HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 16

on appeal from: [2004] EWCA Crim 1981 and [2005] EWHC 684 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R *v.* Jones (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R *v.* J (Appellant))
R *v.* Milling (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R *v.* M (Appellant))
R *v.* Olditch (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R *v.* O (Appellant))
R *v.* Pritchard (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R *v.* P (Appellant))
R *v.* Richards (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R *v.* R (Appellant)) (Conjoined Appeals)

Ayliffe and others (Appellants) *v.* Director of Public Prosecutions (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)

Swain (Appellant) *v.* Director of Public Prosecutions (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

Hearing dates:
20, 21, 22 and 23 February 2006

ON
WEDNESDAY 29 MARCH 2006

Counsel

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R *v*. Olditch and Pritchard
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Ayliffe *v*. Director of Public Prosecutions
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Swain *v*. Director of Public Prosecutions
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LORD BINGHAM OF CORNHILL

My Lords,

1. The immense, perhaps unprecedented, suffering of many people in many countries during the twentieth century had at least one positive result: that it prompted a strong international determination to prevent and prohibit the waging of aggressive war. This determination found expression in the international legal order, and understandably so, since it is states which wage such wars and states that must suppress them. At issue in these appeals is the extent to which, if at all, this international determination is transposed into the domestic legal order of England and Wales.

2. There are 20 appellants before the House. All of them committed acts in February or March 2003 which were, or are alleged to have been,

criminal offences, unless there was legal justification for what they did or are said to have done. The issue in each appeal concerns this legal justification, which (depending on the charge in question) differs somewhat from case to case. But the common feature of all the appeals, and the feature which makes the cases important, is that they all raise the question whether the crime of aggression, if established in customary international law, is a crime recognised by or forming part of the domestic criminal law of England and Wales. The appellants acted as they did because they wished to impede, obstruct or disrupt the commission of that crime, or what they believed would be the commission of that crime, by Her Majesty's Government or the Government of the United States against Iraq in the weeks and days before (as we now know) hostilities began. They accordingly contend, or have contended, that they were legally justified in acting as they did. The House is not asked to rule whether, in preparing to make war against Iraq, the United Kingdom or the United States committed the international law crime of aggression, but it must rule whether, if they may have done, that would justify the appellants' otherwise criminal conduct.

The Fairford appellants

3. On the night of 13 March 2003 the appellants Margaret Jones and Paul Milling broke into the Royal Air Force base at Fairford in Gloucestershire and caused damage to fuel tankers and bomb trailers. They had conspired together to do so. A little later, the appellants Toby Olditch and Philip Pritchard conspired together to cause criminal damage at the base. On 18 March 2003 they had in their possession articles which they intended to use to destroy or damage the runway at the base and aircraft belonging to the United States Air Force. On the same date, 18 March 2003, the appellant Josh Richards attempted to set fire to an aircraft at the base belonging to the United States Air Force. He had with him on that date articles which he intended to use to destroy or damage such aircraft. Also on that date, he caused damage to a perimeter fence at the base. It is convenient to refer to these appellants collectively as "the Fairford appellants". In indictments preferred against them they were (after the withdrawal of one count) charged with counts of conspiracy to cause criminal damage contrary to section 1(1) of the Criminal Law Act 1977 (Jones, Milling, Olditch, Pritchard), having articles with intent to destroy or damage property contrary to section 3(b) of the Criminal Damage Act 1971 (Olditch, Pritchard, Richards) and criminal damage contrary to section 1(1) of the 1971 Act and attempted arson contrary to section 1(1) of the Criminal Attempts Act 1981 (Richards). The Fairford appellants have not yet been tried.

Thus the factual basis of these counts has not been proved. But the facts recounted above are not understood to be contested.

4. A preparatory hearing was held under section 29 of the Criminal Procedure and Investigations Act 1996 to seek rulings on some questions of law arising from the proposed defences of the Fairford appellants. Relevantly, the question was raised whether the defence of using reasonable force under section 3 of the 1967 Act was available to them. Sitting at Bristol, Grigson J ruled on 12 May 2004 (1) that foreign policy and the deployment of the armed services involved the exercise of prerogative power and could not raise justiciable issues, and (2) that the citizen could not plead lawful justification for interfering with the exercise of that power (including the power to make war). The judge accepted, as the Crown had accepted in argument, that the appellants were entitled to contend that they had been acting to prevent the commission of war crimes within the scope of the International Criminal Court Act 2001, so the argument was directed to the crime of aggression. The appellants challenged the judge's ruling in the Court of Appeal (Criminal Division) (Latham LJ, Gibbs J and His Honour Judge Brown). It ruled ([2004] EWCA Crim 1981, [2005] QB 259) that the crime of aggression which the appellants claimed they were seeking to prevent was not a "crime" for the purposes of section 3 of the 1967 Act, and that accordingly the issue of justiciability did not call for decision. It certified as a question of general public importance:

> "Is the crime against peace and/or crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 and, if so, is the issue justiciable in a criminal trial?"

It has not been suggested that there is any difference of substance between a "crime against peace" and a "crime of aggression" and I shall for convenience use the latter expression.

The Marchwood appellants

5. It is convenient to refer to the appellant Benjamin Ayliffe and his 13 co-appellants as "the Marchwood appellants". On 4 February 2003, some weeks before hostilities began against Iraq, they trespassed on the land of the Sea Mounting Centre, Marchwood Military Port, at Hythe in Hampshire. Some of them entered the port by boat. Others cut a hole in

the perimeter wire and entered the port through it. Some of them chained themselves to tanks or reconnaissance vehicles. The work of the port, which involved the loading of vessels bound for the Middle East, was brought to a halt, as they intended. They were all charged with the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994, the charge being that they trespassed on land in the open air and, in relation to a lawful activity, namely port operations, which persons were engaged in on that land, did an act intended to have the effect of obstructing that activity. There was also a charge of criminal damage contrary to section 1 of the 1971 Act.

6. The Marchwood appellants appeared before District Judge Woollard in the Southampton Magistrates' Court. They argued that the activity being carried on at Marchwood was not a lawful activity within the section because it was being carried out in pursuance of a crime of aggression under customary international law and constituted a war crime within the meaning of sections 51 and 52 of the International Criminal Court Act 2001. They also relied on section 3 of the 1967 Act. The judge ruled at a preliminary hearing that "offence" in section 68(2) of the 1994 Act means "a specific offence known to English law by common law or statute", and thus excludes the crime of aggression. At a later preliminary hearing when the Marchwood appellants sought wide-ranging disclosure said to be relevant to their defences under section 3 of the 1967 Act and under the 2001 Act, the judge refused to make an order. He held that the foreign and defence policies of the Government were not matters into which the court could enquire. At trial, all the appellants were convicted of aggravated trespass, and some were convicted of criminal damage. They were conditionally discharged or fined, and some compensation orders were made. The judge stated a case for the opinion of the High Court on the correctness of his rulings.

The appellant Valerie Swain

7. On 9 March 2003 the appellant Valerie Swain and others trespassed on the RAF base at Fairford which she entered by cutting a hole in the perimeter fence. She intended to obstruct or disrupt the maintenance of the security of the base. She (with nine others) was charged with aggravated trespass contrary to section 68(1) of the 1994 Act, alleging that she trespassed on the base and "in relation to a lawful activity, namely the maintenance of security of the base" did an act, namely cut a hole in the perimeter fence, which she intended to obstruct

or disrupt that activity. She was also charged with criminal damage contrary to section 1 of the 1971 Act.

8. This appellant advanced very much the same defences as the Marchwood appellants and District Judge Clark, sitting in the Cirencester Magistrates' Court, ruled at a preliminary hearing that the defences were not maintainable because the decision to go to war and its continuance were not justiciable. At trial this appellant and her co-defendants were convicted of aggravated trespass and criminal damage. She was conditionally discharged and ordered to pay costs and compensation. She alone appealed by way of case stated.

9. The appeals of this appellant and the Marchwood appellants were heard together in the Divisional Court (Waller LJ and Jack J), and dismissed: [2005] EWHC 684 (Admin), [2006] QB 227. It was accepted that the court was bound by the Court of Appeal's judgment on the appeal of the Fairford appellants, and also that the ratio of that case governed the court's decision on section 68 of the 1994 Act. The court certified that these appeals raised two questions of general public importance. The first was

> "Is a crime of aggression capable of being an 'offence' within the meaning of section 68(2) of the Criminal Justice and Public Order Act 1994, and if so is the issue justiciable in a criminal trial?"

The second was in substance that certified in the case of the Fairford appellants.

The appellants' argument

10. The appellants' case was deployed with much erudition and elaboration, to which any summary must necessarily do injustice. But I think their argument, expressed in a composite manner and in my own words, not theirs, involves the following major propositions:

(1) Customary international law is (without the need for any domestic statute or judicial decision) part of the domestic law of England and Wales.

(2) At all times relevant to these appeals customary international law has recognised a crime of aggression.
(3) Crimes recognised in customary international law are (without the need for any domestic statute or judicial decision) recognised and enforced by the domestic law of England and Wales.
(4) "Crime" in section 3 of the 1967 Act covers a crime established in customary international law, such as the crime of aggression.
(5) Alternatively, "crime" in section 3 means a crime in the domestic law of England and Wales, and the crime of aggression is such.
(6) "Offence" in section 68(2) of the 1994 Act covers an offence established in customary international law, such as the crime of aggression.
(7) Alternatively, "offence" in section 68(2) means a crime in the domestic law of England and Wales, and the crime of aggression is such.

I shall consider these steps in turn.

(1) *Customary international law is (without the need for any domestic statute or judicial decision) part of the domestic law of England and Wales.*

11. The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general truth of this proposition, for which there is indeed old and high authority: see, for example, *Triquet v Bath* (1764) 3 Burr 1478, 1481; *Blackstone's Commentaries*, Bk IV, Chap 5, p 67; *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, 51-52; *Emperor of Austria v Day* (1861) 2 Giff 628, 678; *Chung Chi Cheung v The King* [1939] AC 160, 167-168; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 554; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, 207. I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ("International Law in England" (1935) 51 LQR 24, 31), also espoused by the appellants, that international law is not a part, but is one of the sources, of English law. There was, however, no issue between the parties on this matter, and I am content to accept the general truth of the proposition for present purposes since the only relevant qualification is the subject of consideration below.

(2) *At all times relevant to these appeals customary international law has recognised a crime of aggression*.

12. I would question whether, as ruled by the United States Military Tribunal in *United States of America v Ernst von Weizsäcker et al* at p 319 of its judgment of 11-13 April, 1949, "aggressive wars and invasions have, since time immemorial, been a violation of international law, even though specific sanctions were not provided". It may, I think, be doubtful whether such wars were recognised in customary international law as a crime when the 20th century began. But whether that be so or not, it seems to me clear that such a crime was recognised by the time the century ended.

13. It is, I think, enough to identify the major milestones along the road leading to this conclusion. A draft Treaty of Mutual Assistance, sponsored by the League of Nations, described aggressive war as an international crime in 1923. In the following year the same description was used in the preamble to a protocol recommended by the League of Nations Assembly but not ratified. In 1927 the League of Nations Assembly unanimously adopted a preamble which used that description. The Pan-American Conference in 1928 unanimously resolved that "war of aggression constitutes an international crime against the human species". In the same year the General Treaty for the Renunciation of War (94 LNTS 57, the "Kellogg-Briand Pact") condemned recourse to war as an instrument of international policy.

14. The Second World War gave new impetus to this movement. The Charter of the United Nations, in its preamble and in article 2(4), set its face against the threat and use of force. Article 6 of the Charter of the International Military Tribunal established to try major war criminals of the European Axis at Nuremberg defined its jurisdiction as including

> "(a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

The International Military Tribunal convicted a number of defendants of offences under this head. By General Assembly Resolution 95(1) of 11 December 1946 the principles recognised by the Charter of the International Military Tribunal and its judgment were affirmed. The Charter of the International Military Tribunal for the Far East was, save for an immaterial difference of wording, to the same effect as article 6(a). Law No 10 of the Control Council for Germany (20 December 1945) recognised a crime against peace in very similar terms.

15. The condemnation of aggressive war found further expression in General Assembly Resolutions 2131(xx) of 21 December 1965, 2625(xxv) of 24 October 1970 and 3314 (xxix) of 14 December 1974, in the last of which the definition of an act of aggression in contravention of the Charter was approved as including:

> "(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack . . .
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State."

In 1954 the International Law Commission, in a Draft Code of Offences against the Peace and Security of Mankind, defined as such offences

> "(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations."

16. In a further ILC draft code of 1996, article 1(2) declares that "Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law". Thus, as the commentary (paragraph (9)) makes clear, they are crimes "irrespective of the existence of any corresponding national law". Article 2 of the code provides, as was established at Nuremberg, that individuals are personally responsible for crimes committed under international law. Article 16 addresses the

crime of aggression and provides that "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". Paragraph (14) of the commentary on article 8 makes plain that

> "An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State."

But article 16 establishes, as was held at Nuremberg and other post-war trials, that aggression is a leadership crime: it cannot be committed by minions and footsoldiers. Article 8, addressing jurisdiction, provides that jurisdiction over the crime of aggression shall rest with an international criminal court, but without precluding trial of its own nationals alleged to have committed that crime by a state whose leaders participated in an act of aggression.

17. In the Rome Statute of the International Criminal Court 1998 the jurisdiction of the court is limited by article 5 to "the most serious crimes of concern to the international community as a whole". These are: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. But, by article 5(2), the court is not to exercise jurisdiction over the crime of aggression until a provision is adopted defining the crime and setting out the conditions under which the court may exercise jurisdiction with respect to it.

18. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States)* [1986] ICJ Reports 14, para 190, the prohibition on the use of force in article 2(4) of the United Nations Charter was accepted as jus cogens, a universally recognised principle of international law. As Professor Brownlie has observed (*Principles of Public International Law*, 5th ed (1998), p 566), "whatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law".

19. It was suggested, on behalf of the Crown, that the crime of aggression lacked the certainty of definition required of any criminal offence, particularly a crime of this gravity. This submission was based

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

(3) *Crimes recognised in customary international law are (without the need for any domestic statute or judicial decision) recognised and enforced by the domestic law of England and Wales.*

20. In supporting this proposition the appellants were able to rely on the great authority of Blackstone who (in Book IV, chap 5, p 68, of his *Commentaries*) listed the "principal offences against the law of nations, animadverted on as such by the municipal laws of England" as violation of safe conducts, infringement of the rights of ambassadors and piracy.

21. Each of these offences has a long legal genealogy. A statute enacted in the reign of Edward III (see Holdsworth, *A History of English Law*, 1936, vol 2, p 450) made it treason to kill an ambassador, and a statute of Henry V (2 Henry V c.6) imposed penalties on those who broke truces or violated safe conducts. The immunity of ambassadors when performing diplomatic duties was confirmed by the statute 7 Anne c.12, but this statute has been repeatedly recognised as declaring what the law of England, deriving from the law of nations, already was: *Triquet v Bath* (1764) 3 Burr 1478, 1478-1479, 1481; *Viveash v Becker* (1814) 3 M and S 284, 292; *Novello v Toogood* (1823) 1 B and C 554, 562; *Taylor v Best* (1854) 14 CB 487, 519; *Magdalena Steam Navigation Company v Martin* (1859) 2 E1 and E1 94, 114. A long series of domestic statutes dating back to 15 Ric II c.3 addressed the crime of piracy, but the report of the Privy Council delivered by Viscount Sankey LC in *Re Piracy Jure Gentium* [1934] AC 586, 594,

made plain that a distinction must be drawn between piracy under any municipal Act of a particular country and piracy jure gentium.

22. While the appellants acknowledged the paucity of authority on the assimilation of customary international law crimes into municipal law, other than those listed by Blackstone, they contended that war crimes earned inclusion in any modern list. It is true that certain practices have, since mediaeval times, been regarded as contrary to the laws and usages of war. After the Second World War some countries provided for the trial of those accused of this crime by statute (as in Australia), or Order in Council under statutory authority (Canada), and the United States appointed military commissions, a practice which pre-dated the Constitution and was recognised but not established by statute: see Rogers, "War Crimes Trials under the Royal Warrant: British Practice 1945-1949" (1990) 39 ICLQ 780, 787. In this country, an enabling statute was discussed (Rogers, *op. cit*., pp 788-789) but in the event a Royal Warrant was issued under the royal prerogative on 18 June 1945 to provide for the trial in military courts of persons charged with "violations of the laws and usages of war", which were treated as synonymous with war crimes. Such courts were to take judicial notice of the laws and usages of war. Pursuant to this instrument some 500 trials were held during the years 1945-1949 (Rogers, *op. cit*., p 795). *Re Sandrock and Others* (1945) 13 ILR 297, which concerned the summary execution of a prisoner of war, is one reported example. Since, by 1945, the creation of new offences lay outwith the royal prerogative, the underlying premise of the Royal Warrant must, I think, have been that war crimes, recognised as such in customary international law, had been assimilated into our domestic law. It was, however, contemplated that an Act of Indemnity should be passed to give retrospective validity to the proceedings (Rogers, *op. cit*., pp 788-799), which may betray some uncertainty on the point. But history has moved on. In 1950 the International Law Commission, summarising the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, listed war crimes ("Violations of the laws or customs of war") as crimes under international law. In section 1(1) of the War Crimes Act 1991, jurisdiction was conferred on British courts to try charges of murder, manslaughter or culpable homicide against a person in this country irrespective of his nationality at the time of the alleged offence if that offence was committed between 1 September 1939 and 5 June 1945 in a place which at the time was part of Germany or under German occupation and "constituted a violation of the laws and customs of war", an expression which it was not thought necessary to define. It would seem to me at least arguable that war crimes, recognised as such in customary international law, would now be triable and punishable under

the domestic criminal law of this country irrespective of any domestic statute. But it is not necessary to decide that question, since war crimes are something quite distinct from the crime of aggression.

23. I would accordingly accept that a crime recognised in customary international law may be assimilated into the domestic criminal law of this country. The appellants, however, go further and contend that that result follows automatically. The authorities, as I read them, do not support that proposition. Lord Cockburn CJ rejected it in *R v Keyn* (1876) 2 Ex D 63, 203, when he said:

> "Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas."

In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 the issue was whether British courts had jurisdiction, before section 134 of the Criminal Justice Act 1988 came into force, to try those accused of torture abroad. But I agree with the observation of Buxton LJ in *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499, 506, where a contention similar to the appellants' was advanced:

> "It is also in my view impossible to reconcile that contention with the debate in *Pinochet (No 3)* which concluded, illuminatingly subject to the specific dissent on this point of Lord Millett, that although State torture had long been an international crime in the highest sense (to adopt the formulation of Lord Browne-Wilkinson [2000] 1 AC page 198F) and therefore a crime universally in whatsoever territory it occurred, it was only with the passing of Section 134 of the Criminal Justice Act 1998

> that the English criminal courts acquired jurisdiction over 'international', that is to say extra territorial, torture."

In the context of genocide, an argument based on automatic assimilation was rejected by a majority of the Federal Court of Australia in *Nulyarimma v Thompson* (1999) 120 ILR 353. In the context of abduction it was rejected by the Supreme Court of the United States in *Sosa v Alvarez-Machain et al* 542 US 692 (2004). It is, I think, true that "customary international law is applicable in the English courts only where the constitution permits": O'Keefe, "Customary International Crimes in English Courts" (2001) BYIL 293, 335. I respectfully agree with the observations of Sir Franklin Berman (*Asserting Jurisdiction: International and European Legal Perspectives*, ed M Evans and S Konstantinidis, 2003, p 11) answering the question whether customary international law is capable of creating a crime directly triable in a national court:

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

now be regarded as reserved exclusively to Parliament, by Statute."

(4) *"Crime" in section 3 of the 1967 Act covers a crime established in customary international law, such as the crime of aggression.*

24. Section 3 of the Criminal Law Act 1967 provides:

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
>
> (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

A side-note "Use of force in making arrest, etc" follows a draft of the Criminal Law Revision Committee, 7th Report, 1965 (Cmnd 2659) which recommended the substance of the provision. It is accepted that the reasonableness of the force used must be judged objectively in the circumstances which the defendant believed to exist, but this belief can extend only to facts and not to the legal consequences or implications of those facts.

25. I have some doubt whether section 3 was ever intended to apply to conduct like the appellants' which, although causing damage to property in some cases, was entirely peaceable and involved no violence of any kind to any person. In its *Report on Offences of Damage to Property* 1970 (Law Com No 29), para 49, the Law Commission appears to have considered that a policeman who forced open a door to execute a warrant of arrest could raise a defence of lawful excuse under what became the 1971 Act, and in *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499, 508, Buxton LJ understood section 3 to have been introduced to deal with physical force to the person. It was, however, common ground before Grigson J that what the Fairford appellants did or intended to do involved a use of force; there is authority to support that view (*Swales v Cox* [1981] QB 849; *R v Renouf* [1986] 1 WLR 522); this question of interpretation was not the subject of appeal; and it has not been fully investigated. I shall

therefore treat the section as applicable to acts such as the appellants did.

26. The main object of the 1967 Act was to amend the law of England and Wales by abolishing the distinction between felonies and misdemeanours as recommended by the Criminal Law Revision Committee. Part I of the Act, headed "Felony and Misdemeanour", includes section 3 and contains provisions governing matters such as arrest, trial and penalties on conviction. Part II abolished a number of obsolete crimes. Part III abolished tortious liability for maintenance and champerty. The focus of the Act is entirely domestic, and it would seem to me very highly unlikely that Parliament understood "crime" in section 3 as covering crimes recognised in customary international law but not assimilated into our domestic law by any statute or judicial decision. In construing a domestic statute the ordinary practice is to treat "offence", in the absence of an express provision to the contrary, as referring to an offence committed here against a common law or statutory rule: *R (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692, para 67. The same approach must apply to "crime". Nothing in the Act or in the Report on which it was based suggests a contrary intention in this case. I cannot, therefore, accept the appellants' submission on this issue.

(5) *Alternatively, "crime" in section 3 means a crime in the domestic law of England and Wales, and the crime of aggression is such.*

27. I approach this proposition assuming the correctness of the conclusions already reached, that "crime" in section 3 means a crime in the domestic law of England and Wales and that a crime recognised as such in customary international law (such as the crime of aggression) may, but need not, become part of the domestic law of England and Wales without the need for any domestic statute or judicial decision.

28. The lack of any statutory incorporation is not, however, a neutral factor, for two main reasons. The first is that there now exists no power in the courts to create new criminal offences, as decided by a unanimous House in *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435. While old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences. The second reason is that when it is sought to give domestic effect to crimes established in customary international law, the practice is to

legislate. Examples may be found in the Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995, dealing with breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977; the Genocide Act 1969, giving effect to the Genocide Convention of 1948; the Criminal Justice Act 1988, s 134, giving effect to the Torture Convention of 1984; the War Crimes Act 1991, giving jurisdiction to try war crimes committed abroad by foreign nationals; the Merchant Shipping and Maritime Security Act 1997, s 26, giving effect to provisions of the United Nations Convention on the Law of the Sea 1982 relating to piracy; and sections 51 and 52 of the International Criminal Court Act 2001, giving effect to the Rome Statute by providing for the trial here of persons accused of genocide, crimes against humanity and war crimes, but not, significantly, the crime of aggression. It would be anomalous if the crime of aggression, excluded (obviously deliberately) from the 2001 Act, were to be treated as a domestic crime, since it would not be subject to the constraints (as to the need for the Attorney General's consent, the mode of trial, the requisite *mens rea*, the liability of secondary parties and maximum penalties) applicable to the crimes which were included.

29. These reasons, taken together, are very strong grounds for rejecting the appellants' contention, since they reflect what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle.

30. In the present case, involving the crime of aggression, there are compelling reasons for not departing. A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law. The first of these rules is vouched by authorities such as *Chandler v Director of Public Prosecutions* [1964]

AC 763, 791, 796; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398; *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, para 60; *R (Marchiori) v The Environment Agency* [2002] EWCA Civ 03, [2002] EuLR 225, paras 38-40. The second rule is supported by such authorities as *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 932; *J H Rayner (Mincing Lane) Limited v Department for Trade and Industry* [1990] 2 AC 418, 499; *Westland Helicopters Limited v Arab Organisation for Industrialisation* [1995] QB 282, 292; and *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, paras 38, 40. In *Buttes*, at p 933, Lord Wilberforce cited with approval the words of Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897), 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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

I do not suggest that these rules admit of no exceptions: cases such as *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 may fairly be seen as exceptions. Nor, in the present context, is the issue one of justiciability, to which many of these authorities were directed. In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is nonetheless very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection.

31. The potential and readily foreseeable problems which might arise if it were permissible to impede military preparations or action by the existing government in this country on the ground of their unlawfulness would not end there. For a person so acting could, at least arguably, on facts more significant than those relied on here, be said to "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere" within the meaning of the Treason Act 1351, or to commit the common law offence of sedition by exciting disaffection against the government or the constitution. It has never been a defence

to such a charge that the Crown or the government had committed itself to an unjust or unlawful cause. It would be strange if the same conduct could be both a crime and a defence. The justification relied on by the appellants would also, if legally available, give rise to applications for disclosure which, if allowed, would be likely to result in the discontinuance of any prosecution. As the House observed in *R v H* [2004] UKHL 3, [2004] 2 AC 134, para 35,

> "The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good."

I am of the clear opinion that the crime of aggression is not a crime in the domestic law of England and Wales within the meaning of section 3.

(6) *"Offence" in section 68(2) of the 1994 Act covers an offence established in customary international law, such as the crime of aggression.*

32. Section 68 of the 1994 Act, so far as relevant to these appeals and as originally enacted, provides:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect—
>
> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or
>
> (c) of disrupting that activity.
>
> (2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land."

The original object of the section was to penalise the activities of trespassing hunt saboteurs and animal rights activists, but the section has been widened by deleting reference to the open air. By virtue of section 172(10) the section applies throughout the United Kingdom.

33. The 1994 Act is a long and detailed statute, addressing a large number of criminal justice matters, particularly in England and Wales but also in Scotland and Northern Ireland. Although some provisions of the Act have a wider reach (section 160 extends the powers of constables to United Kingdom waters), section 68 is directed to land within one or other of the three domestic jurisdictions. There is no suggestion that those whose activities the Marchwood appellants and the appellant Swain sought to obstruct or disrupt were themselves trespassers. So the only question is whether "offence" in section 68(2) should be understood to cover an offence under customary international law.

34. The answer to that question must be negative, for very much the same reasons as are given in para 26 above. "Offence" is not defined in the Act. It must be understood as meaning an offence under the domestic criminal law of the relevant UK jurisdiction.

(7) *Alternatively, "offence" in section 68(2) means (for purposes of this case) a crime in the domestic law of England and Wales, and the crime of aggression is such*.

35. This proposition must be rejected, for the reasons given in paragraphs 28 to 31 above. It is a conclusion which involves, in my opinion, no substantial injustice to the Marchwood appellants and the appellant Swain since, even if this proposition were accepted it would be all but unarguable that those whose activities these appellants obstructed or disrupted at Marchwood and Fairford were themselves committing the crime of aggression or that there was a sufficient nexus between the conduct of these appellants and the preparation for or waging of an aggressive war even if (which is not a matter for decision) the hostilities against Iraq could be properly so described. This was the conclusion reached by the courts below, and I agree with it.

36. For these reasons, which are much the same as those given by the Court of Appeal and followed by the Administrative Court, I would answer the certified questions in paragraphs 4 and 9 above together, as

follows: the crime against peace (or crime of aggression) is not capable of being a "crime" within the meaning of section 3 of the Criminal Law Act 1967 or an "offence" within the meaning of section 68(2) of the Criminal Justice and Public Order Act 1994. I would accordingly dismiss all the appeals.

LORD HOFFMANN

My Lords,

Demonstrations against war

37. The war against Iraq began with the bombing of Baghdad on 20 March 2003. It caused deep divisions among the people of the United Kingdom. Many people thought that it was morally wrong and contrary to international law. On 15 February 2003 there was a demonstration in central London in which about a million people marched through the streets to demonstrate their opposition. Others thought that it was justified, necessary and lawful. A motion in support of the war was passed by the House of Commons on 18 March by a majority of 396 to 217.

38. In the weeks before the war, some people protested by acts of civil disobedience at military installations. These appeals are concerned with incidents which occurred during February and March 2003 at a military port facility at Marchwood, Southampton and at the airbase at RAF Fairford in Gloucestershire. At Marchwood demonstrators entered the port area and chained themselves to railings and to tanks which were about to be loaded onto ships. At Fairford they entered by cutting the perimeter fence and caused damage to vehicles or otherwise disrupted activities at the base. The appellants were arrested and charged.

The charges

39. Most of the demonstrators were prosecuted summarily before the Magistrates' Courts (at Southampton or Cirencester respectively) on charges of aggravated trespass or criminal damage. Aggravated trespass is an offence under section 68 of the Criminal Justice and Public Order

Act 1994. At the time of these events (the scope of the offence has since been broadened) it was committed by a person who—

> "(1)…trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect…(b) of obstructing that activity, or (c) of disrupting that activity.
>
> (2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land".

40. Criminal damage is an offence under section 1(1) of the Criminal Damage Act 1971:

> "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

41. Section 5 enlarges upon the concept of reasonable excuse:

> "(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse — …
>
> (b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and

at the time of the act or acts alleged to constitute the offence he believed—

(i) that the property, right or interest was in immediate need of protection; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held."

42. In addition, one group of Fairford demonstrators was charged with offences such as conspiracy to cause criminal damage, which can be tried only on indictment. They were brought before the Crown Court at Bristol. For reasons which I shall explain, the trial has not yet taken place.

The defences

43. In essence, all the demonstrators said that their actions were justified, not only morally but also legally, because they were aimed at preventing a greater evil, namely the war in Iraq and its probable consequences. Translating these generalities into the terms of the various statutes, they said that their acts of disruption were not aggravated trespass because the activities of the Crown at Marchwood and Fairford were not lawful within the meaning of section 68. They involved the commission of criminal offences associated with the prosecution of the war. Likewise, the intention to prevent the commission of a crime was a "lawful excuse" for causing damage to property within the meaning of section 1 of the 1971 Act. And, in respect of any of the offences charged, they were entitled to rely upon section 3 of the Criminal Law Act 1967:

"(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

44. All these defences thus depend upon the proposition that the war in Iraq was a crime as well as a mistake. What was that crime? Various offences were suggested but all except one have either fallen by the wayside or been left for further consideration at a later stage. The one which remains is the crime of aggression, the unlawful use of war as an instrument of national policy. There is no doubt that this is a recognised crime in international law. Twelve of the major German war criminals were convicted of aggression in one form or another by the International Military Tribunal at Nuremberg and eight of them were executed. This decision has since received general international approbation. Article 5 of the Rome Statute of the International Criminal Court lists "the crime of aggression" together with genocide, crimes against humanity and war crimes as the crimes over which the Court is to have jurisdiction, these being "the most serious crimes of concern to the international community as a whole". But the Statute postpones the exercise of jurisdiction over the crime of aggression until the adoption of a provision which defines the crime and sets out the conditions under which the jurisdiction is to be exercised.

45. Anticipating that the prosecution might not share its view that the war constituted aggression, the defendants proposed that the issue be determined by the District Judges at Southampton and Cirencester or the jury at Bristol. For this purpose, they made applications for disclosure of a wide range of documents of which the following (taken from the proceedings in Southampton) is a small sample:

> "Any material used by the Government when deciding whether to launch an armed attack on Iraq, in particular any and all material which undermines or may undermine its published statements concerning (i) possession of weapons of mass destruction by the regime of President Saddam Hussein; (ii) the capability of the said regime to use such weapons;
>
> All military plans and orders drawn up in readiness for the armed conflict including (but not limited to) (i) bombing and targeting plans; (ii) maps indicating the sites which were to be bombed in the course of the war; (iii) all memoranda, minutes or other material identifying them and explaining and/or justifying their selection as such sites."

46. In the event, the applications for disclosure were rejected because the District Judges at both Southampton and Cirencester ruled that

aggression was not an offence within the meaning of section 68 of the 1994 Act or a crime within the meaning of section 3 of the 1967 Act. It was therefore unnecessary to decide whether the war had been lawful or not. The District Judges said that there was no evidence that the activities of the Crown upon the land involved the commission of any other offences and convicted all the defendants. They were conditionally discharged. The defendants appealed by way of case stated to the Divisional Court.

47. At Bristol, there was a preparatory hearing before Grigson J under section 29 of the Criminal Procedure and Investigations Act 1996. The judge was invited to give preliminary rulings as to various matters, including the extent to which the defendants could rely upon the alleged illegality of the war (or their beliefs as to its illegality) for the purposes of section 3 of the 1967 Act, "lawful excuse" under section 1 of the 1971 Act and the common law defence of necessity. It is not necessary to set out the terms of the judge's rulings because they were all appealed by one side or the other to the Court of Appeal.

The appeals

48. The appeal from the Bristol Crown Court came before the Court of Appeal in June 2004: see *R v Jones (Margaret)* [2005] QB 259. The Court decided that "crime" in section 3 of the 1967 Act meant a crime in domestic law. It was not sufficient that it was a crime under a foreign or international law. It then proceeded to consider whether, by virtue of the principle that international law forms part of English law, the crime of aggression had been incorporated into domestic law. It rejected this submission on the ground that the definition of aggression was too uncertain. The article defining the crime for the purposes of the Rome Statute had not yet been agreed. There was no international agreement over whether, for example, the International Criminal Court could exercise its jurisdiction without there having been a determination of the Security Council. So the Court of Appeal said:

> "It is difficult to see in these circumstances how it can be said that there is, accordingly, a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law, where there is no consensus as to an essential element of the crime."

49. On the questions of lawful excuse and necessity, the court said that it was only necessary to decide whether these defences could raise an issue as to the legality of the war in Iraq. It decided that no such issue could arise because, assuming the other elements in the defence to be made out, all that mattered was the honest opinion of the defendants about the need for action. The court rejected a prosecution argument that the threatened damage to property must be unlawful and that it could not be a lawful excuse that one had intended to prevent damage which would be the inevitable consequences of warfare.

50. The appeal from the Magistrates' Courts was heard by the Divisional Court in February 2005: see *Ayliffe v Director of Public Prosecutions* [2006] QB 227. The court followed the decision of the Court of Appeal in rejecting the arguments that aggression was a "crime" for the purposes of the 1967 Act. It held that it was likewise not an "offence" for the purposes of section 68(2) of the 1994 Act. The Divisional Court also dealt with the question of whether there was any ground for an argument that the defendants were acting to prevent war crimes, that is to say, crimes like wilful killing or taking hostages, committed in the course of what might otherwise be a lawful war. These had been made offences in English domestic law by section 51 of and Schedule 8 to the International Criminal Court Act 2001. The court said that no issue had been raised at the trial as to whether such crimes were likely to be committed and in any case there could be no connection between the actions at Marchwood and Fairford and possible war crimes in Iraq. Jack J put the reasoning in a single sentence: "The reality is that these were protests and…not attempts to prevent crimes."

The certified question

51. The Court of Appeal in *R v Jones (Margaret)* certified two questions of general public importance:

> "(1) Is the crime against peace and/or the crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 and, if so, is the issue justiciable in a criminal trial?
>
> (2) Is the defence of lawful excuse under section 5 of the Criminal Damage Act 1971 available to a defendant who acts to protect the property of another abroad from damage that will be caused by

> the executive's lawful exercise of prerogative power to wage war?"

52. The second question was presumably included at the request of the prosecution. But only the defendants sought the leave of the House to appeal, which was granted on 1 November 2004.

53. In *Ayliffe v Director of Public Prosecutions* the Divisional Court certified two questions of general public importance:

> "(1) Is a crime of aggression capable of being an 'offence' within the meaning of section 68(2) of the Criminal Justice and Public Order Act 1994, and if so is the issue justiciable in a criminal trial?
>
> (2) Is a crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967, and if so is the issue justiciable in a criminal trial?"

The House gave the defendants leave to appeal on 28 July 2005.

Section 3 of the 1967 Act

54. I think it is clear that "crime" in section 3 means a crime in domestic law. The Act was passed to give effect to the Seventh Report of the Criminal Law Revision Committee, *Felonies and Misdemeanours*, which had been published in May 1965. The Committee recommended the abolition of the ancient distinction between felonies and misdemeanours and dealt with certain questions which would need to be clarified once the distinction had gone. One of these arose out of the existence of some old authority ("very obscure") which suggested that extreme force could be used to arrest a person or prevent a crime only when the crime was a felony. The Committee (paragraphs 20-23) recommended against any attempt to clarify the degree of force which could be used or the circumstances in which it could be justified. But they suggested a clause to make it clear that it should make no difference whether the offence had been a felony or a misdemeanour. That clause became section 3.

55. This background suggests that "crime" in section 3 means something which had previously been either a felony or a misdemeanour: a form of classification peculiar to the common law and inapplicable to foreign or international law. And, as my noble and learned friend Lord Rodger of Earlsferry pointed out in the course of argument, that is confirmed by the long title of the Act:

> "An Act to amend the law of England and Wales by abolishing the division of crimes into felonies and misdemeanours and to amend and simplify the law in respect of matters arising from or related to that division or the abolition of it…"

56. "Crimes" in the long title are self-evidently domestic crimes and in my opinion "crime" in section 3 must have the same meaning.

57. The main thrust of the appellants' argument is that aggression is indeed a crime in English domestic law. They point out that in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553-554 Lord Denning MR discussed the two rival schools of thought on the relationship between international law and domestic law: the one saying that the rules of international law as they exist from time to time are "incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament" and the other saying that they did not become part of English law unless adopted by "the decisions of the judges, or by Act of Parliament, or long established custom". Lord Denning preferred the former view. More recently, in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1081-1082, this House refused to recognise the effect of a domestic law of Iraq on the title to property situated within Iraq on the ground that the property had been brought to Iraq after being plundered in the course of the invasion of Kuwait which was contrary to international law and condemned as aggression by the Security Council.

58. Lest it be said that these cases are concerned only with the civil law, the appellants draw attention to cases in which crimes under international law have been treated as ipso facto forming part of domestic law. Blackstone (*Commentaries on the Laws of England*, Book IV, Chap 5) records that violation of safe-conducts and the rights of ambassadors, as well as piracy, were treated as offences in English law because they were offences against the law of nations. And in *In re Piracy Jure Gentium* [1934] AC 586 the Privy Council looked to

international law as a "living and expanding code" (p 592) for the definition of the crime of piracy triable in a British court.

59. I say nothing about the reception into English law of rules of international law which may affect rights and duties in civil law. But there are two reasons why I think that aggression has not become a domestic crime. One concerns new international law crimes in general and the other reason is peculiar to the crime of aggression. Before explaining them, I should say that I do not rely upon the reason given by the Court of Appeal, namely that the elements of the offence are too uncertain. It is true that there is at present no consensus about the circumstances in which the International Criminal Court should exercise its jurisdiction to try the crime of aggression and in particular whether the imprimatur of the Security Council should have to appear on the indictment. But I think that upon analysis it will be found that these disputes are not about the definition of the crime but about the circumstances in which the International Criminal Court (as opposed to some domestic or ad hoc international tribunal, such as the International Military Tribunal at Nuremberg) should try someone for committing it. Of course the definition of a crime so recent and so rarely punished will have uncertainties. But that is true of other crimes as well. If the core elements of the crime are certain enough to have secured convictions at Nuremberg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international or domestic law.

60. I come then to the two reasons why I think that aggression is not a crime in English domestic law. The first is the democratic principle that it is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence. In the eighteenth century judges were less inhibited about creating new offences. Perhaps the last assertion of that power was by Viscount Simonds in *Shaw v Director of Public Prosecutions* [1962] AC 220, 268:

> "When Lord Mansfield…said that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate

> when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance…Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them."

61. But this opinion has since been repudiated. In *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435 all members of the House were agreed that, as Lord Reid said (at pp 457-458), the courts do not

> "have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment."

62. The same reasoning applies to the incorporation into domestic law of new crimes in international law. The law concerning safe conducts, ambassadors and piracy is very old. But new domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party. In *Sosa v Alvarez-Machain* (2004) 159 L Ed 2d 718, 765, Scalia J recently said:

> "American law – the law made by the people's democratically elected representatives – does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here."

At least so far as the criminal law is concerned, I think that the same is true of English law.

63. My second reason for rejecting aggression as a domestic crime is that, in the absence of statutory authority, the prosecution of that particular crime in a domestic court would be inconsistent with a fundamental principle of our constitution. Aggression is a crime in which the principal is always the state itself. The liability of individuals is in a sense secondary. Thus the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind* (see ILC *Yearbook* 1996, Vol II, Part Two, p 42) defined individual liability in article 16 by reference to the action of the state:

> "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."

64. The commentary explains:

> "Individual responsibility for such a crime is intrinsically and inextricably linked to the commission of aggression by a State. The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State. Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct. At the same time, a State is an abstract entity which is incapable of acting on its own. A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression… Thus, the violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words 'aggression committed by a State' clearly indicate that such a violation of the law by a State is a sine qua non condition for the possible attribution to an individual of responsibility for a crime of aggression."

65. How, consistently with our constitution, is liability for such a crime to be determined in a domestic court? First, there is the theoretical difficulty of the courts, as the judicial branch of government, holding not merely that some officer of the state has acted unlawfully (as in, for example, *M v Home Office* [1994] 1 AC 377) but, as a sine qua non condition, that the state itself, of which the courts form part, has acted unlawfully. Secondly, there is 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 enquire. I say that it is a practical difficulty because, as Lord Devlin pointed out in *Chandler v Director of Public Prosecutions* [1964] AC 763, 806-812, the reason why the courts cannot enquire is not the technicality that the powers form part of the royal prerogative. Lord Devlin's view that the prerogative origin of the powers did not in itself exclude judicial control was affirmed by the House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. It is because of the discretionary nature of the power itself. As Lord Devlin said (at pp.809-810):

> "When Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77, 107 said that 'Those who are responsible for the national security must be the sole judges of what the national security requires,' he was not, I think, laying down any special constitutional doctrine about the powers of the Crown in relation to national security. He was simply stating the reason why the court should declare those powers to be discretionary."

66. It is of course open to the court to say that the act in question falls wholly outside the ambit of the discretionary power. But that is not the case here. The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs.

67. To say that these matters are not justiciable may be simply another way of putting the same point. But I would not accept the implication, inherent in the way the certified questions are formulated, that one can first decide whether aggression is a crime in English domestic law and then go on to consider whether the issues which it raises are justiciable. Mr Rabinder Singh QC, who appeared for the defendants in *Ayliffe v Director of Public Prosecutions* submitted that it would be contrary to the right to a fair trial under article 6 of the Convention for a defendant to be told that he could not rely on a defence

otherwise open to him because it raised questions which were not justiciable. There seemed to me to be much force in this submission. But, as Mr Singh readily acknowledged, article 6 does not require that, as a matter of substantive criminal law, any particular defence should be available to the defendant: compare *Matthews v Ministry of Defence* [2003] 1 AC 1163. The discretionary nature or non-justiciability of the power to make war is in my opinion simply one of the reasons why aggression is not a crime in domestic law. It follows that an intention to prevent aggression cannot be a defence under section 3 of the 1967 Act.

Disposition

68. It follows that the first part of the certified question in *R v Jones (Margaret)* can be answered no and that is sufficient to enable the appeals by the defendants to be dismissed. As the prosecution has not appealed, there is no need to answer the second certified question and, since the appeal is interlocutory and the case must go back to the Bristol Crown Court for trial, it is unnecessary to say anything more about it.

69. The first parts of the certified questions in *Ayliffe v Director of Public Prosecutions* can likewise be answered no and the appeals dismissed. But Mr David Perry, who appeared for the prosecution in the latter case, invited your Lordships, in both his printed case and oral submissions, to dismiss the appeals on broader grounds. These raised issues of very considerable public importance concerning the scope of justification for acts of civil disobedience. Mr Keir Starmer QC, who appeared for the appellants in *R v Jones (Margaret)*, said that the House should confine itself to the certified questions and not say anything about the grounds upon which Mr Perry relied. But the jurisdiction of the House in dealing with the appeals is not limited to answering the certified questions: see *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349 and your Lordships may dispose of the proceedings in *Ayliffe v Director of Public Prosecutions* on any grounds which appear to be appropriate. Those proceedings will now be finally concluded. I do not think that your Lordships should refrain from expressing your opinions on matters fairly raised by the respondents simply because they may be thought to have some relevance to the conduct of the trial in *R v Jones (Margaret)* when it returns to the Bristol Crown Court. That will be a matter for the judge at the trial.

The limits of self-help

70. Put shortly, Mr Perry's submission was that even if aggression was a crime in domestic law and the defendants honestly believed that the United Kingdom was about to commit it, section 3 of the 1967 Act would not justify the action which they took. The section says that a person may use "such force as is reasonable" and it was not reasonable in all the circumstances for the defendants to have taken it into their own hands to use any force at all.

71. My Lords, I pass over the question of whether damaging property counts as the use of force within the meaning of section 3 of the 1967 Act. There is much to be said for the view that offences against property have their own provisions for justification, such as "reasonable excuse" as defined in section 5 of the 1971 Act and that "force" in section 3 means force against persons committing crimes or escaping arrest. But I am willing to assume for the sake of argument that chaining oneself to railings or putting sugar into the petrol tanks of lorries involves the use of force for the purposes of section 3 of the 1967 Act.

72. In *R v Baker and Wilkins* [1997] Crim LR 497 the Court of Appeal decided that in considering whether a defendant was entitled to rely upon section 3, it must be assumed that the events which the defendant apprehended were actually going to happen. Provided that his belief was honest, it did not matter that it was unreasonable. If those events would in law constitute a crime, he was entitled to use such force as was reasonable to prevent it.

73. My Lords, I have no difficulty with these propositions. I am willing to assume that, in judging whether the defendant acted reasonably, it must be assumed that the facts were as he honestly believed them to be. But the question remains as to whether in such circumstances his use of force would be reasonable. And that is an objective question. The position may be different under section 5 of the 1971 Act but section 3 of the 1967 Act does not excuse a defendant if he uses such force as he himself thinks to be reasonable. It must actually have been reasonable.

74. The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a

Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law. I take, by way of example only, the statement by Margaret Jones and Paul Milling appended to their printed case, which states their beliefs when they entered RAF Fairford:

> "By disrupting the loading of bombs onto aeroplanes and by interfering with the ability of the base to refuel the aircraft they were acting lawfully, reasonably and proportionately in order to (i) prevent armed aircraft from operating from RAF Fairford and (ii) in order to prevent domestic and international criminal offences from being committed.
>
> That the action they took was reasonable to protect persons and property in Iraq from injury and damage caused by criminal acts. That their action would at least in part prevent the commission of the crime of aggression. Their action would at least in part prevent invasion by armed forces of the aggressor or would at least in part prevent the attack by the airpower of the aggressor."

75. That is a fair picture of what an observer from the United Kingdom would have thought of a somewhat ineffectual attempt by a Second World War *résistante* to sabotage a German airfield in occupied France. It assumes the defendant to be a lonely individual resisting the acts of a hostile and alien state to which she owes no loyalty. But the state in this case was the defendant's own state, the state which protected and sustained her and to which she owed allegiance. And the legal system which had to judge the reasonableness of her actions was that of the United Kingdom itself.

76. It is a fundamental characteristic of the state as a social structure that, in the classic formulation of Max Weber (*Politics as a Vocation (Politik als Beruf)*, 1918), it

> "claims the monopoly of the legitimate use of physical force within a given territory…[T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it."

77. That formulation does not of course answer the questions which arise in these appeals, because the appellants say that the state, by its legislation, did indeed permit them to use physical force in the circumstances which existed, or which they honestly thought to exist. But when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (*Leviathan*, Chapter 13) called the state of nature in which

> "men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and what is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."

78. In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In *Southwark London Borough Council v Williams* [1971] Ch 734, 745 Edmund Davies LJ said:

> "the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances."

79. There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help. The most obvious example is the right of self-defence. As Hobbes said (*Leviathan*, Chapter 27):

> "No man is supposed at the making of a Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough for his assistance."

But, he went on to say:

> "To kill a man, because from his actions, or his threatnings, I may argue he will kill me when he can, (seeing I have time, and means to demand protection, from the Soveraign Power) is a Crime."

80. In the same spirit as Hobbes, Lord Upjohn said in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 164 - 165:

> "No doubt in earlier times the individual had some…rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade."

81. What is true of the use of self-help to protect one's own interests is *a fortiori* true of the use of self-help to protect the interests of third parties or the community at large. In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them.

82. What if the sovereign power, when called, will not come? Sometimes this is for operational reasons, as when the police lack the resources to provide protection (see, for example, *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418). A

citizen whose person or property is under threat would in such a case be entitled to take reasonable steps to protect himself. So in *R v Chief Constable of Devon and Cornwall, Ex p Central Electricity Generating Board* [1982] QB 458, where the police refused to intervene to prevent protesters from obstructing a survey of land with a view to building a nuclear power station, the Court of Appeal said that the Board was legally entitled to use reasonable force to repel the protesters. But the court did its best to discourage them from exercising this right. Lord Denning MR suggested that the Board should be content with erecting a barbed wire fence.

83. The right of the citizen to use force on his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large. The law will not tolerate vigilantes. If the citizen cannot get the courts to order the law enforcement authorities to act (compare *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118) then he must use democratic methods to persuade the government or legislature to intervene.

84. Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it. So in *Monsanto v Tilly* [2000] Env LR 313 a landowner claimed an injunction against protesters who threatened to trespass upon his land and dig up genetically modified crops. They claimed to be acting in the public interest and to protect third parties from damage which the crops might cause. The Court of Appeal said that this was no defence. Mummery LJ said (at p 338):

> "Trespass by the individual, in the absence of very exceptional circumstances, cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public. In this case the Department of the Environment has that responsibility. In such cases the right of the individual to trespass out of necessity, whether as defender of his own or a third party's interest or as champion of the public interest, without attempting to enlist the assistance of the public authority, is obsolete."

85. It was clear that the Department, if called upon, would have done nothing to stop the growing of the genetically modified crops. It had granted Monsanto a licence under the relevant legislation for the specific purpose of enabling them to be grown. But, as Stuart-Smith LJ pointed out (at p 329), the protesters' remedy, if any, was to challenge the legality of the licence by judicial review. Or, if that failed, they could seek to have the law changed. But that must be effected by lawful means. Whatever the honest apprehension of danger to the community, it is not reasonable to resort to force.

86. My Lords, to legitimate the use of force in such cases would be to set a most dangerous precedent. As Lord Prosser said in *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, 160G-H:

> "What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others…They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy."

87. A time of war is the extreme example of the dangers. Of course citizens are entitled, indeed required, to refuse to participate in war crimes. But if they are allowed to use force against military installations simply to give effect to their own honestly held view of the legality of what the armed forces of the Crown are doing, the Statute of Treason would become a dead letter.

88. In my opinion, therefore, the District Judges would have been right to convict even if aggression had been a crime in domestic law. The apprehension, however honest, that such a crime was about to be committed could not have made it reasonable for the defendants to use force of any kind to obstruct military activities at Marchwood or Fairford.

Civil disobedience

89. My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.

90. These appeals and similar cases concerned with controversial activities such as animal experiments, fox hunting, genetically modified crops, nuclear weapons and the like, suggest the emergence of a new phenomenon, namely litigation as the continuation of protest by other means. (See, for examples, *R v Hill* (1988) 89 Cr App R 74 (nuclear weapons) *Blake v Director of Public Prosecutions* [1993] Crim LR 586 (Gulf War) *Morrow, Geach and Thomas v Director of Public Prosecutions* [1994] Crim LR 58 (anti-abortion) *Hibberd v Director of Public Prosecutions* (27 November 1996) Divisional Court, unreported (Newbury by-pass) *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499 (Trident missiles) *Nelder v Crown Prosecution Service* (3 June 1998) Divisional Court, unreported (fox hunting) *Lord Advocate's Reference No 1 of* 2000 2001 JC 143 (Trident missiles) *Director of Public Prosecutions v Tilly* [2002] Crim LR 128 (genetically modified crops) *Monsanto v Tilly* [2000] Env LR 313 (genetically modified crops).) The protesters claim that their honestly held opinion of the legality or dangerous character of the activities in question justifies trespass, causing damage to property or the use of force. By this means they invite the court to adjudicate upon the merits of their opinions and provide themselves with a platform from which to address the media on the subject. They seek to cause expense and, if possible, embarrassment to the prosecution by exorbitant demands for disclosure, such as happened in this case.

91. In *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499, where a protester sought to justify causing damage to a fence at Aldermaston on the ground that she was trying to halt the production of nuclear warheads, Buxton LJ said:

> "There was no immediate and instant need to act as Mrs Hutchinson acted, either [at] the time when she acted or at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable."

92. I respectfully agree. The judge then went on to deal with Mrs Hutchinson's real motive, which ("on express instructions") her counsel had frankly avowed. It was to "bring the issue of the lawfulness of the government's policy before a court, preferably a Crown Court." Buxton LJ said:

> "In terms of the reasonableness of Mrs Hutchinson's acts, this assertion on her part is further fatal to her cause. I simply do not see how it can be reasonable to commit a crime in order to be able to pursue in the subsequent prosecution, arguments about the lawfulness or otherwise of the activities of the victim of that crime."

93. My Lords, I do not think that it would be inconsistent with our traditional respect for conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed.

94. The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a

functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required.

95. I would dismiss these appeals.

LORD RODGER OF EARLSFERRY

My Lords,

96. I have had the privilege of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, in draft. I agree with them and, for the reasons which they give, I too would dismiss the appeals and answer the certified questions in the manner proposed. There is nothing which I can usefully add.

LORD CARSWELL

My Lords,

97. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. I entirely agree with their reasons and conclusions and cannot usefully add to them. I would dismiss the appeals and answer the certified questions in the manner proposed.

LORD MANCE

My Lords,

98. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, and I agree with their conclusions.

99. I agree in particular that there is under public international law a crime of aggression which is, as history confirms, sufficiently certain to be capable of being prosecuted in international tribunals. But neither the concept of "crime" in section 3 of the Criminal Law Act 1967 nor the concept of "offence" in section 68(2) of the Criminal Justice and Public Order Act 1994 can in my view embrace conduct which is no more than a crime under public international law. So the issue is whether the public international law crime of aggression has as such automatically become, or should now be recognised as, a crime and an offence under domestic law.

100. It is unnecessary to consider the recognition or reception of international law in the context of civil law. In *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 the courts refused in civil proceedings to recognise an expropriatory decree made in the context of armed aggression by Iraq designed to extinguish Kuwait's existence as a separate state.

101. As regards the criminal law, my noble and learned friend, Lord Bingham of Cornhill, has demonstrated in paragraphs 20-22 that crimes under public international law have in the past been received and recognised at common law as domestic crimes. This was the case with piracy and violation of safe conducts and diplomatic immunity and, very arguably, with war crimes.

102. It does not follow that all public international law crimes must or should be received and recognised as domestic law crimes. The expansive former view that the courts had a general residual power to recognise or in effect create new crimes, when the public interest in their view so required, no longer survives: *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435. The creation and regulation of crimes is in a modern Parliamentary

democracy a matter *par excellence* for Parliament to debate and legislate. Even crimes under public international law can no longer be, if they ever were, the subject of any automatic reception or recognition in domestic law by the courts.

103. This consideration is determinative when one considers the special nature of the crime of aggression. It is a public international law crime of a different nature to any so far received and recognised in domestic law. It is a crime committed primarily by the state itself. I agree that it would, for the reasons given by Lord Bingham of Cornhill in paragraphs 30-31 and by Lord Hoffmann in paragraphs 65-66, be incongruous for the courts to treat it as a domestic crime without specific statutory authority.

104. The incongruity would be underlined by the exclusion from the International Criminal Court Act 2001 of any reference to the crime of aggression, a point which is not undermined by the fact that the International Criminal Court's present lack of jurisdiction over crimes of aggression is itself probably attributable to the international community's inability to reach agreement on the pre-conditions for bringing any charges relating to such crimes before that court.

105. I therefore agree that the public international law crime of aggression is not a crime or offence under domestic law, and so not a crime for the purpose of section 3 of the 1967 Act or an offence for the purpose of the 1994 Act.

106. I also agree with Lord Hoffmann's remarks in paragraphs 70 to 94 on the limits of self-help in the context of section 3 of the 1967 Act.