial branch of government, holding not merely that some officer of the state has acted unlawfully . . . but, as a *sine qua non* condition, that the state itself, of which the courts form part, has acted unlawfully’.⁴⁹ Similarly, Lord Mance – in a comment potentially relevant, it would seem, as much to the domestic adjudication of a crime of aggression as to its judicial creation – alluded to the ‘incongruity’ of the recognition by the courts of what he characterised as ‘a crime committed primarily by the state itself’.⁵⁰ The apparent suggestion by their Lordships is that it would be logically absurd, and as a result somehow unconstitutional, for the courts of the UK to pronounce on the international legality of the conduct of the same UK of which they themselves are a constituent part.

But the logical absurdity argument is flawed. As the international legal person whose conduct would need, by way of preliminary determination in the course of prosecuting an individual for the crime of aggression, to be adjudged an act of aggression in manifest violation of the Charter of the United Nations,⁵¹ the UK is not to be viewed as the disaggregable sum of the legislative, executive and judicial

⁴⁸ *Jones (Margaret)*, *supra* note 2, at para. 63. ⁴⁹ *Ibid.*, at para. 65.

⁵⁰ *Ibid.*, at para. 103. That Lord Mance’s argument goes, at least in part, to the point advanced by Lord Hoffmann is suggested at para. 103, where his Lordship expressly agrees with Lord Hoffmann’s reasoning. As with Lord Bingham, it is worth clarifying that Lord Mance’s reference to the commission of the crime ‘by the state itself’ is merely figurative.

⁵¹ Article 8 *bis*(1) of the Statute.

branches of its government. International law conceives of the juridical person of the state as a formal abstraction wholly distinct from, and more than, the organs and officials which together constitute its domestic legal and socio-political reality.⁵² Putting it simply, the ‘state’ whose acts would be at issue in the adjudication before the UK courts of a crime of aggression on the part of a UK official is a separate conceptual entity from any ‘state’ of which those courts might, as a question of domestic law⁵³ and real life, be said to form part. As a consequence, there would be no logical absurdity involved in any preliminary determination by a UK court that conduct by the UK amounted to an act of aggression in manifest violation of the UN Charter, just as no such absurdity would be involved in any determination to the same effect with respect to a foreign state. Even less could such a preliminary determination be considered unconstitutional for the sole reason that it would necessitate domestic judicial scrutiny of the conduct of the UK.

It is true that the courts of England and Wales, of Scotland and of Northern Ireland may not purport to hold the UK formally responsible under international law or liable under domestic law for a breach of international law. But the explanation for this is not the theoretical impossibility of doing so. They simply lack the jurisdiction *ratione personae*⁵⁴ and *ratione materiae*.⁵⁵ It does not follow from this want of procedural competence to adjudicate a claim against the UK under public international law that the domestic courts are incompetent to rule on the international legality of the UK’s conduct as a preliminary determination en route to adjudging the liability under domestic law of a natural or legal person validly before them.⁵⁶ In terms of the crime of aggression, the fact that the domestic courts may not hold the UK formally responsible under international law or liable under domestic law for an act of aggression would not bar them from finding, as

⁵² In the words of H. Kelsen, *Principles of International Law* (New York: Rinehart, 1952), 100, ‘as a juristic person the state is the personification of a social order, constituting the community we call “state”’. As explained in ILC, ‘Report of the International Law Commission on the Work of its Fifty-Third Session, 23 April–1 June and 2 July–10 August 2001’, UN Doc. A/56/10 (2001), 35, the attribution to the state of the conduct of its organs and officials is simply a pragmatic recognition of ‘the elementary fact that the State’, being no more than an abstraction, ‘cannot act of itself’, and ‘is necessarily a normative operation’.

⁵³ As it is, in contrast to the situation under the domestic law of many states, no domestic legal concept of ‘the state’, as formally distinct from the various ministries of its government and individual officers, is known to any of the three bodies of domestic law applicable in the UK.

⁵⁴ The UK cannot be made a defendant to a claim in the English, Scottish or Northern Irish courts.

⁵⁵ Pure questions of public international law – that is, questions of public international law in their own right, rather than necessarily incidental to questions of domestic law – are not justiciable before the courts of the UK. See, for example, *Cook v. Sprigg* [1899] AC 572, at 578; *J. H. Rayner (Mincing Lane) v. Department of Trade and Industry* [1990] 2 AC 418, at 499 (Lord Oliver); *R (Campaign for Nuclear Disarmament) v. Prime Minister* [2002] EWHC 2777 (Admin), 126 ILR 727, at para. 36 (Simon Brown LJ); *MacCormick v. Lord Advocate* 1953 SC 396, at 413 (Lord President). As is clear from his Lordship’s citation of *Rayner* and *Campaign for Nuclear Disarmament* in support of his argument, this is one aspect of what Lord Bingham refers to in *Jones (Margaret)*, *supra* note 2, at para. 30, as the domestic courts’ ‘slow[ness] to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law’.

⁵⁶ It is worth highlighting in this connection the long-established position of the UK courts that public international law is a body of law known to the court.

a step towards determining whether the legal conditions for a domestic crime of aggression were met, that the UK had engaged in an act of aggression constituting a manifest violation of the UN Charter.

Indeed, the courts of the UK regularly examine the international lawfulness of the UK's past or prospective conduct in the course of deciding cases brought under domestic law against respondents amenable to their jurisdiction. For example,⁵⁷ an inquiry into whether a public authority has acted contrary to section 6 of the Human Rights Act 1998⁵⁸ is – in substantive albeit not formal essence – an inquiry into whether the UK has breached the European Convention on Human Rights, while an inquiry into whether a public authority has acted contrary to section 2 of the Asylum and Immigration Appeals Act 1993 is, at root, an inquiry into whether the UK has breached the Refugee Convention.⁵⁹ Take also the UK courts' permissible and frequent interpretative recourse to the text of a treaty to which the UK is party to resolve, in favour of a construction in line with the treaty, any ambiguity in the text of a later Act:⁶⁰ the operative presumption, that Parliament does not intend to legislate in a way that would place the UK in breach of the treaty, involves the courts in an implicit assessment of the international lawfulness of the legislative practice of the UK.

As it is, it pays to recall Lord Hoffmann's precise words when introducing both his 'theoretical' and 'practical' arguments, namely that the prosecution of aggression in the domestic courts would, 'in the absence of statutory authority', be unconstitutional.⁶¹ Quite how statutory authority could overcome the purported problem of logical absurdity is not, it must be said, self-evident; but the fact remains that his Lordship considered that the problem fell away with the passage of statute, and the point to be made is that any crime of aggression as may in future become domestic law in the UK would be statutory.

⁵⁷ It might be argued in response to the first two examples given in the text that, in the case of aggression, the determination that the UK has breached international law would be more in the nature of a prerequisite, as distinct from the collateral implication involved in the examples. But the harder one looks at the distinction, the more elusive and unworkable it becomes. In addition, what distinction there may be does not hold good for the third example given in the text.

⁵⁸ Section 6 of the Human Rights Act 1998 makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right', while section 1 specifies that the term 'Convention rights' as used in the Act means the rights and fundamental freedoms set out in, *inter alia*, articles 2–12 and 14 of the ECHR and articles 1–3 of its First Protocol, as read with articles 16–18 of the former.

⁵⁹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 2545. Section 2 of the Asylum and Immigration Appeals Act 1993 states that 'nothing in the immigration rules (within the meaning of the [Immigration Act 1971]) shall lay down any practice which would be contrary to the [Refugee Convention]'. See, for example, *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.

⁶⁰ See, for example, *Garland v. British Railway Engineering Ltd* [1983] 2 AC 751, at 771 (Lord Diplock); *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, at 747–48 (Lord Bridge), 760–61 (Lord Ackner).

⁶¹ *Jones (Margaret)*, *supra* note 2, at para. 63.

28.3.1.2 *The Non-Justiciability of Relevant Exercises of the Prerogative*

In ruling out the judicial recognition of a common-law crime of aggression, Lord Hoffmann spoke in *Jones (Margaret)* of ‘the practical difficulty’ implicated by the hypothetical prosecution of the crime ‘that the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not inquire’.⁶² In the same vein, as one of his ‘compelling reasons’ against judicial recognition of a common law crime of aggression, Lord Bingham cited the UK courts’ slowness to review the executive’s exercise of the prerogatives over the conduct of foreign affairs and the deployment of the armed forces.⁶³ In the context of *Jones (Margaret)* itself, with its focus on the judicial creation of the crime, their Lordships saw the question as more than one of justiciability; but it is clear that, were a crime of aggression already to exist under the domestic law of the UK, the question would be no less one of justiciability.⁶⁴ In this light, the implication that might be drawn from an insufficiently attentive reading of their Lordships’ dicta⁶⁵ is that the prosecution of a domestic crime of aggression allegedly committed by a member of the UK executive may well be barred by the non-justiciability of the relevant exercises of the prerogative.

But it is highly doubtful whether a pre-existing domestic crime of aggression would be non-justiciable in the UK courts. The non-justiciability of certain exercises of the prerogative is a doctrine of administrative law whose applicability to criminal law is far from obvious, to say the least. The rationale for the non-justiciability of the prerogative power to make war, as recalled by Lord Hoffmann in *Jones (Margaret)*, is that the power is inherently discretionary.⁶⁶ No legal standard exists by which to judge whether the realm should go to war. Law is not the yardstick of a purely political judgement. The same goes for the exercise of the prerogatives over the conduct of foreign affairs and the deployment of the armed forces. But when the question is whether an exercise of a prerogative power is criminal, a legal yardstick exists. Putting it another way, a decision-maker enjoys no discretion to commit a crime (unless the legislature grants it). Any political discretion vested in him or

⁶² *Ibid.*, at para. 65. Lord Mance agreed, at para. 103, with the reasoning of both Lord Bingham and Lord Hoffmann, his dictum as to the ‘incongruity’ of judicial recognition of ‘a crime committed primarily by the state itself’ being directed in equal part towards this point.

⁶³ *Ibid.*, at para. 30.

⁶⁴ Recall *ibid.*, where Lord Bingham states that ‘in the present context’ the matter goes beyond the question of justiciability ‘to which many of [the cited] authorities were directed’, and *ibid.*, at para. 67, where Lord Hoffmann concedes that to say that the relevant exercises of the prerogative are not justiciable ‘may be simply another way of putting the same point’.

⁶⁵ None of their Lordships states that the prosecution of a common law crime of aggression would be barred as such by non-justiciability.

⁶⁶ *Jones (Margaret)*, *supra* note 2, at para. 65, citing *Chandler v. Director of Public Prosecutions* [1964] AC 763, at 806–12 (Lord Devlin) and *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

her is fettered to the extent of the criminal law. Just as it would be startling were the non-justiciability of the prerogative powers over foreign affairs, war and the armed forces to bar the prosecution in the UK courts of a UK government official for ordering a war crime,⁶⁷ it would be a striking abrogation of the rule of law were the non-justiciability of the same prerogatives to preclude the prosecution in the UK of a UK official for the crime of aggression. Political discretion ends where the criminal law begins.

Anyway, it is important to recall once more Lord Hoffmann's prefatory statement that the prosecution of aggression in the domestic courts would be unconstitutional 'in the absence of statutory authority'.⁶⁸ In other words, should the legislature – be it the UK Parliament at Westminster or a competent devolved legislature like the Scottish Parliament – enact a law the application of which requires the courts to scrutinise what might otherwise be non-justiciable conduct on the part of the executive, the courts are authorised, indeed compelled, to scrutinise that conduct so as to permit the legislation's application. Under the UK constitution, the will of Parliament (and, within the bounds of their powers, of its devolved analogues) is supreme. The executive may not hide behind the cloak of non-justiciability should Parliament render the matter at hand justiciable. In this light, were the relevant legislature in the UK to enact a domestic crime of aggression on the Kampala model, it is clear that the domestic courts would be statutorily authorised to examine and determine whether the defendant's conduct in the exercise of the prerogative powers over the conduct of foreign affairs, the making of war and the deployment of the armed forces satisfied the elements of the crime.

28.3.2 *Judicial Scrutiny of the Conduct of Foreign States*

The second of Lord Bingham's 'compelling reasons' in *Jones (Margaret)* for not recognising a common law crime of aggression was the domestic courts' slowness 'to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law'.⁶⁹ The reference is in part to the doctrine of the non-justiciability of foreign sovereign acts developed by Lord Wilberforce in *Buttes*.⁷⁰ To this might be added the narrower doctrine of non-justiciability known as the 'foreign act of State' doctrine, applicable to the acts of a foreign state within its own territory. Neither, however, would bar a preliminary determination, in the course of the prosecution in the UK courts of a foreign state

⁶⁷ See International Criminal Court (UK) Act 2001, sections 52, 55 (England and Wales) and sections 59, 62 (Northern Ireland); International Criminal Court (Scotland) Act 2001, sections 2, 7.

⁶⁸ *Jones (Margaret)*, *supra* note 2, at para. 63. ⁶⁹ *Ibid.*, at para. 30.

⁷⁰ *Ibid.*, where in support of his argument Lord Bingham cites *Buttes*, *supra* note 17, at 932.

official for a statutory crime of aggression, that the foreign state in question had committed an act of aggression in manifest violation of the UN Charter.

28.3.2.1 'Buttes' Non-Justiciability

It will be recalled that, in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, Lord Wilberforce, identifying a lack of 'judicial or manageable standards'⁷¹ by which to do so, posited that the English courts will not adjudicate on the legality, under municipal or international law, of 'the transactions of foreign sovereign states'⁷² or, putting it another way, of 'acts done abroad by virtue of sovereign authority'.⁷³ It was to this doctrine, *inter alia*, that Lord Bingham explicitly alluded in *Jones (Margaret)*, where his Lordship's point was that the prosecution of a foreign state official for a crime of aggression in connection with an alleged act of aggression by his or her state would 'draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection'.⁷⁴

Lord Bingham is doubtless right that the prosecution of the crime of aggression would in relevant cases compel the courts to examine the legality of what would ordinarily be the non-justiciable conduct of a foreign sovereign. But it is important to stress that 'Buttes' non-justiciability would not actually bar a UK court from making, in the course of adjudicating the crime of aggression, the requisite preliminary determination in relation to the conduct of the foreign state over which the defendant was in a position effectively to exercise control or over whose political or military action the defendant was in a position to direct.⁷⁵

First, in *Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 and 5)*, which Lord Bingham himself acknowledges in *Jones (Margaret)* to establish an exception to the doctrine espoused in 'Buttes',⁷⁶ the House of Lords, highlighting the rationale for the doctrine in the lack of 'judicial or manageable standards',⁷⁷ held that 'Buttes' non-justiciability is inapplicable where '[t]he standard being applied by the court is clear and manageable, and the outcome not in doubt'⁷⁸ – that is, where the breach of the relevant law is 'plain beyond dispute'.⁷⁹ In this light, there is little reason to think that the foreign state conduct at indirect issue in the adjudication of the crime of aggression would be beyond the rightful purview of the UK courts. In order to found a crime of aggression by a state official, the act of aggression by that official's state must, at least according to the definition of the

⁷¹ *Buttes*, *supra* note 17, at 938. ⁷² *Ibid.*, at 931. ⁷³ *Ibid.*, at 932.

⁷⁴ *Jones (Margaret)*, *supra* note 2, at para. 30.

⁷⁵ Note, again, that his Lordship does not go so far as to say that the domestic prosecution of the crime of aggression in these circumstances would be barred as such by the 'Buttes' doctrine.

⁷⁶ *Jones (Margaret)*, *supra* note 2, at para. 30. ⁷⁷ *Buttes*, *supra* note 17, at 938.

⁷⁸ *Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 and 5)* [2002] UKHL 19, [2002] AC 883, at para. 26 (Lord Nicholls, with whom Lord Hoffmann agreed).

⁷⁹ *Ibid.*, at para. 140 (Lord Hope).

crime agreed four years after *Jones (Margaret)* in Kampala, ‘by its character, gravity and scale’ constitute ‘a manifest violation of the Charter of the United Nations’;⁸⁰ and while it is arguable that the adjective ‘manifest’ is used in the definition in something other than its usual sense, to denote more the seriousness than the obviousness of the violation, it is unlikely that the term can be entirely divorced from its ordinary meaning.⁸¹ In other words, the very definition of the crime of aggression presupposes that the violation of the UN Charter by the foreign state will be ‘plain beyond dispute’ and cognizable therefore by the UK courts.⁸²

Second, and ultimately determinatively, a statutory crime of aggression would amount in relevant cases to a legislative directive to the courts to examine and come, by way of necessary preliminary determination, to a finding on the international lawfulness of a foreign state’s conduct – a directive, Parliament being supreme, that would trump the common law doctrine of ‘*Buttes*’ non-justiciability. Nor would this be a novelty. For example, the courts have frequent cause to consider whether, in accordance with regulation 5(1) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, a person is a refugee, a determination which regularly requires them to ask whether an act of persecution by a foreign state is ‘sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right’⁸³ or ‘includ[es] a violation of a human right which is sufficiently severe as to affect an individual in a similar manner’.⁸⁴ Likewise, a decision by an extradition court under section 21(1) of the Extradition Act 2003 that a person’s extradition pursuant to, *inter alia*, a European arrest warrant would be incompatible with the Convention rights secured to that person by the Human Rights Act 1998 necessarily involves a judicial determination that substantial grounds exist for believing that, if extradited, the person faces a real risk of a violation by the requesting state, and in relevant cases a ‘flagrant’ violation, of pertinent provisions of the European Convention on Human Rights. Neither determination is barred by ‘*Buttes*’ non-justiciability. In short, as in other areas of domestic law in the UK, the necessity for the courts preliminarily to rule on the international legality of a foreign state’s conduct in the course of adjudging, in relevant cases, a statutory crime of aggression would presuppose the question’s justiciability.

⁸⁰ Article 8 *bis*(1) of the Statute.

⁸¹ See *Oxford English Dictionary*, ‘manifest’, meaning A.1.a, *viz.* ‘clearly revealed to the . . . judgement’, ‘obvious’.

⁸² It might be objected that the argument leads to a ‘catch 22’ whereby a foreign state’s conduct on the plane of international law is justiciable in the UK courts if it amounts to an act of aggression in manifest violation of the Charter, but that the non-justiciability of a foreign state’s conduct on the plane of international law bars the UK courts from determining whether it amounts to an act of aggression in manifest violation of the Charter. But the conundrum is inherent in the merits-based exception to ‘*Buttes*’ non-justiciability posited by the House of Lords in *Kuwait Airways*. The Lords clearly envisaged that the courts would not be hamstrung by this logical nicety.

⁸³ Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525, regulation 5(1)(a).

⁸⁴ Refugee or Person in Need of International Protection (Qualification) Regulations 2006, regulation 5(1)(b).

28.3.2.2 *The Foreign Act of State Doctrine*

In addition to and predating the broad doctrine of ‘*Buttes*’ non-justiciability, there exists in English⁸⁵ law a narrower rule as to the non-justiciability of foreign state conduct. Should an English court be called on to give effect to foreign law or to some other act done by a foreign state within its own territory, it will give such effect without inquiring into the legality, under either municipal or international law, of that law or act.⁸⁶ In the words of the well-worn saying, the English courts ‘will not sit in judgment’ on the acts of a foreign state within its own territory. This territorially bounded rule as to the non-justiciability of foreign state conduct – known as the ‘act of state’ doctrine or, more precisely, the ‘foreign act of state’ doctrine – is said to reflect the sovereign equality of states and to be based on considerations of international comity. Lord Bingham implicitly endorsed it in *Jones (Margaret)*⁸⁷ in the context of his ‘compelling reasons’ for declining to recognise a common law crime of aggression. From this the unintended implication might be drawn that, insofar as some of the acts listed in paragraph 2 of article 8 *bis* of the Rome Statute take place within the putative aggressor state’s territory,⁸⁸ domestic judicial consideration of whether they constitute acts of aggression in manifest violation of the UN Charter would be precluded by the foreign act of state doctrine.

Again, however, any such conclusion would be incorrect. The foreign act of state doctrine would no more bar the UK courts from determining, as a preliminary matter, that a foreign state had committed an act of aggression constituting a manifest violation of the UN Charter than would ‘*Buttes*’ non-justiciability.

To begin with, in an exception to the foreign act of state doctrine, an English court will not give effect to foreign law or to other acts of a foreign state within its territory where to do so would be contrary to English public policy; and the House of Lords held in *Kuwait Airways* that to give effect to foreign law or to other territorial acts of a foreign state that constitute ‘flagrant’⁸⁹ or ‘gross’⁹⁰ violations of

⁸⁵ Again, it can only be presumed that a cognate doctrine would apply under Scots law and the law of Northern Ireland.

⁸⁶ See, for example, *A. M. Luther & Co. v. James Sagor & Co.* [1921] KB 532; *Kuwait Airways*, *supra* note 78.

⁸⁷ See *Jones (Margaret)*, *supra* note 2, at para. 30, where, as is not uncommon, his Lordship elides the foreign act of state doctrine with the broader doctrine of ‘*Buttes*’ non-justiciability. Having cited *Buttes* as an example of the English courts’ ‘slow[ness] to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law’, Lord Bingham recalls Lord Wilberforce in *Buttes* quoting with approval the seminal statement of the narrower doctrine by Fuller CJ of the US Supreme Court in *Underhill v. Hernandez*, 168 US 250 (1897), at 252 (‘Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.’)

⁸⁸ See article 8 *bis*(2)(f), (g) of the Statute.

⁸⁹ *Kuwait Airways*, *supra* note 78, at paras. 20 (Lord Nicholls, with whom Lord Hoffmann agreed), 107, 113–16 (Lord Steyn), 148–49 (Lord Hope).

⁹⁰ *Ibid.*, at paras. 29 (Lord Nicholls, with whom Lord Hoffmann agreed), 113 (Lord Steyn).

international law would be *ipso facto* contrary to English public policy. In this light, since the foreign state's act of aggression would need by definition to constitute a manifest – synonymously, flagrant – violation of the UN Charter to found a crime of aggression, it would by definition be justiciable.⁹¹ It is true that one of their Lordships took the view that the exception did not necessarily apply in respect of every rule of international law,⁹² while two others referred consistently to the rules at issue in that case as rules 'of fundamental importance'.⁹³ But the prohibition on the use of inter-state force in article 2(4) of the UN Charter, the yardstick by which the state conduct specified in article 8 *bis*(2) is to be measured or not an act of aggression constituting a manifest violation of the Charter, was precisely the rule at issue in *Kuwait Airways*, where it was held to ground the exception to the foreign act of state doctrine adumbrated in that case.

As it is, moreover, even were the foreign act of state doctrine to pose an obstacle, the fact that any future crime of aggression under English, Scots or Northern Irish law would be statutory would again make the conclusive difference. Just as with 'Buttes' non-justiciability, any Act providing for a crime of aggression would in relevant cases represent a legislative directive to the courts to reach the necessary preliminary determination as to international lawfulness of a foreign state's conduct within its own territory, and this legislative directive would override the common law foreign act of state doctrine.

28.3.3 Judicial Consideration of Unincorporated Treaty Provisions

A provision of a treaty to which the UK is party cannot give rise to rights, obligations or liabilities under English, Scots or Northern Irish law unless and until Parliament or the relevant devolved legislature enacts legislation to give effect to it.⁹⁴ Putting it another way, treaties are not 'self-executing' in the UK.⁹⁵ A corollary of this is the general rule that the UK courts have no jurisdiction to interpret, apply or otherwise have regard to an unincorporated treaty provision (*viz.* a treaty provision that has not been given domestic effect by legislation), since the

⁹¹ What is said *supra* note 82 in relation to 'Buttes' non-justiciability is applicable *mutatis mutandis* to the foreign act of state doctrine.

⁹² *Kuwait Airways*, *supra* note 78, at para. 114 (Lord Steyn). Lord Hope made no such qualification.

⁹³ *Ibid.*, at paras. 20, 29 (Lord Nicholls, with whom Lord Hoffmann agreed). See also *ibid.*, at para. 29 ('such a fundamental breach of international law'). But compare *ibid.*, at para. 29, citing *Oppenheim* to the effect that 'international law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law' *simpliciter*.

⁹⁴ The principle is so well established that, in *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, at para. 63, Lord Hoffmann stated that 'it should no longer be necessary to cite authority for the proposition that ... an international treaty ... is not part of English domestic law'. The same goes for Scots law and the law of Northern Ireland.

⁹⁵ There are exceptions to this rule, but they are very few, and are now, for all intents and purposes, of historical curiosity value only.

courts of none of the three jurisdictions within the UK enjoy the jurisdiction to adjudge pure questions of public international law – that is, questions of public international law not necessarily incidental to questions of domestic law.⁹⁶ In short, unincorporated treaty provisions are not, as a general rule, justiciable in the UK courts.⁹⁷ This may be thought to pose a problem for the adjudication of the crime of aggression. Determining whether the defendant has committed the crime of aggression would require the court first to determine whether an act of aggression by the state (be it the UK or a foreign state) over which the defendant was in a position effectively to exercise control or whose political or military action the defendant was in a position to direct constituted a manifest violation of the Charter of the United Nations. This would compel the court to have regard to article 2(4) and perhaps articles 42 and 51, respectively, of the Charter, and none of these articles has been or, indeed, is logically capable of being incorporated into English, Scots or Northern Irish law.

But a UK court may have regard to an unincorporated treaty provision where this is necessary to determine rights, obligations or liabilities under domestic law.⁹⁸ The court's jurisdiction to do so is necessarily incidental to its self-evident jurisdiction to adjudicate upon questions of domestic law. In this light, there is no doubt whatsoever but that, were the legislature to enact a domestic crime of aggression, the legality of the putative act of aggression by the relevant state – the preliminary determination of which would constitute a prerequisite to the court's adjudication of the offence – would thereby be rendered justiciable.

28.4 Judicial Dicta on the Crime of Aggression

While rejecting the crime of aggression's punishability at common law, the House of Lords in *Jones (Margaret)* nonetheless offered dicta on the customary international legal content, as they saw it, of the crime as it was then said to exist, four years before the Review Conference of the Rome Statute in Kampala. These dicta are not without interest. But their accuracy was open to doubt even at the time. Furthermore, and more significantly, it is likely that the relevant customary international law has since been affected by the positions staked out by states in the lead-up to and at the Kampala conference and by the compromise eventually struck there.

⁹⁶ Recall *supra* note 55.

⁹⁷ See, for example, *Rayner*, *supra* note 55, at 499 (Lord Oliver); *MacCormick*, *supra* note 55, at 413 (Lord President). This non-justiciability cannot be waived by the parties, as made clear in *Republic of Ecuador v. Occidental Exploration and Production Co.* [2005] EWCA Civ 1116, [2006] QB 432, at para. 57 (Mance LJ, delivering the judgment of the court).

⁹⁸ See *Campaign for Nuclear Disarmament*, *supra* note 55, at paras. 36, 47 (Simon Brown LJ), endorsed in *Occidental*, *supra* note 97, at para. 31 (Mance LJ). This exception, although posited in the specific context of English law, can be assumed apply also under Scots law and the law of Northern Ireland.

28.4.1 R v. Jones (Margaret)

Unlike the Court of Appeal of England and Wales before them,⁹⁹ their Lordships held in *Jones (Margaret)* that the crime of aggression existed at the time under customary international law with sufficient clarity to permit its trial and punishment. Lord Bingham traced the history of the prohibition on the use of force and of the crime of aggression,¹⁰⁰ recalling, *inter alia*, the crimes against peace referred to in respective articles 6(a) of the Nuremberg and Tokyo Charters and in Control Council Law No 10;¹⁰¹ the definition of an act of aggression in 1974 GA Resolution 3314; the crime of aggression recognised in article 16 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind;¹⁰² and the reference to the Court's jurisdiction over the crime of aggression in article 5 of the Rome Statute.¹⁰³ He then addressed the point on which the House differed from the Court of Appeal:

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. 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 precondition 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.¹⁰⁴

⁹⁹ See *R v. Jones (Margaret) and Others* [2004] EWCA Crim 1981, [2005] QB 259, at para. 43.

¹⁰⁰ See *Jones (Margaret)*, *supra* note 2, at paras. 13–18.

¹⁰¹ 'Charter of the International Military Tribunal', in Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 284, Annex; Charter of the International Military Tribunal for the Far East, General Orders No. 1, 19 January 1946, Tokyo, as amended, General Orders No. 20, 26 April 1946, TIAS No. 1589, 4 Bevans 20.

¹⁰² ILC, 'Draft Code of Crimes against the Peace and Security of Mankind', Yb ILC (1996), vol. II, 15 (including commentary).

¹⁰³ It will be recalled that, in accordance with article 5(1)(d) of the Rome Statute, the Court enjoys jurisdiction *ratione materiae* with respect to the crime of aggression but also that, as specified in article 5(2), the Court shall not exercise this jurisdiction until a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to it.

¹⁰⁴ *Jones (Margaret)*, *supra* note 2, at para. 19, citation omitted.

Lord Hoffmann arrived at the same conclusion:

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.¹⁰⁵

Lord Mance agreed that there existed as a matter of customary international law ‘a crime of aggression which is, as history confirms, sufficiently certain to be capable of being prosecuted in international tribunals’.¹⁰⁶

28.4.2 *The Dicta’s Value*

Their Lordships’ view that aggression existed as a crime under customary international law in 2006 with enough definitional precision to enable its trial and punishment, although not altogether implausible, is by no means compelling. It appears based, at least on Lord Bingham’s part, on a conflation of an act of aggression within the meaning of article 39 of the UN Charter, a question of state conduct and ultimately of state responsibility, and the crime of aggression, *viz.* individual criminal responsibility for the planning, preparation, initiation or execution of an act of aggression by a state.¹⁰⁷ As for Lord Hoffmann’s assertion that ‘the core elements of the crime [were] certain enough . . . to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait’,¹⁰⁸ its premise is simply incorrect (even leaving aside his Lordship’s elision of an act of aggression and the crime of aggression), the Security Council having determined that the invasion constituted a breach of the peace, not an act of aggression.¹⁰⁹ Moreover, one is left wondering why, if the Lords’ conclusion as to the content of the crime of aggression at the time is correct, the International Law Commission was not able between 1948 and 1996 to come up with anything more than a circular definition of the

¹⁰⁵ *Ibid.*, at para. 59. ¹⁰⁶ *Ibid.*, at para. 99.

¹⁰⁷ It will be recalled, notably, that the definition of aggression in 1974 GA Res. 3314, as relied on by Lord Bingham, was adopted, in the words of para. 4 of the resolution, by way of ‘guidance in determining, in accordance with the Charter, the existence of an act of aggression’ by a UN member state.

¹⁰⁸ *Jones (Margaret)*, *supra* note 2, at para. 59.

¹⁰⁹ See Security Council Resolution 660 (1990), 2 August 1990, UN Doc. S/RES/660, preamble (second recital).

offence,¹¹⁰ and why the Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute continued in 2006 to struggle to agree on a definition – and not merely, *pace* their Lordships, on connected procedural questions.¹¹¹ Indeed, if the Lords' view is correct, one is left wondering why none of them put forward a definition of the crime.

Perhaps more to the point, whatever the customary position in 2006, there is convincing reason to think that things have moved on since then, with the agreement in Kampala on a definition of the offence which distinguishes clearly between an act of aggression by a state and a crime of aggression by an individual, the latter additionally requiring, *inter alia*, that the act of aggression in question, 'by its character, gravity and scale', constitute 'a manifest violation of the Charter of the United Nations'. This is not to say that the Kampala definition of the crime of aggression currently reflects customary international law. It is, however, likely that this definition has unsettled any such customary definition as may, on an optimistic reading, have predated it. It is likely too that any customary definition as may emerge in future will reflect article 8 *bis* of the Rome Statute.

28.5 Conclusion

No domestic crime of aggression currently exists in the UK. But there would be no inherent legal bar to its prosecution should the legislature choose in future to enact one. This is not to say that such prosecution would necessarily proceed: in a case involving a foreign state official,¹¹² it would come up against the defendant's potential immunity, either *ratione personae* or *ratione materiae*, from the jurisdiction of the UK criminal courts – a question not at issue in *Jones (Margaret)*, where the crime of aggression was raised *ex hypothesi* by the defence, rather than brought on indictment by the prosecution. The point, however, is that, in the event that the defendant to a charge of aggression could permissibly be proceeded against in a UK court, the questions implicated by the adjudication of a statutory crime of aggression would be within the rightful power of those courts to determine. The same is likely to be the case in at least certain other jurisdictions of the common law and

¹¹⁰ See 1996 ILC Draft Code of Crimes, *supra* note 103, article 16: 'An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.'

¹¹¹ See 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 8 to 11 June 2006', ICC-ASP/5/SWGCA/INF.1, in *ASP Official Records*, ICC-ASP/5/32, especially paras. 7–50, 84–95, Annexes I, II.

¹¹² Perhaps needless to say, such immunities demanded by international law as may be given effect in domestic law would be irrelevant to the prosecution of a UK official. Nor do any of the bodies of domestic law in the UK accord procedural immunity to UK officials.

Westminster traditions. The only fundamental bar to such adjudication is the political will to enact a crime of aggression.

Perhaps curiously, despite there being no domestic crime of aggression in the UK, the UK courts have nonetheless had occasion to remark on the content of the crime under customary international law. But what they said back in 2006 is probably no longer of much use, if it ever was.

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