SCOTS LAW AND TRIDENT: A BREACH OF THE PEACE ?

1. CONTEXT: THE NUREMBERG PRINCIPLES

1.1 In a number of the trials prosecuted in Germany in the wake of the International War Crimes tribunal at Nuremberg, the principle of individual criminal responsibility for acts contrary to the requirements of international law was affirmed by the prosecuting Allied Powers as applying to private individuals who were not directly part of the official State apparatus but who actively co-operated in its acts (which had subsequently been deemed by the Allies to be unlawful). [1]

1.2 The idea that private individuals have overriding duties to obey a higher law against that of the (Nazi) State also lay behind various prosecutions which were brought in Germany before its domestic courts in the immediate post-World War II period against private persons who had informed on or denounced relatives and colleagues to the authorities for "political offences". As a result of these calculated denunciations those informed against had been handed over to a judicial system - in particular the Nazi People's Courts - "which dealt mercilessly with political opponents at that time, as the population was well aware". [2] Thus

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[1] See, for example the *Zyklon B Case* (Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1947) in which various civilian officers of the firm of Tesch & Stabenow - an established distributor of certain types of gas and disinfecting equipment - were tried by a British Military Court in Hamburg in March 1946 on a charge of being accessories before the fact of mass murder - in furnishing concentrated prussic acid under the proprietary name Zyklon B to various concentration camps in Eastern Germany and occupied Poland, knowing that it was to be used to kill the inmates. The contemporary case note commentary notes at 1498:

> "The decision of the Military Court in the present case is a clear example of the application of the rule that *the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authority, but to anybody who is in a position to assist in their violation The activities with which the accused in the present case were charged were commercial transactions conducted by civilians*. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal"

See too Willard B. Cowles "Trials of War Criminals (Non-Nuremberg)" (1948) 42 *The American Journal of International Law* 299 who notes at 310:

> "Dr. Bruno Tesch, the owner, and his principal executive, one Karl Weinbacher, were sentenced to death by hanging. The sentences were carried into effect. A third accused was acquitted apparently on the ground that he held a subordinate position and that there was reasonable doubt that he knowingly did any act as a principal or accessory"

[2] See Ingo Müller *Hitler's Justice: the Courts of the Third Reich* (I. B. Turis & Co. Ltd.: London, 1991), in particular Chapter 29 at page 274. See, too, Michael Stolleis *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998) and Neil Gregor (ed.) *Nazism, war and genocide : essays in honour of Jeremy Noakes* (Exeter: University of

a woman who, with a view to effecting a swift end to her marriage, reported her husband to the authorities for slandering Hitler in their private conversations. Her denunciation resulted in his imprisonment and sentence of death (later commuted to service on the Eastern Front). She was subsequently convicted in the post-War period of de-Nazification by national German courts of wrong-doing for relying in bad faith on unjust laws of the Nazi system. [3]

1.3 Such cases may be understood as examples of the application (and in the case of the denouncing wife, of the *extension* to conduct other than crimes against peace, war crime or crimes against humanity) of the principle that all individuals have legal duties derived directly from fundamental human rights considerations to be found in international law, which may bind those individuals, even against the claims and justifications of national law. [4]

1.4 The ideas behind these Nuremberg and post-Nuremberg prosecutions were subsequently codified into the "Nuremberg principles" which sought authoritatively to summarise the principle of individual responsibility under international law in the following terms::

(I) Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment

(II) The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not free the person who committed the act from responsibility under international law

(III) The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Exeter Press, 2005) Chapter 5 Nikolaus Wachsmann "'Soldiers of the home front': jurists and legal terror during the Second World War"

[3] See Case Note in (1951) 64 *Harvard Law Review* 1005-1007. See, too, the commentary on this and similar cases in H. O. Pappe "On the validity of Judicial Decisions in the Nazi Era" (1960) 23 *Modern Law Review* 260-274

[4] For a celebrated discussion of the justification of this case from the standpoint of competing legal philosophies see HLA Hart: "Positivism and the separation of law and morals" (1958) 71 *Harvard Law Review* 583-629 and Lon Fuller: "Positivism and the separation of law and morals: a reply to Professor Hart" (1958) 71 *Harvard Law Review* 630-673

(IV) The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

(V) Any person charged with a crime under international law has the right to a fair trial on the facts and law. [5]

1.5 As was observed by the Special Rapporteur of the International Law Commission charged by the United Nations in 1950 with the task of re-formulating the Principles applied by the Nuremberg Tribunal: [6]

> "The general principle of law underlying Principle I is that *international law may impose duties on the individual without any interpretation of domestic law directly*, a conception which in theory is considered as involving the 'international personality' of individuals. The findings of the Court are very definite on the question of whether rules of international law may apply to individuals. 'That international law imposes duties and liabilities upon individuals as well as upon States', says the Court, 'has long been recognised.' [7] And elsewhere: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' [8]
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> [P]rinciple [II] that a person committing an international crime is responsible therefor and liable to punishment under international law, independently of the attitude of domestic law, implies what is commonly called the 'supremacy' of international law over domestic law. It is accordingly considered that *international law can bind individuals even if domestic law does not direct them to observe the rules of international law* (It is in this sense that the term 'supremacy' is used here). Characteristic of the above inference is the following passage of the Court's findings: ' *…The very essence of the Charter is that individuals have international law duties which transcend the national obligations imposed by the individual State*. [9] "

1.6 Principle VI of the Nuremberg Principles sets out the crimes which are to be regarded as "punishable as crimes under international law" as follows:

(a) "Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

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[5] Printed in *Yearbook of the International Law Commission* 1950 II page 195

[6] *Yearbook of the International Law Commission* 1950 II page 192 paragraphs (3) and (2)

[7] *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington DC: US Government Printing Office, 1951) III at 52

[8] *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington DC: US Government Printing Office, 1951) III at 53

[9] *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington DC: US Government Printing Office, 1951) III at 53

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime." [10]

1.7 And Nuremberg Principle VII provides that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law." [11]

1.8 The Nuremberg principles were formally adopted into international law by UN Resolution 95(1) of UN General Assembly of 11 December 1946 and by Article 51 of the UN Charter, in relation to the prohibition of wars of aggression. The United Kingdom Parliament was advised in 1963 by the then Lord Chancellor that the United Kingdom Government then took the view that the Nuremberg Principles, as formulated by the International Law Commission, were "generally accepted among States and have the status of customary international law". [12]

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[10] See, now, Article 5 of the Rome Statute of the International Criminal Court (which entered into force on 1 July 2002):

"*Crimes within the jurisdiction of the Court*

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression."

[11] The decision of the Appeals Chamber the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Dusko Tadic*, decision of 15 July 1999 finding that customary international law does not contain any requirement to the effect that crimes against humanity may not be committed from purely personal motives, such as revenge or personal gain.

[12] *Hansard* HL Volume 253, column 831, 2 December 1963

1.9 The post-Nuremberg assertion that a higher normative authority inheres in principles derived from international humanitarian (and human rights) law, even as against the requirements of national law, was also specifically incorporated into the 1950 European Convention on Human Rights by the terms of Article 7 ECHR. The Convention refers, in Article 7(2) ECHR, to the possible trial and punishment of any person for any act or omission which, at the time it was committed, "was criminal according to the general principles of law recognised by civilised nations".

1.10 Thus when including Article 7 ECHR as one of the "Convention rights" for the purposes of the Human Rights Act 1998 ("HRA") (and associated statutes such as the Scotland Act 1998) the United Kingdom Parliament arguably also effectively introduced Nuremberg derived principles regarding the justifiability of conduct under national and international law directly into domestic law. [13] It might therefore be thought that, within the context of the post-HRA United Kingdom constitution, there can properly be no conflict between the requirements of the (domestic) "law of the land" and any "moral imperative"[14] - at least as

[13] See, too, Article 38(1)(c) of the Rome Statute of the International Criminal Court which refer to "the general principles of law recognised by civilised nations". The Rome States and the jurisdiction of the IICC has been recognised and given domestic effect to in the United Kingdom by the International Criminal Court Act 2001 and, in Scotland, by the International Criminal Court (Scotland) Act 2001 (asp 13)

[14] See *Francôme v. Mirror Group of Newspapers Ltd.* [1984] 1 WLR 892, CA *per* Sir John Donaldson MR at 897:

> "Parliamentary democracy as we know it is based upon the rule of law. That requires all citizens to obey the law, unless and until it can be changed by due process. There are no privileged classes to whom it does not apply. ....
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> It is sometimes said... that all are free to break the law if they are prepared to pay the penalty. This is pernicious nonsense. The right to disobey the law is not obtainable by the payment of a penalty or licence fee. It is not obtainable at all in a parliamentary democracy, although *different considerations arise under a totalitarian regime*.
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> In saying this I nevertheless recognise that, *in very rare circumstances a situation can arise in which the citizen is faced with a conflict between what is, in effect, two inconsistent laws. The first law is the law of the land. The second is a moral imperative, usually, but not always, religious in origin. An obvious example is the priest's obligation of silence in relation to the confessional, but others can be given. In conducting the business of the courts, judges seek to avoid any such conflict, but occasionally it is unavoidable. Yielding to the moral imperative does not excuse a breach of the law of the land, but it is understandable and in some circumstances may even be praiseworthy. However, I cannot over-emphasise the rarity of the moral imperative. Furthermore, it is almost unheard of for compliance with the moral imperative to be in the financial or other best interests of the person concerned. Anyone who conceives himself to be morally obliged to break the law, should also ask himself whether such a course furthers his own interests.* If it does, he would be well advised to re-examine his conscience."

See too Fox LJ at 901

derived from international legal principles - since both domestic law and international humanitarian and human rights law would now appear to operate in principle within the same normative framework.

1.11 Certainly, there has been an ever growing official realisation in the years since Nuremberg trials of the need for official and individuals to ensure that their conduct in war and in preparation for war is legal under international law, and this understanding is percolating down more generally in society in the United Kingdom. For example, as Lord Hope observed:

> "22. ... When the Chief of the Defence Staff insisted on receiving unequivocal advice that the invasion [of Iraq] would be legal he was not thinking of the physical risks that his troops would be exposed to. *His concern was that, if it was not legal, they might be at risk of being prosecuted*. As Lord Kingsland said in the debate I have already mentioned, the issue is essentially one of morale: Hansard (HL Debates), 31 January 2008, col 790. An individual soldier needs to know that he will not be prosecuted for a war crime.
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> 23 The International Criminal Court Act 2001 gave effect in domestic law to the Rome Statute of the International Criminal Court. It has raised awareness of the need to ensure that armed conflict takes place within the established framework of international law: see also the International Criminal Court (Scotland) Act 2001 (asp 13). The definition of war crimes in article 8 of the Rome Statute, which is reproduced in Schedules 8 and 1 of these Acts respectively, is very wide. Much depends on the laws and customs applicable in international armed conflict. Rules of engagement can only go so far. *The umbrella of an assurance that the conflict is lawful in international law is essential if soldiers are to feel confident that it is an operation that they can properly engage in. This is so too of their commanders, who under section 65 of the 2001 Act are responsible for the acts of their subordinates*." [15]

2. THE DECISION IN *LORD ADVOCATE'S REFERENCE (NO. 1 OF 2000)*

2.1 It is against this general post-Nuremberg background that the decision of the High Court of Justiciary in *Lord Advocate's Reference (No. 1 of 2000) re nuclear weapons* [16] may best be understood. This was a case which the then Lord Advocate referred to the High Court of Justiciary, pursuant to his powers under Section 123(1) of the Criminal Procedure (Scotland) Act 1995. The Lord

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"The proposition that citizens are free to commit a criminal offence if they have formed the view that it will further what they believe to be the public interest is quite baseless in our law and inimical to parliamentary authority. I do not disregard the existence of what is called the moral imperative. But such cases are rare in the extreme."

[15] *R (Gentle) v Prime Minister* [2008] AC 1352 per Lord Hope 1371-2

[16] *Lord Advocate's Reference (No. 1 of 2000) re nuclear weapons*, 2001 JC 143, HCJ

Advocate wished the High Court's advice and guidance on four questions of law which he raised before the court following the acquittal by the Sheriff at Greenock of three women – Angie Zelter, Ulla Roder and Ellen Moxley – who had been charged with causing malicious damage to a vessel involved in facilitating the transport and deployment of Trident nuclear missiles.

2.2 These women had successfully argued before the Sheriff that the damage to property which they admitted having caused was not "malicious" but was instead justified since, they said, the deployment of the Trident nuclear weapons system was in breach of customary international law, and therefore in breach of Scots law. They were accordingly acting not in breach of the law but were rather to be seen as "citizen interveners" seeking to enforce the law, even against officials of the State. [17] They argued, in effect, for the existence of an "(international) law enforcement motivation" defence within the Scots common law sufficient to allow them to defeat their prosecution for having done a prohibited act with the requisite *mens rea*. The basis for this defence was the avowed purpose of their apparently criminal action: namely to bring a wrong-doer (the United Kingdom Government) to justice, or to expose its (greater) criminal wrong-doing. [18] An alternative analysis was that the actions for which they had been prosecuted had in fact been done by them in exercise of the implicit power and responsibility - possessed by every law-abiding citizen at common law - to take proportionate

[17] Compare with *Helen John v Donnelly*, 1999 JC 336 where the appellant, one of a group of protesters, was charged under Section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 with vandalism for cutting part of the perimeter fence of the Faslane Royal Naval nuclear base. She stated J, stated when cautioned and charged that she had cut the fence in order to protest against 'the genocidal nature of the illegal Trident weapons programme'. Her defence at trial was that she had a reasonable excuse for her conduct by reason of her sincere belief in the illegality of nuclear weapons and her anxiety at their potentially appalling effects on mankind and the environment. That defence was rejected and on conviction she appealed. It was held on appeal that a person could be said to have a reasonable excuse when he or she had acted in response to some particular and immediate stimulus and that in the present case the appellant had acted deliberately and without any immediate stimulus.

[18] Compare with the English Court of Appeal decision in *R . v. Denis Geoffrey Clarke* (1985) 80 Cr. Ap R. 344 an appeal in relation to a conviction for aiding and abetting a burglary charge in which the defence had been put forward by the accused that he was in fact working as an informer for the police and was passing on information about the other offenders to them. The Court of Appeal held that it would not be right to state "that conduct which is overall calculated and intended not to further but to frustrate the ultimate result of the crime is always immaterial and irrelevant". Accordingly in "exceptional and rare cases" where it could be said that the acts in question were done n order to allow "the police to make use of information concerning an offence that is already 'laid on', a jury might conclude that the defendant had been acting lawfully.

action to prevent or impede reasonably apprehended breaches of the law by another, and thereby assist in keeping the peace within the realm (and internationally). [19]

2.3 It was not open to the prosecution authorities to appeal against the acquittal of these three women. Concerned, however, that the decision of the sheriff might be thought to set a general precedent for anti-nuclear protesters intent on direct action, the Lord Advocate referred the following four questions to the High Court of Justiciary, in an attempt to restore the presumed *status quo ante*:

(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?

[19] See the English Court of Appeal decision in *R v. Fitzroy Derek Pommel* [1995] 2 Cr. App. R. 607 where the defendant's answer to charges of possessing a prohibited firearm and ammunition without a licence (in fact a loaded sub-machine gun) was that he had taken them from another man who was intending to commit a crime with them and intended to pass them on to his brother for surrender to the police. The Court of Appeal held that if these facts could be established, a defence should be available to the accused, termed by the court "duress of circumstances" and observed

> "[In] the situation where someone commendably infringes a regulation in order to prevent another person from committing what everyone would accepts as being a greater evil with a gun … it cannot be satisfactory to leave it to the prosecuting authority not to prosecute, or to individual courts to grant an absolute discharge. The authority may, as in the present case, prosecute because it is not satisfied that the defendant is telling the truth and then, even if he is vindicated, he is left with a criminal conviction which, for some purposes would be recognised as such."

2.4 After some days of complex and lengthy argument (in a hearing at which the Lord Advocate was represented by senior and junior counsel, the Advocate General who appeared for the UK Government's interest was represented by senior counsel, senior counsel was appointed as *amicus curiae* to represent the interests of and position of Angie Zelter who appeared and argued on her own behalf, Ellen Moxley was represented by senior and junior counsel; and Ulla Roder by two junior counsel) the court answered the four questions put to it by the Lord Advocate as follows:

(1) No. In a Scottish criminal trial, evidence could not be led as to the content of customary international law. A rule of customary international law was a rule of Scots law and the jury were not entitled to consider expert evidence but must be directed thereon by the judge;

(2) No. The conduct of the UK government had not been illegal because the peacetime deployment of Trident as a deterrent was not a "threat". Furthermore there was, said the court, currently no rule of customary international law justifying the commission of a crime in order to prevent the commission of another crime, even in times of war;

(3) No. The (subjective) belief of the respondents Zelter, Roder and Moxley that the deployment of Trident was in breach of customary international law did not provide a defence of justification to the charge of malicious damage

(4) Except for the defence of necessity, it was not a defence to a criminal charge that the relevant actions had been taken to hinder the commission of an offence by another person. Although the defence of necessity could be employed where the malicious damage was remote from the threat to people or property, it was only available where the perceived threat was immediate and there was no alternative to a criminal act in order to avert the threat. In any event the defence of necessity was not available in the instant case where the actions of the Government had not been shown to be unlawful.

Significance of the decision for Scots law

2.5 At some levels, then, the decision of the High Court of Justiciary was an unequivocal defeat for direct action campaigning involving breach of the law, but the decision of the court did in fact mark a number of significant developments in, and for, Scotland and Scots law.

2.6 In the first place the High Court accepted – by the very fact that it answered the question posed to it by the Lord Advocate - that questions relating to the lawfulness of the deployment of weapon systems by the United Kingdom government were justiciable before the courts.

2.7 Secondly, customary international law was recognised by the court automatically to form part of municipal Scots law without need for any formal treaty incorporation. It would appear that the court implicitly accepted, too, that customary international law could be relied upon by individuals in determining the lawfulness of their actions – and the lawfulness of the actions of the State.

2.8 Finally the case highlighted the importance of international law generally before the Scottish courts. As we shall see, the relevance of - and the potential for direct reliance upon - international treaty law before the courts in Scotland has been increased by the provisions of the Scotland Act (notably Sections 35, 58, 106(6) SA) which make it clear that the acts of the Scottish Parliament and of the Scottish Government may be subject (specifically at the instance of the Secretary of State) to legal challenge before the courts insofar as these acts are thought to be incompatible with the United Kingdom's "international obligations" (which Section 108(1) SA defines as meaning "*any* international obligation of the United Kingdom, *other than* obligations to observe and implement Community law or the Convention rights"). The obligations on the part of the devolved Scottish institutions to respect Community law and Convention rights are, of course, the subject of other more specific provisions within the Scotland Act..

Scots criminal law wholly distinct from English criminal law

2.9 It should be noted that there was no possibility of any appeal against this decision. This is because the High Court of Justiciary is the highest court in matters concerning Scots criminal law. In contrast to the position which applies in England, Wales and Northern Ireland, the House of Lords has no appellate jurisdiction in criminal law matters from Scotland. [20] As Lord Bingham has noted:

> "When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London …. There was originally a doubt as to whether there was even a civil appeal from Edinburgh to London, but it was very quickly established that there was and indeed extensive use of it was made to such an extent that there was very little time to hear English appeals! But what is important is that *the Scots criminal system has always been self-contained and has had no English input at all.*" [21]

2.10 With the coming into force of the Scotland Act, however, the Judicial Committee of the Privy Council (which has traditionally been the final Imperial court of appeal in cases for the British Commonwealth) was given a role to play in matters of Scots criminal law in that it could hear appeals or references from the Scottish criminal court on matters which raise "devolution issues" – typically the proper interpretation of Convention rights. But the jurisdiction of the Privy Council in issues concerning crime in Scotland is strictly a limited one - at least so the judges of the High Court of Justiciary claim - [22] and it is not given general

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[20] See *Mackintosh v Lord Advocate* (1876) 2 App Cas 41, HL(Sc).

[21] Lord Bingham of Cornhill, evidence to the Parliamentary Joint Committee on Human Rights, 26 March 2001

[22] See for example *Fraser (Nat Gordon) v. HM Advocate* [2008] SCCR 407, HCJ per Lord Osborne at paragraphs 219-220

> 219 ... [T]he relationship between the concepts of a miscarriage of justice, recognised in section 106(3) of the Criminal Procedure (Scotland) Act 1995 and an unfair trial in terms of Article 6(1) of the Convention is not straightforward. Plainly they are not co-extensive. An unfair trial may not result in a miscarriage of justice. That would be so where, for example, that trial concluded with an acquittal, since the concept of miscarriage of justice comes into play only following a conviction on indictment, as provided in section 106(1) of the 1995 Act. Furthermore, a trial may be completely fair yet result in a conviction which must be regarded as a miscarriage of justice, as for example where the provisions of section 106(3)(a) operate.
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> 220 What importance, if any, it may be asked, attaches to these considerations in the present context. The answer, in my view, is that it is potentially confusing and therefore unhelpful, in criminal appeals under section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995 to seek to rely on *dicta* pronounced in appeals under paragraph 13 of Schedule 6 to the Scotland Act 1998, since the issues which this court must determine in the former type of

or overall competence to decide upon matters of criminal law or procedure in Scotland. The Privy Council's current devolution jurisdiction (including that exercised in Scottish criminal matters) is to be amalgamated with the appellate jurisdiction currently enjoyed by the House of Lords in Scottish civil matters into the new UK Supreme Court. [23]

3. THE DECISION IN *SMITH (PAMELA) V DONNELLY*

3.1 The requirement for the proper definition of the crimes with which one is charged was considered by the High Court of Justiciary in *Smith (Pamela) v Donnelly*. [24] The case concerned an anti-nuclear protestor who had been charged with "breach of the peace" in respect of her actions intended as a protest against the use of nuclear weapons in lying in a road outside a military base and so causing a disruption to traffic on the highway. She argued that the offence of breach of the peace in Scots law was not sufficiently or clearly defined so as to comply with the requirements of Article 7 ECHR. She submitted that the courts' interpretation of "breach of the peace" in Scotland, had, over the years, become a catch-all offence, so wide and potentially applicable to almost any course of conduct which the prosecution authorities took exception to, that the offence could not (or no longer) reasonably be deemed to comply with the requirements of Article 7 ECHR.

3.2 Article 7 ECHR is in the following terms:

> "(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence *under national law or international law* at the time when it was committed. Nor shall a heavier penalty be imposed that the one which was applicable at the time when the criminal offence was committed.
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> (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was *criminal according to the general principles of law recognised by civilised nations."*

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appeal, which I have described in some detail, are inevitably quite different from those issues which the Judicial Committee require to determine in the latter."

[23] See Section 40 of the Constitutional Reform Act 2005

[24] *Smith (Pamela) v Donnelly*, 2002 JC 65

3.3 Article 7 ECHR contains, then, two main strands: first a requirement the proper prior definition in respect of crimes charged; and secondly, a requirement against retrospectivity in the defining of, and punishing for, criminal offences. Article 7 ECHR was intended to re-state the existing general legal principles of *nullum crimen sine lege* [25] (no crime without a (prior) statute) and *nulla poena sine lege*[26] (no punishment without a (prior) statute), while also seeking to take into account and reconcile these principles with the existence of the jurisprudence concerning individual criminal responsibility for gross breaches of international humanitarian and human rights law, as these concepts were first articulated at the post-World War II Nuremberg trials. [27]

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[25] In *Korbely v. Hungary*, ECtHR, 19 September (2008) 25 BHRC 382 the Grand Chamber of the Strasbourg Court noted as follows at paragraph 70:

> "70.... Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability."

[26] See *Coëme and others v. Belgium*, ECtHR, 22 June 2000 at paragraph 45:

> "45. Since the term "penalty" is autonomous in scope, to render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision (see the *Welch v. the United Kingdom* judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27). While the text of the Convention is the starting-point for such an assessment, the Court may have cause to base its findings on other sources, such as the *travaux préparatoires*. Having regard to the aim of the Convention, which is to protect rights that are practical and effective, it may also take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals and the notions currently prevailing in democratic States (see, among other authorities, the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26, and the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, pp. 34-35, § 95)."

[27] In *Kononov v. Latvia*, ECtHR 24 July (2008) 25 BHRC 317, the Strasbourg Court observed (at para 115):

> "115. With regard to Article 7 § 2, the Convention institutions have commented as follows:
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> (a) The second paragraph of Article 7 of the Convention relating to "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations" constitutes an exceptional derogation from the general principle laid down in the first. The two paragraphs are thus interlinked and must be interpreted in a concordant manner (*Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002).
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> (b) The preparatory works to the Convention show that the purpose of paragraph 2 of Article 7 is to specify that Article 7 does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and

3.4 In interpreting and applying Article 7 ECHR (that is to say in determining when and how an individual should properly be found guilty of and punished for a criminal offence defined in the law) the domestic courts have also to take account of the "general principles of law recognised by civilised nations", that it so say the requirements of customary international (humanitarian and human rights) law.

3.5 In *Smith (Pamela) v Donnelly* the Crown resisted the claim that "breach of the peace" in Scots criminal law meant anything that the prosecution wanted it to mean. The Crown argued that, while past case law certainly showed that the method of committing the offence of breach of the peace had wide variations and a variety of actual circumstances, that did not alter the essential definition of the crime.

3.6 The High Court of Justiciary rejected the accused Pamela Smith's challenge to the Convention compatibility of the offence of "breach of the peace" with which she had been charged as a result of her actions at Faslane. The court did seek to clarify the legal position by stating that in order to constitute the crime of breach of the peace, there has to be conduct severe enough to cause alarm to an ordinary person *and* to threaten serious disturbance to the community. [28] Mere

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> collaboration with the enemy; accordingly, it does not in any way aim to pass legal or moral judgment on those laws (*X. v. Belgium*, no 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). This reasoning also applies to crimes against humanity committed during this period (*Touvier v. France*, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR) 88, p. 148; and *Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts))."

[28] See, more recently, *Paterson v. HM Advocate*, 2008 SLT 465, HCJ at paragraphs 22-23 considering the potential use of a charge of breach of the peace to convict an individual accused of lewd, indecent and libidinous behaviour toward a seventeen year old:

> "In *Smith v Donnelly*, 2002 JC 65 this court examined the existing authorities on breach of the peace with a view to determining whether bringing proceedings on such a charge, as developed, violated the requirements of art 7 of the Convention (no punishment without law). The court held that, on a sound interpretation of these authorities, the definition of the crime was such as to meet the requirements of the Convention. ... In the context of behaviour towards a 17 year old girl by a man 20 years her senior the conduct was, in our view, severe enough to cause alarm to ordinary people. ... The conduct does not require to cause serious disturbance to the community. It is sufficient that it threatens such disturbance. Such conduct by a mature man towards an adolescent girl was such that, if discovered, was likely to cause a serious reaction among other adults. In these circumstances the nature of the conduct was such that, if proved, it constituted on each occasion breach of the peace.
>
> [...]
>
> Although the two elements in the conjunctive expression [conduct severe enough to cause alarm to an ordinary person *and* to threaten serious disturbance to the community] may include common elements and the same evidence in particular circumstances may cover both, they focus on different things. In particular, the former element highlights the objective

annoyance or irritation were insufficient but rather conduct which was genuinely alarming or disturbing to the reasonable person was required. The court also advised that bearing in mind the terms of the European Convention, it might be appropriate in any charge for the prosecution to include proper specification of the conduct alleged to have caused the breach of the peace.

Scots criminal law and the common law declaratory power of the High Court of Justiciary

3.7 The case of *Pamela Smith v Donnelly* (and the argument in it) is of some general interest beyond its particular facts because it illustrates how so much of the criminal law in Scotland is the product of the common law, that is to say the decisions of the judges. In contrast to the position in England and Wales, there is no general codification of the substantive criminal law in Scotland. Crimes in Scotland are not, as a rule, defined in and/or regulated by statute. One academic commentator has summarised the position in Scotland thus:

> "It is important to note that most major crimes are creatures of the common law in Scotland. [29] Indeed, that the substantive criminal law of Scotland relies greatly upon the common law has been described as its 'most noteworthy feature'. [30] The starting point for determining the definition of a common law crime in Scotland is *Commentaries on the Law of Scotland Respecting Crimes*, written by Baron David Hume in 1797.[31] Hume is frequently referred to by the judges in the High Court of Justiciary, Scotland's supreme criminal court. [32] The crime of murder is defined by the common law in Scotland. So too is 'culpable homicide', a crime similar to the English crime of manslaughter. Rape is a common law crime, [33] as are assault, [34]

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character of relevant alarm while the latter highlights the community aspect of the offence. Any definition of breach of the peace should use the conjunctive."

[29] For a description of the common law nature of Scottish criminal law, see T.H. Jones, "Common Law and Criminal Law: the Scottish Example" [1990] *Crim.L.R.* 292 and I.D. Willock, "Scottish Criminal Law--Does it Exist?" (1981) *SCOLAG Bulletin* 225

[30] Jones, *ibid*. See also Royal Commission on Capital Punishment (1949-1953), Minutes of Evidence, *per* Lord Justice General Cooper at 428:

> "The Scottish law of crime is not statutory but almost exclusively common law, which has been and is still being evolved by judicial decisions applied with anxious care to the precise facts of actual cases."

[31] The Scottish courts generally employ the 4th edition of Hume, edited by B.R. Bell and published in 1844

[32] The High Court of Justiciary was established in 1672

[33] Other sexual offences are, however, found in statute - see the Criminal Law (Consolidation) (Scotland) Act 1995 and the Sexual Offences (Amendment) Act 2000

theft, [35] fraud, and robbery, to name but a few. Most of the general principles of criminal liability are to be found in the common law, including matters such as accessory liability and attempts to commit crime. In the opinion of the code group, the unsatisfactory state of the current common law is the most persuasive argument in favour of codification." [36]

3.8 The fact that the criminal law is in large part the creation of the common law means in Scotland the judges of the High Court of Justiciary may - albeit exceptionally in the exercise of the court's inherent declaratory power [37] - find and declare certain conduct to be criminal. [38] The judges may also exercise this

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[34] It is an aggravated assault where the victim is a police officer: see s.41(1)(a) of the Police (Scotland) Act 1967

[35] Note, however, that the Theft Act 1607 makes it an offence to steal bees, and fish from fishponds

[36] Pamela R. Ferguson "Codifying criminal law: a critique of Scots common law" (2004) *Criminal Law Review* 49-59 at 50-51

[37] See *Grant v. Allen*, 1987 JC 71 per Lord Justice-Clerk Ross:

> "[T]his court has an inherent power to punish any act which is obviously of a criminal nature (Hume on *Crimes* (3rd edn.), i, 12; Macdonald *Criminal Law* (5th edn.), p. 193; *Sugden v. H.M. Advocate* 1934 J.C. 103)
>
> ....
>
> Hume describes the declaratory power of the court as an inherent power to punish every act which is obviously of a criminal nature. Although there are circumstances where it will be appropriate for the court to exercise this power, I am of opinion that great care must be taken in the exercise of this power. Exercising the power may well conflict with the principle *nullum crimen sine lege*. The declaratory power has been considered in a number of cases over the last fifty years. I do not find it necessary to consider these cases because I am not satisfied that what is libelled in this complaint was so obviously of a criminal nature that it should be treated as a crime under the criminal law. No doubt what the appellant is alleged to have done was reprehensible and immoral, but as was recognised in *H.M. Advocate v. Mackenzies*, 1913 JC 107,, the fact that conduct is reprehensible or indicates moral delinquency is not sufficient to bring it within the scope of the criminal law. I recognise that there may be reasons for thinking that conduct of this kind ought to be regarded as criminal. However, if that is so, I am of opinion that it is for Parliament and not the courts to create any new crime in that regard."

[38] See *McLaughlan v Boyd*, 1934 JC 19 per Lord Justice-General Clyde at 22-3:

> "*It would be a mistake to imagine that the criminal common law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime*. It has been pointed out many times in this Court that such is not the nature or quality of the criminal law of Scotland. I need only refer to the well-known passage in the opening of Baron Hume's institutional work (Hume on *Crimes* (3rd ed.) ch. i), in which the broad definition of a crime - a doleful or wilful offence against society in the matter of 'violence, dishonesty, falsehood, indecency, irreligion' is laid down. *In my opinion the statement in Macdonald's* Criminal Law *(4th ed., p. 221) that 'all shamelessly indecent conduct is criminal,' is sound and correctly expresses the law of Scotland*. No doubt there may be in particular cases circumstances of aggravation, but I am not prepared to rule out of the category of crime any shamelessly indecent conduct, and I am not prepared to infer, from the circumstances that sec 11 of the Act of 1885 affirmed the proposition that shamelessly indecent conduct by one male adult in relation to another was criminal, that such conduct was not, or could not have been, the competent subject of prosecution in Scotland before."

inherent declaratory power to find certain conduct no longer to be criminal at common law by, for example, abolishing one common law defined crime and replacing it with another.[39]

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[39] In *Webster v Dominick*, 2005 JC 65 a court of five judges headed by the Lord Justice Clerk (Gill) (with Lord Marnoch, Lord Macfadyen, Lady Cosgrove, Lord Sutherland, Lord Gill) decided to abolish the previously recognised crime of "shameless indecency" and replace it with a crime of different scope which they termed "public indecency Lord Justice Clerk Gill stating

> "[43] ... [T]wo decisions of this court [*McLaughlan v Boyd* 1934 JC 19 and *Watt v Annan* 1978 JC 84] have *created a crime* that rests on an unsound theory, has an uncertain ambit of liability and lays open to prosecution some forms of private conduct the legality of which should be a question for the legislature (*Paterson v Lees*1999 JC 159 , Lord Justice-General Rodger, p 234D). It is time that this court put the matter right.
>
> ...
>
> [45] The soundness of the present law on shameless indecency is not a mere academic question. There are important practical considerations. Since shameless indecency is a sexual offence within sch 1 to the Sex Offenders Act 1997 (para 2(1)(a)(vii)), every person convicted of it becomes a sex offender and is subject to the notification requirements of secs 1 and 2 of that Act.
>
> ...
>
> [51] In my opinion, this crime, clearly established in Scots law before *McLaughlan v Boyd* , 1934 JC 19, should in modern practice be described as 'public indecency'. It has a similar place in the law of Scotland to that of the common law offence of public indecency in the law of South Africa. Public indecency was declared to be a crime by the Supreme Court of the Cape Colony in *R v Marais* (1887) 6 SC 367 on the analogy of the *crimina extraordinaria* described by Voet (*Commentarius ad Pandectus* (1704, A de Hondt, Hagae at 47.11.1ff.; cf D. 47.11; Mars, WH, '*Crimina Extraordinaria*' (1911) 8 *SALJ* 490; Snyman, CR, *Strafreg* (4th ed, Butterworths, Durban, South Africa, 2003), pp 365, 366) and by reference to the English common law on the subject (*R v Marais*, (1887) 6 SC 367 per De Villiers CJ at 370). In its original conception, the South African crime of public indecency was considered to be criminal by reason of the tendency of the conduct to deprave the morals of others (*R v Marais*), but it has been recognised in the modern case law that it is sufficient for liability if the conduct outrages the public's sense of decency (*R v B and C* (1949) (2) SA 582 (T); Milton, vol 2, pp 271, 272, 276-278). In *S v F* (1977) (2) SA 1(T), for example, an indecent action committed by a performer in a cabaret was found by the magistrate to have been designed to incite lascivious thoughts and arouse sexual desires, but the decision of the appellate court was concerned almost entirely with the question whether the audience were shocked.
>
> [52] In my view, if such conduct is seen as a public order offence, questions about the depraving or corrupting effects of the conduct complained of are at most of indirect relevance. As in the English offence of outraging public decency (*Knuller (Publishing Printing and Promotions) Ltd v DPP* [1973] AC 435, Lord Simon of Glaisdale, p 493), it is sufficient for liability that, on an objective assessment, the conduct complained of should cause public offence.
>
> [53] In the law of Scotland, in my opinion, the *actus reus* of the crime has two elements, namely the act itself and the effect of it on the minds of the public. As to the indecent act, the paradigm case is that of indecent exposure (1995 Act, sch 5; *Lord Advocate, Petr* , 1998 JC 209 Lord Justice-General Rodger, p 405A-C; *Usai v Russell*, 2000 JC 144, Lord McCluskey, p 62B-C); but the crime may extend to any other form of indecency, for example sexual intercourse in public view (*Paterson v Lees* 1999 JC 159 Lord Sutherland, p 235F-G; *R v B and C* (1949) (2) SA 582 (T)), or the making of indecent actions or gestures in a stage show (eg *S v F* (1977) (2) SA 1(T)). Whether or not such indecency is committed for sexual gratification is, in my view, irrelevant to liability, being a matter of motive, but may, on conviction, be a relevant factor in the court's disposal.

3.9 The judges in Scotland might equally in the exercise of their common law powers (re-)define what might constitute valid defences to a criminal charge, or may alter the previously understood essential elements for a known crime. For example in its decision in *Lord Advocate's Reference (No.1 of 2001)* the High Court of Justiciary re-defined (in effect reformed) the crime of rape by judicial *fiat*, removing the previous requirement of the law that there be a forcible overcoming of the rape victim's will and holding, instead, that all that had to be established for the crime to be committed was that the victim had, as a matter of fact, not consented to sexual intercourse without any need to show force or overcoming of the will. Lord Nimmo Smith, one of the judges on the divided (5:2) seven judge bench which made this decision said this:

> "Ours is, however, a 'live system of law' [40] and it lies within the powers of this court, as custodians of the common law, to review it, and to correct the way in which it is stated, when it is necessary to do so in order to take account of developments in the law and to meet the needs of the community. This latter consideration appears to me to be of particular importance in a case such as the present. There have been profound changes in the position of women as members of society, and in attitudes to sexual conduct, since Baron Hume wrote. So it appears to me to be necessary to examine with particular care the way in which the crime of rape has been defined from time to time." [41]

> [54] Whether the crime extends, like the South African offence of public indecency (Burchell, JM, and Milton, JRL, *Principles of Criminal Law* (2nd ed, Juta, Lansdowne, South Africa, 1997), p 615) and the English offence of outraging public decency (*R v Gibson* [1990] 2 QB 619), to conduct that is not of a sexual nature is a question that can be decided if and when it arises.
>
> [55] As to the public element of the crime, the test, in my view, is not whether the conduct occurs in a public place in any technical sense. Conduct falling within the definition could take place on a private occasion if it occurred in the presence of unwilling witnesses or if it occurred on private premises but was nonetheless visible to the public (eg *Usai v Russell*, 2000 JC 144 ; *R v Thallman* (1863) 9 Cox CC 388; *R v B* 1955 (3) SA 494 (D); *Manderson v R* 1909 TS 1140 , p 1142).
>
> ....
>
> [58] If it is analysed as I propose, public indecency is an offence that fulfils an appropriate role in the maintenance of public order. Whether a particular act is indecent will depend on the circumstances of the case judged by social standards that will change from age to age (cf *McGowan v Langmuir*, 1931 JC 10 per Lord Sands, pp 13, 14). These will be the standards that would be applied by the average citizen in contemporary society.

[40] *Stallard v HM Advocate*, 1989 SLT 469 per the Lord Justice General (Emslie) at 473

[41] *Lord Advocate's Reference (No.1 of 2001)* 2002 S.L.T. 466 per Lord Nimmo Smith at 481 para 2 of his judgement. See to like effect Lady Cosgrove at 481 para 15 of her judgment:

> "[15] It has been said that ours is a live system of law. Our law should be like a living tree, not only growing but shedding dead wood as it does so. The opportunity has now presented itself and I am of the view that the law should be revisited and the flawed approach, imported in *HM Advocate v Sweenie (Charles)* (1858) 3 Irv 109, departed from in the manner suggested by your Lordship in the chair."

3.10 As our previously mentioned academic commentator has also noted

> "Some judicial development of the common law is of course inevitable and indeed desirable. The European Court of Human Rights has described this as 'a well entrenched, necessary part of legal tradition'. [42] Nor does the evolution of the common law offend against the principle of legality and non-retrospectivity contained in Article 7 of the Convention. According to that court, Art.7 'cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.' However, judicial development of the common law should be kept within proper limits." [43]

3.11 Given the breadth in the concept of "breach of the peace" in Scots law which the case of *Pamela Smith v. Donnelly* highlighted, the question might then arise as to whether or not it would it be possible for an individual to take action to seek to prevent or impede the State authorities themselves taking action in (threatened) "breach of the peace" ? That, in a sense, was the question which the House of Lords considered in our next case *R v. Jones*.

4. THE DECISION OF THE HOUSE OF LORDS IN *R. V MARGARET JONES AND OTHERS*

4.1 In *R. v Margaret Jones and others* the House of Lords – exercising the criminal appellate jurisdiction which it has for England, Wales and Northern Ireland - considered the cases of a number of individuals, all of whom had either been charged with or convicted of aggravated trespass or criminal damage arising out of their individual protest actions against the invasion of Iraq War at various

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[42] *SW v UK* (1995) 21 E.H.R.R. 363 at 399

[43] Pamela R. Ferguson "Codifying criminal law: a critique of Scots common law" (2004) *Criminal Law Review* 49-59 at 58. This approach has recently been confirmed in the Strasbourg decision *Korbely v. Hungary*, 19 September 2008 where the Grand Chamber of the ECtHR noted as follows (at paragraph 71):

> "71. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Jorgic v. Germany*, no. 74613/01, §§ 100-101, 12 July 2007; *Streletz, Kessler and Krenz*, cited above, § 50; and *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, §§ 34-36, and Series A no. 335-C, pp. 68-69, §§ 32-34, respectively).

military bases in the United Kingdom. In their resulting criminal trials some of the protesters sought to rely upon the statutory defence available to them under Section 3 of the Criminal Law Act 1967 to the effect that their actions were lawful since they could properly be regarded as the use of reasonable force to prevent the commission of a crime by the State, namely the pursuing of an unlawful war of aggression contrary to the binding norms of international law. Others argued that because the actions of the Crown in mobilising the armed forces for the invasion of Iraq could not be said to be lawful under international law, the protesters' admitted acts in seeking to disrupt the military action could not be characterised as "aggravated trespass" within the meaning of section 68(2)of the Criminal Justice and Public Order Act 1994. The House of Lords were therefore asked to rule on the question as to whether the various protesters could rely upon the customary law notion of "crimes against peace" or "crimes of aggression" to justify their actions under domestic criminal law.

4.2 The House of Lords agreed, first of all, that the concept of crimes against peace (including the planning, preparation or waging of a war of aggression, or participation in a common plan or conspiracy to accomplish such acts) was sufficiently defined and clearly established in customary international law to permit lawful prosecution and punishment of those responsible. This is perhaps an unsurprising conclusion given that it was on the basis of such charges that various high functionaries in the German Nazi and Japanese wartime governments were charged convicted - and in some cases executed - in the post-War Nuremberg and Tokyo war crimes trials. Further and, in any event, in its decision in *Kuwait Airways Corporation v. Iraqi Airways Co (Nos. 4 and 5)* the House of Lords had already recognised the concept of the international crime of aggression. They held that the fact that the invasion of Kuwait by Iraq was generally considered to be an unlawful war of aggression contrary to customary international law and to the provisions of the UN Charter could be given effect to by the English courts in a purely domestic context. Their Lordships therefore refused to recognise the validity of an Iraqi decree which purported to transfer property in certain Kuwaiti state owned aircraft to the Iraqi state in recognition

of the fact that these acts had been made pursuant to an unlawful war of aggression. [44]

4.3 In their subsequent decision in *R v. Jones* their Lordships held, however, that there was no *automatic* assimilation of crimes recognised and defined under customary international law into domestic English criminal law. More specifically they held that there need to be express Parliamentary authority before it was possible to treat the customary internal law crime of aggression as a domestic crime in English law. Accordingly, the international crime of aggression was not to be regarded as a crime or an offence in domestic law within the meaning and for the purposes of either section 3 of the 1967 Act or section 68(2) of the 1994 Act. This meant that - regardless of whether or not the United Kingdom's prosecution and participation in the Iraq war was lawful in international law - the resolution of that issue would provide no statutory defence in domestic English law for the protesters.

4.4 Now while this decision of the House of Lords definitively established the current position under English criminal law it does not, of course, apply in Scotland, for

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[44] *Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 per Lord Nicholls of Birkenhead at 1081:

> 28 *The acceptability of a provision of foreign law must be judged by contemporary standards.* Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times: see *Blathwayt v Baron Cawley* [1976] AC 397, 426. In *Oppenheimer v Cattermole* [1976] AC 249, 278, Lord Cross said that the courts of this country should give effect to clearly established rules of international law. This is increasingly true today. *As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important*. RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today.
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> ...
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> 29. *Enforcement or recognition of this law would be manifestly contrary to the public policy of English law. For good measure, enforcement or recognition would also be contrary to this country's obligations under the UN Charter. Further, it would sit uneasily with the almost universal condemnation of Iraq's behaviour and with the military action, in which this country participated, taken against Iraq to compel its withdrawal from Kuwait. International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law*: see the discussion in *Oppenheim's International Law,* 9th ed (1992), vol 1, (ed Jennings and Watts), pp 371-376, para 113.

the reasons already mentioned: namely that the House of Lords has no jurisdiction in matters of Scots criminal law.

4.5 More importantly however, the decision of their Lordships is in some way so specific to the features of English criminal law that it may not even be regarded as even a persuasive authority in Scotland, since much of its central constitutional reasoning does not readily translate into Scottish terms. In particular, the decision of Lord Bingham rests centrally on the assertion that:

> "[T]here now exists *no power in the courts to create new criminal offences* [45].... 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*. ... [This] reflects 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." [46]

4.6 As we have seen, however, these strictures about the court having *no* power to create new offences or to be able to change the substantive definition of what constitutes criminal conduct do *not* apply within the context of Scots criminal law. In Scotland the High Court of Justiciary takes a far more proactive approach in defining and developing the criminal law to match contemporary expectation of the national (and arguably, at least, also the international) community. There is no particularly strong tradition or custom of deference by the courts in Scotland to Parliament (whether in Westminster or in Edinburgh) on issues of criminal law when the legislature has not spoken.

4.7 Thus, given that customary international law has been said automatically to form part of Scots law, and that the substance of the criminal law in Scotland is one which continues to be shaped and created by the judges, it might be thought that the Scottish criminal justice system would be far more permeable to developments in the field of customary international law than the English statutory based domestic criminal legal system, at least as that system was explained by the House of Lords in *R v. Jones*.

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[45] See *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435

[46] *R. v Margaret Jones and others* [2007] 1 AC 136 per Lord Bingham at paragraphs 28-29

5. PROSECUTION IN DOMESTIC COURTS FOR INTERNATIONAL CRIMES

5.1 In *Regina (Gentle and another) v. Prime Minister and others* Baroness Hale opened her speech with the following arresting narrative:

> "46. ... [O]n 11 March 2003, the Chief of the Defence Staff asked the Prime Minister for what he later called 'an unambiguous black and white statement saying that it would be legal for us to operate if we had to'. The next day, the legal adviser to the Ministry of Defence wrote to the Legal Secretary to the Law Officers, recording that he had advised the Chief of the Defence Staff that he could properly give his order committing United Kingdom forces 'if the Attorney General has advised that he is satisfied that the proposed military action … would be in accordance with national and international law'. The Treasury Solicitor also indicated that a clear statement from the Attorney General that military action would be lawful was required, not only by the military but also by the civil service, who might be involved in giving assistance to the military effort.
> ...
> 48 Why were the Chief of the Defence Staff and the Treasury Solicitor so concerned? Not, we may be sure, because they thought that the risk to the lives of military and civil service personnel would be greater if the war was unlawful than if it were lawful. They were concerned about the legal consequences. Whether there was much substance in those concerns may be open to doubt. The United Kingdom is party to the Charter of the United Nations which defines when one state may lawfully use force against another. We have therefore accepted that we cannot go to war just because we see good reason to do so. We have also committed ourselves to the Rome Statute of the International Criminal Court (1999) (Cm 4555). Crimes within the jurisdiction of the court are genocide, crimes against humanity, war crimes and the crime of aggression: article 5(1). However the court cannot exercise its jurisdiction over the crime of aggression until a definition and other conditions have been adopted, which cannot be before 2009: see article 5(2). Hence the UK's International Criminal Court Act 2001 only provides for the arrest and surrender of people accused of genocide, crimes against humanity and war crimes, which are also made offences in domestic law. The prosecutor of the International Criminal Court has received many communications related to concerns about the legality of the armed conflict in Iraq. In response, he has explained that the court has only a mandate to examine *conduct during the conflict* and not whether *the decision to engage* in it was legal...
>
> 50 But even if the prospect of prosecution for engaging in an unlawful war (as opposed to conducting a war unlawfully) is remote, the Chief of the Defence Staff and Treasury Solicitor were surely right in principle to seek the assurance which they did. Flight Lieutenant Kendall-Smith was court-martialled for disobeying a lawful command when he refused to return to Iraq in June 2005. It was accepted by the Crown that for there to be an offence (then under section 34 of the Air Force Act 1955) the order in question must not have been an order to do something which was unlawful in domestic or international law. The Judge Advocate ruled that this order was not unlawful because it had been given after the United Nations resolutions authorising the activities of the multi-national force. But he also ruled that it is no defence that the defendant believed that the order was not lawful. The individual's duty is to obey the order, as long as it is not obviously contrary to law. There is no defence of conscientious objection to the order (compare the position under the German Constitution, as indicated in the ruling of the 2nd *Wehrdienstsenat* of the *Bundesverwaltungsgericht* of 21 June 2005, *Case No BVerwG 2 WD 12.04)* . This places the individual British service man or woman in a very difficult position. If he

> or she obeys the order and it is not in fact lawful, then he or she could in theory face prosecution for the illegal act. Under the International Criminal Court Statute, the more sceptical he or she is about the legality of the order, the less possible it might be to rely on a defence of superior orders: see article 33. If he or she disobeys the order and it is in fact lawful, then he or she will probably face a court martial for disobeying it. A state which expects its soldiers to obey their orders irrespective of their own views on the lawfulness of those orders should, it seems to me, owe a correlative duty to its soldiers to ensure that those orders are lawful." [47]

5.2 Despite repeated invitations made to them the courts in England and Wales, and in particular the judges of the House of Lords, have consistently sought to avoid judging on the legality of decisions relating to war [48] or the preparations for war.[49] The judges say that it is not their function to review the exercise of

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[47] See *Regina (Gentle and another) v. Prime Minister and others* [2008] 1 AC 1356 per Baroness Hale at 1377-9

[48] See *Regina (Gentle and another) v. Prime Minister and others* [2008] 1 AC 1356 per Lord Hope at 1372:

> "The issue of legality in this area of international law belongs to the area of relations between states. Article 2 of the Charter of the United Nations declares that the organisation and its members shall act in accordance with the principles that it sets out. The third of these principles is: 'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' Application of the guidance that this principle offers in the conduct of international relations between states is a matter of political judgment. It is a matter for the conduct of which ministers are answerable to Parliament and, ultimately, to the electorate. It is not part of domestic law reviewable here or, under the Convention, in the European court at Strasbourg.

[49] See, for example, *Chandler v. The Director of Public Prosecutions* [1964] AC 763 *per* Lord Reid at 791:

> "It is my opinion that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that one can seek a legal remedy on the grounds that such discretion has been wrongly exercised. I need only refer to the numerous authorities gathered together in *China Navigation Company Ltd. v. Attorney-General* [1932] 2 KB 197. Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of government or otherwise, no-one is entitled to challenge it in court."

and *per* Viscount Radcliffe at 798-799:

> "If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's Ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different. … [T]he question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make that issue a matter for judge or jury"

See, too, *Lord Advocate's Reference (No. 1 of 2000) re nuclear weapons*, 2001 JC 143, HCJ at 163:

> "[60] In our view it is not at all clear that if this issue had been fully debated before us, the incorporation of Trident II in the United Kingdom's defence strategy, in pursuance of a strategic policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. *Chandler* remains *binding* (*sic*) authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in

prerogative powers in relation to the deployment of the armed services. [50] They defer to the executive in matters of foreign policy. [51] And they say are unwilling to adjudicate on rights and obligations arising out of transactions entered into between sovereign states on the plane of public international law. [52]

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matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion."

[50] Contrast with the approach in Canada in *Operation Dismantle and others v. The Queen* (1985)18 *Dominion Law Reports* 481 (4th) per Madame Justice Wilson of the Supreme Court of Canada at 500, 504, 505 at reviewed the common law authorities available up to 1985 on the question of the justiciability of the decision by the Canadian government to allow the testing of American Cruise missiles on its territory, noting as follows:

> "I cannot accept the proposition that difficulties of evidence or proof absolve the court from taking a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the court *should* or *must* rather than on whether they *can* deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the court to decide the issue before us.
>
> …
>
> [I]f the court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive. Because the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the court should in the same way refuse to involve itself. However, I think that would be to miss the point, to fail to focus on the question before us. The question before it is not whether the government's defence policy is sound but whether or not it violates the appellant's rights and freedoms under Section 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question. I do not think that there can be any doubt that this is a question for the courts.
>
> …
>
> [I]t seems to me that the legislature has assigned the courts as a constitutional responsibility the task of determining whether or not the decision to permit the testing of cruise missiles violates the appellant's rights under the charter. … It is therefore, in my view not only appropriate that we decide the matter; it is our constitutional obligation to do so."

[51] See *R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76 refusing to order the Foreign Secretary to intervene in the case of a British subject held as enemy combatant by United States at Guantanamo Bay. See too *R. (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin); [2006] H.R.L.R. 30 refusing to require the secretary of state to make a formal request for the return of the foreign national Guantanamo detainees who had strong British connection. And see *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] 3 W.L.R. 955 the House of Lords held that the requirement that laws had to be made for the 'peace, order and good government' of a Crown colony could not be construed as words limiting the power of a legislature and the courts would not inquire into the substantive merits of any legislation resulting.

[52] See *R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); [2003] A.C.D. 36 where the court refused to provide an advisory declaration as to the true meaning of Resolution 1441 of the United Nations Security Council dated November 8, 2002 and in particular as to whether it authorised states to take military action in the event of non compliance by Iraq with its terms.

5.3 But as Professor Rosalyn Higgins QC, now President of the International Court of Justice, has written:

> "The international responsibility of a State is engaged when it violates international law, with various possible consequences. And from the perspective of international law, 'the State' encompasses all the organs of the State, the judiciary as well as the executive and legislative. *The responsibility of the State is incurred by the acts and decisions of the judiciary, notwithstanding the proper separation, in a democracy, of the judiciary from other State organs*." [53]

5.4 And the doctrine of judges as "State actors" is also evident from the series of trials organised by the American authorities subsequent to the main war crimes trial at Nuremberg and which concerned the relationship of specific professional sectors of German society with the Nazi regime. "Case 3" or *United States v. Altstötter and others* concerned the prosecution of a selection of some 16 jurists (public prosecutors, presiding judges and officials and ministers in the Ministry of Justice) who had assisted in the administration of the legal system during the Nazi era. These individual were presented by the American prosecuting authorities as being representatives of the entire judicial system for the administration of "what passed for justice in the Third Reich". These jurists were put on trial as regards their involvement in or complicity with war crimes, organised crime and crimes against humanity, in particular "judicial murder and other atrocities which they committed by destroying law and justice in Germany and by utilising the empty forms of legal process for persecution, enslavement and extermination on a vast scale". [54] In line with their international law remit,[55]

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[53] R. Higgins "The Relationship between International and Regional Humanitarian law and Domestic Law" (1992) 18 *CLB* 1268 at 1268.

[54] See *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946-April 1949* (Washington DC: US Government Printing Office, 1951) Volume III at 32-33

[55] In Judgment of the Nuremberg International Military Tribunal in the Main War Crimes Trial (1947) 41 AJIL 172 noted when considering the law of the Charter setting up the Tribunal:

> "The making of the Charter was the exercise of sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and he undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

This passage is also quoted in YBILC 1950 II page 187 at paragraph 26

the American prosecuting authorities concentrated on such crimes as committed against non-Germans and the conscious participation by these individuals in

> "a nation-wide government-organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist". [56]

5.5 It is clear from this trial - and from the conviction of a number of the accused - that it was considered by the Allied prosecuting authorities and judges at Nuremberg that officers of the judicial system themselves owed duties derived from consideration of international law which over-rode their duties to give effect to and apply provisions of national law insofar as these contravened these international humanitarian and human rights principles.

5.6 The written advice of 7 March 2003 of the Attorney General to the United Kingdom government shows that the Attorney General was clearly aware of this and another Nuremberg precedents. In discussing the issue as to whether an invasion of Iraq by the United Kingdom might be found to be unlawful under international law, he raised the concern of possible criminal prosecutions for those involved in the decision to go to war, noting:

> "Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military action is unlawful and an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts." [57]

5.7 Now while this argument that there might be a prosecution before the courts in England in respect of the customary international law crime of international aggression was later rejected by this House of Lords in *R v Jones (Margaret)* it would appear that the *possibility* of such a prosecution in Scotland is not yet a closed one, as a matter of Scots criminal law and procedure. And as one academic commentator has noted:

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[56] See *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington DC: US Government Printing Office, 1951) III at 984-985

[57] Attorney General memorandum of 7 March 2003, para 34 available at http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf

> "Perhaps there might emerge for international crimes a correspondingly mounting influence upon the interpretation of domestic crimes, bolstered by increasing state ratifications of the Rome Statute, the effective operation of the ICC itself, and also the Rome Statute's expectation (in Art.1) of complementarity in terms of a firm national response so as to avert the need for international action. Based on the sentiments expressed in the Preamble of the Rome Statute, one might wish every success to the ICC and that the UK courts will eventually take due notice of that progress." [58]

5.8 Further, as the decision of the House of Lords in *Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3)* [59] shows, there is no immunity from the criminal jurisdiction of the United Kingdom in respect of a (former) head of state for any acts or omission - even when done in his official capacity as head of state - if those actions constituted international crime against humanity and *jus cogens.* In the case of General Pinochet the crimes with which he was charged were those of torture or conspiracy to torture. It is not immediately clear why different rules or considerations should apply in respect of possible prosecutions of officials in respect of any of the other international crimes defined and condemned in Nuremberg Principle VI

5.9 We have earlier referred to Section 58 of the Scotland Act 1998 ("SA") which provides that the UK Secretary of State has the power to direct a member of the Scottish Executive (including necessarily, the Lord Advocate) either: (1) to refrain from proposed action where he has reasonable grounds to believe that such action would be incompatible with the international obligations of the United Kingdom; or (2) to order otherwise competent action from any member of the Scottish Executive where he has reasonable grounds to believe that such action is required for the purpose of giving effect to any such international obligations. As we have seen "international obligations" is defined under Section 126(10) of the Act as meaning "any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights." Section 58(5) SA provides that the Secretary of

[58] See Clive Walker "Case comment: Appellants protesting against war in Iraq – defendants committing criminal offences of damage or aggravated trespass on military bases" (2007) *Criminal Law Review* 66-70 at 70

[59] *Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3)* [2000] AC 147

State is required to state his reason in making any such order, and his or her decisions will therefore be subject to judicial scrutiny review on the usual grounds for review of administrative action. This means that Scottish Government's duty to comply with international obligations may become the subject of an order pronounced by the domestic courts if, for example, the Secretary of State's order is unsuccessfully challenged before them.

5.10 In *Friend v Lord Advocate* [60] the House of Lords unanimously rejected the challenge argued by a party litigant to the Convention compatibility of the Scottish fox hunting ban. Unfortunately, given that this was a case argued by a litigant without the benefit of any legal representation and where no *amicus curiae* had been appointed, their Lordships also saw fit also to pronounce on the issue as to whether Sections 35 and 58 of the Scotland Act might have modified the heretofore accepted dualist approach to international law (which requires specific incorporation of international treaty obligation into domestic law before they become enforceable before the court). There remains at least an interesting argument to the effect that by statutorily binding the Scottish Government under the Scotland Act to respect all of the United Kingdom's international obligations (albeit an obligation which Section 58 SA envisages to be enforced by action on the pat of the Secretary of State) then this is sufficient to incorporate these international obligations of the UK into domestic Scots law – at least as against the Scottish Government – such as to allow these obligations of the Scottish Government to be relied upon by any private parties who could show themselves prejudiced as citizens by the Scottish Government (in)action which was not compatible with the UK's international treaty obligations. [61]

5.11 Notwithstanding the dicta of the House of Lords in *Friend* it may still be

[60] *Friend v Lord Advocate*, 2008 SC (HL) 107

[61] *Lord Advocate's Reference (No. 1 of 2000) re nuclear weapons*, 2001 JC 143, HCJ confirmed the direct enforceability of norms of customary international law in Scots law. For a somewhat partisan survey and account (with a conservative, pro-Government spin) of the modern English case-law on this matter see Philip Sales and Joanne Clement "International Law in Domestic Courts: the developing framework" (2008) 124 *Law Quarterly Review* 388-421

argued that Section 58 SA provides the basis for an enforceable legitimate expectation to the effect that the actions of the Scottish devolved institutions will be compatible with the UK's international obligations. On this basis it might be said that the Scotland Act effectively binds the Lord Advocate - and the other Scottish Ministers - to respect the whole range of international treaty obligations which have been ratified by the Crown, even where they have not been incorporated into the domestic law of the United Kingdom. [62] The scheme of Scotland Act may be said also to provide further statutory authority to underpin and confirm the obligation already incumbent upon the Scottish Ministers and Lord Advocate at common law to respect the norms of customary international law insofar as these create international obligations on the United Kingdom. Thus, we may say that the Lord Advocate and the other Scottish Ministers are legally obliged both to refrain from acting in a manner would be incompatible with both customary and treaty international obligations of the United Kingdom, and may indeed have obligations under domestic law to take positive action for the purpose of giving effect to any such international obligations.

5.12 In particular, it seems clear that the Lord Advocate's prosecutorial discretion requires to be exercised in a manner which is both compatible with an individual's Convention rights *and* in a manner which is compatible with the United Kingdom's obligations under general international law. What this might mean is that the devolved Lord Advocate cannot lawfully initiate a prosecution against an individual if that individual's actions are properly found upon and justified under international law. By the same token it might be argued that a decision by the Lord Advocate to *refuse* to initiate a prosecution – for example against a State official or politician in respect of the international crime of

[62] Thus, in contrast to the situation that prevailed in *J. H. Rayner (Mincing Lane) Ltd. v. DTI* [1990] 2 AC 418 *per* Lord Templeman at 476F-477A, Lord Griffiths at 483C and Lord Oliver at 499E-501B is cannot be said in relation to acts of the Lord Advocate that the provisions of an unincorporated treaty was non-justiciable or otherwise outside the purview of the domestic courts. See, too, *Kaur v Lord Advocate* 1981 SLT 322, OH *per* Lord Ross at 330:

> "So far as Scotland is concerned, I am of the opinion that the court is not entitled to have regard to the Convention either as an aid to construction or otherwise. I respectfully share the view ... that the Convention is irrelevant to legal proceedings unless and until its provision have been incorporated or given effect to in legislation. To suggest otherwise is to confer upon a Convention concluded by the Executive an effect which only an Act of the Legislature can achieve."

aggression – might be subject to judicial review before the courts to test the lawfulness of this decision. Standing the specific exception provided in Article 7(2) ECHR (which provides that the application of the general principles of *nullum crimen sine lege* "shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations") it would be difficult to argue that the prosecution before a domestic tribunal for a crime clearly defined in Nuremberg Principle VI (for example for "crimes against peace" such as "planning, preparation, initiation or waging of a war of aggression") could, in itself, be said to be contrary to the Convention rights of the accused

5.13 The decision by the Lord Advocate on whether or not to prosecute in any case has not heretofore been the subject of any challenge before the courts in Scotland.[63] But there is no constitutional reason which such decisions should

[63] See *Crichton v. McBain*, 1961 JC 25 per Lord Justice General Clyde at 28-29:

> "The Lord Advocate has appeared in person at this hearing and has informed the Court that he has fully investigated the matter more than once and, in the exercise of that wide discretion which is invested in the Lord Advocate, he has come to the conclusion that a prosecution would not be justified in connexion with this matter. He has therefore decided not to prosecute at his own instance and not to give his concurrence to the private prosecution which the present complainer desires to raise.
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> *The Lord Advocate is quite entitled to take up this position. In this country he is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion. This system has operated in Scotland for centuries, and—see Alison on Criminal Law, vol. ii, p. 88—the result has completely proved the justice of these principles,* for such has become the public confidence in the decision of the Lord Advocate and his deputies on the grounds of prosecution, that private prosecutions have almost gone into disuse. *It is utterly inconsistent with such a system that the Courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this Court to proceed to review their soundness. Any* dicta *indicating that such a course is open to any Court are, in my view, quite unsound*."

See too *Hester v. McDonald*, 1961 SC 370 per Lord President (Clyde) at 378-379

> "His [the Lord Advocate's] responsibilities and privileges are quite unique, and they depend for their continuance on the confidence of the public in the utter impartiality with which he has always administered his onerous duties regarding crime. From time immemorial it has, therefore, been recognised, as Baron Hume puts it *Crimes*, vol. ii, p. 135 that 'a constitutional trust is reposed in that high officer, selected by His Majesty from among the most eminent at

not be open to challenge by way of judicial review, just as the decisions of the prosecution authorities are in England. [64] Indeed, the decision of the Lord

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the Bar; and it will not be supposed of him, that he can be actuated by unworthy motives in commencing a prosecution, or fall into such irregularities or blunders in conducting his process, as ought properly to make him liable in amends.' As Alison says (vol. ii, p. 93) he is absolutely exempt from penalties and expenses. *It is, therefore, an essential element in the very structure of our criminal administration in Scotland that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment*."

[64] The position in England has been set out in *Regina (Corner House Research and another) v. Director of the Serious Fraud Office (JUSTICE intervening)* [2008] 3 WLR 568, HL *per* Lord Bingham at 580:

"30 It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences, which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. *It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator*: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, paras 63-64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-736; *Sharma v Brown-Antoine* [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

31 The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*)

'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'

Thirdly, the powers are conferred in very broad and unprescriptive terms.

32 Of course, and this again is uncontroversial, *the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice.*"

See too *R (B) v. DPP* [2009] EWHC 106 (Admin) (27 January 2009) *per* Toulson LJ at paras 52-53:

"52. There is now a substantial body of authority on judicial review of decisions not to prosecute. The leading authorities are *R v DPP ex parte Manning* [2001] 1 QB 330, *R (Da Silva) v DPP* [2006] EWHC 3204 (Admin), *Sharma v Brown-Antoine* [2006] UKPC 57 and *Marshall v DPP* [2007] UKPC 4. In summary, judicial review of a prosecutorial decision is available but is a highly exceptional remedy. The exercise of the court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional. The reason for this was stated by Lord Bingham CJ in *Manning,* para 23:

Advocate in her capacity has head of the system of investigation of deaths in Scotland to refuse an inquiry has recently been the subject of a successful challenge by way of judicial review before the Court of Session.[65]

6. CONCLUSION

6.1 One legal philosopher has noted as follows:

> "When the very institution whose purpose is to realise human rights is used to trample them, when justice is turned against itself, the virtue of justice will be turned against itself too. Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights. The person with the virtue of justice, the lover of human rights, unable to run to the actual laws for their enforcement, has nowhere else to turn. She may come to feel that there is nothing for it but to take human rights under her own protection and so to take the law into her own hands." [66]

> 'In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting an effective remedy would be denied."
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> 53. There is an assumption underlying this passage (with its reference to the exercise of an informed judgment) that a prosecutor can ordinarily be expected to have properly informed himself (within the limits of what is reasonably practical) and asked himself the right questions before arriving at a decision whether or not to prosecute."

[65] See *Kennedy v. Lord Advocate*, 2008 SLT 195 granting decree reducing the decision of the Lord Advocate of 15 June 2006 to refuse to order an inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and *Kennedy v. Lord Advocate (No. 2)* [2009] CSOH 1 where the Lord Ordinary pronounced a further decree in the same case in the following terms:

> 'Declarator that the petitioner is entitled to an independent, effective and reasonably prompt inquiry into the death of [her late mother Mrs. Eileen O'Hara/her late husband David Charles Black], in which the deceased's next of kin may be involved to the extent necessary to ensure compliance with their rights under Article 2 of the European Convention on Human Rights, and during which they can be legally represented; and that any continuing failure to hold such an inquiry is incompatible with Article 2."

[66] Christine M. Korsgaard "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in Reath, Herman and Korsgaard (eds.), *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge: Cambridge University Press, 1997) at 297.

6.2 As we have seen, one way in which concerned individuals have conscientiously sought to resolve their dilemma of an apparent conflict between the requirements of domestic law and their perceived requirements of justice on the issue of the stockpiling of nuclear weapons in the United Kingdom has been their attempt, in their prosecutions for direct action protests, to rely on customary international law before the courts in Scotland. These protesters have sought to use international law in such a way as to provide them with a lawful defence against their prosecution for direct actions which they have taken by way of protest against - and in order to highlight their claims as to - the unlawfulness of the State's own actions in pursuing its policies of nuclear weapon stockpiling as part of a strategy of nuclear deterrence.

6.3 In *Lord Advocate's Reference (No. 1) of 2000)* legal submissions were made to the High Court of Justiciary on behalf of Ellen Moxley to the effect that in this intersection of public international law, constitutional law, humanitarian law, human rights law and criminal law the court might usefully adapt the classic tri-partite test of proportionality known in European law (and which was originally developed in German domestic law to test the lawfulness of police action) to set out the conditions for any possible "citizen intervention necessity" defence. The proportionality test would mean that such a defence would only be available in circumstances where it can be said that:

(i) the action of the State against which it was aimed was in fact illegal, whether under domestic or applicable international law;

(ii) the action was necessary in the sense that there was no legal reasonable alternative in fact available to the actor (for example because the relevant authorities had refused or refrained from enforcing the law in relation to the illegal act)

(iii) the actor could reasonably expect that the actions taken would be effective in at least impeding, if not wholly preventing, the illegal act;

(iv) the actions of the protesters or interveners were marked by a "fidelity to legal values" within our democratic polity in that that they were proportionate, involved no possibility of harm to individuals and no attempt was made to avoid detection in the doing of the act

6.4 It was submitted on behalf of Ellen Moxley that the corollary of admitting and applying the proportionality test to any such defence would be that there would clearly be no possibility of successfully relying upon it where:

(i) the State action complained of was not in fact illegal, or

(ii) that the action was unnecessary (in the sense that reasonable alternatives were open) or

(iii) that it could not have been reasonably be expected that it would impede the commission of the unlawful act, or

(iv) that the action was not one which was characterised by fidelity to legal values because, for example, it was done clandestinely with a view to escaping detection or

(v) because the action was disproportionate in the sense that its evil or undesirable effects (for example in resulting in physical harm to individuals) outweighed the evil that it was seeking to prevent.

6.5 The High Court of Justiciary rejected these legal submissions. And in general, all and any attempts to have the courts recognise any such conscientious "citizen intervener" defence against a criminal charge have been uniformly (and perhaps unsurprisingly) unsuccessful. The judges express their fear that anarchy will result should they allow for the possibility of individuals being authorised to break the law, in order to highlight the commission of greater State crimes. [67]

[67] See *R. v Margaret Jones and others* [2007] 1 AC 136 per Lord Hoffmann at 177-9

"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

6.6 There is an alternative strategy which might be used to bring before the domestic court the current state of international criminal law on matters of war and peace. This would be to request the State prosecution authorities to initiate criminal investigations and the prosecution of persons within the jurisdiction against whom a case might colourably be made of their complicity in recognised international crimes - in particular the crime of international aggression, or other crimes against peace.

6.7 Article 5 of the Rome Statute which set up the International Criminal Court (the ICC) includes the international crime of aggression in the list of serious offences – "the most serious crimes of concern to the international community" – over which the ICC has jurisdiction. But the Rome statute also provides, in Article 5(2), that

> "the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."

What this means is that the ICC is precluded from exercising jurisdiction over the crime of aggression unless and until the assembly of States that ratified the Rome Statute passes an amendment to the Statute defining the crime of aggression. This has not been done. The result has been an international political stalemate the crime of aggression does not yet fall within the purview of the ICC.

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conventions....

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."

6.8 In any event the ICC will *not* adjudicate on a crime enumerated in its Statute unless it is satisfied that the "national authorities are 'unwilling or unable' to carry out a genuine investigation and, if appropriate, prosecution." The ICC is intended to supplement or complement national criminal justice systems. Accordingly the jurisdiction of the ICC need not be called upon where those national criminal justice systems are effective in the prosecution of international crimes. And as the House of Lords noted in its decision in *R v. Margaret Jones* the parameters of the crime of aggression are sufficiently well-known for it to be capable of being considered a crime in domestic law. The only reason they said that it is not yet a prosecutable offence in English law is because the Westminster Parliament has not yet made specific provision for its incorporation into the domestic legal system. But such considerations do not apply (or, at the very least, do not apply with the same force) within the Scottish criminal justice system, given that Scots criminal law - based as it is on the common law – still allows for the incorporation of new crimes into the law by judicial *fiat* rather than requiring in all cases specific Parliamentary enactment.

6.9 Accordingly it would appear to be at least competent for the prosecution authorities in Scotland, if so advised, to raise prosecution in Scotland in respect of the international crime of aggression. Insofar as the Scottish prosecution authorities fail or refuse to do so where there are otherwise reasonable grounds for so proceedings, it would seem in principally that such a decision might itself be the subject of challenge before the courts by way of judicial review. It has to be said, however, that the judges in Scotland are, if anything temperamentally, culturally and institutionally even more conservative than their English counterparts. As the late Professor Bill Wilson of Edinburgh University once observed:

> "It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it. … The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function." [68]

[68] W. A. Wilson "The progress of the law 1888-1988" (1988) *Juridical Review* 207 at 231

6.10 So the likelihood of any such challenge having any immediate success, at least before the judges in Scotland, would not be great. However, given that judicial review is a matter of civil law in Scotland, there would remain the possibility of taking the case, as a matter of constitutional right without the need for leave of any court, [69] on appeal to the House of Lords, or its replacement the UK Supreme Court. Neither the House of Lords (nor the UK Supreme Court) would be bound by their previous decision in *R v. Jones* since this would be an appeal from Scotland on a matter ultimately of the incorporation of crimes under customary international law into Scots criminal law.

6.11 Unlike the situations pertaining in their decisions in *R v. Jones* and *R (Gentle) v. Prime Minister* their Lordships would be faced in any such appeal directly with the question as to the lawfulness under domestic law of decisions made by the governing powers to prepare for war (in the case of the Trident stockpiling) or to go to war (in the case of Iraq). We might then at last learn from the highest court in the land whether such official decisions pertaining to war which can be said to fall within the ambit of the "crime of aggression" for the purposes of customary international law, might also constitute - for the purposes of the domestic criminal law of the northern part of the United Kingdom at least - an prosecutable breach of the (international) peace. [70]

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[69] See however the critical comments of Lord Brown of Eaton-under-Heywood in the House of Lords appeal from the Court of Session in *Buchanan v. Alba Diagnostics Ltd.*, 2004 SC (HL) 9 at paragraph 41 on the lack of any leave requirement for appeals in civil matters from Scotland to the House of Lords:

> "For the reasons given by my noble and learned friend Lord Hoffmann I too would dismiss this appeal. I add only that *it seems to me a great misfortune for Mr Buchanan that he was able to bring this appeal before your Lordships House without leave. Had leave been required assuredly it would have been refused and Mr Buchanan thereby saved a very great deal of expense*."

Compare however the pre-Union Scottish Parliament's Claim of Right of 1689 which declares that:

> "*it is the right and privilege of the subjects to protest for remeed of law to the King and Parliament against Sentences pronounced by the Lords of Session* providing the same do not stop Execution of these sentences"

[70] See in this regard Article 1(1) of the United Nations Charter:

> "1. The purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and *for the suppression of acts of aggression or other breaches of the peace*, and to bring about by peaceful means, and in conformity with the principles of justice and international law, *adjustment or settlement of international disputes or situations which might lead to a breach of the peace*"