Neutral Citation Number: [2004] EWCA Crim 1981

Case No: 2004/2759/D

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BRISTOL CROWN COURT
GRIGSON J
T2003337041 TO 45

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2004

Before :

LORD JUSTICE LATHAM
MR JUSTICE GIBBS
and
HIS HONOUR JUDGE RICHARD BROWN DL

- -

Between :

JONES & MILLING, OLDITCH & PRITCHARD, AND RICHARDS	**Appellant**
- and -	
GLOUCESTERSHIRE CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

James Lewis, QC & James Hines (instructed by **The Stokoe Partnership**) for the **Appellants Jones & Milling**
Vaughan Lowe & Alison McDonald (instructed by **Bindman & Partners**) for the **Appellants Olditch & Pritchard**
Keir Starmer, QC & Hugo Charlton (instructed by **The Stoke Partnership**) for the **Appellant Richards**
Prof Malcolm Shaw QC , Mark Ellison & Peter Blair (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates : 29/30 Jun 04

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Judgment

Lord Justice Latham:

Introduction

1. These appeals arise out of rulings given by Grigson J at a preparatory hearing under the provisions of Section 29 of the Criminal Procedure and Investigations Act 1996 on the 12th May 2004. Those rulings relate to a common issue raised in the three prosecutions with which we are concerned, namely the extent to which the defendants in the proceedings can rely on their beliefs as to the lawfulness of the United Kingdom's actions in preparing for, declaring, and waging war in Iraq in 2003.

The background facts.

2. i) R –v- Jones and Milling

These defendants are jointly indicted with conspiring together, contrary to Section 1(1) of the Criminal Law Act 1997 on the 13th March 2003, to cause criminal damage.

At about 2145hrs on that day, the defendants were discovered together by a senior USAF airman in the secure fuel installation complex inside the perimeter fence of RAF Fairford, which was at the time a 24 hour operational military airbase and NATO stand-by base, as well as being home to Allied US visiting forces. They were in possession of tools which had enabled them to enter the airbase, and which they intended to use to cause damage to equipment on the airbase. By the time that they were apprehended, they had damaged three refuelling trucks, two munitions trailers and their tractor units. When arrested they both stated that it was their intention to prevent the United States and the United Kingdom from using the base for what they described as a launching pad for war crimes.

ii) R –v- Olditch and Pritchard

These defendants are charged with two counts. The first count is conspiracy contrary to Section 1(1) of the Criminal Law Act 1977 between the 16th and 19th March 2003 to cause criminal damage. The second is having articles in their custody or control on the 18th March 2003 intending to destroy or damage property in a way which they knew was likely to endanger the lives of others contrary to Section 3(b) of the Criminal Damage Act 1971.

At about 5.25am on the 18th March 2003, the defendants were discovered lying in the grass inside the perimeter of RAF Fairford. They both had rucksacks in their possession containing items which were clearly intended to cause damage, although no damage had in fact been occasioned before they were arrested. Each of them asserted in prepared typed statements that they were intending to take action against the bombers on the airbase in such way as to immobilise them if possible on the grounds that the United Kingdom and the United States of America were acting unlawfully.

iii) R –v Richards.

This defendant is charged with three counts. The first count is attempted arson on the 18th March 2003 being reckless as to whether the life of another would thereby be endangered. The second is having articles in his custody or under his control on the same date intending that they should be used to destroy or damage property in a way which he knew was likely to endanger the lives of others contrary to Section 3(b) of the Criminal Damage Act 1971. And the third is Criminal Damage contrary to Section 1(1) of the Criminal Damage Act 1971.

The defendant was discovered at 0210hrs on the 18th March 2003 just outside the perimeter fence of RAF Fairford close to where a section of the perimeter fence had recently been cut. He was in possession of a rucksack in which petrol and washing-up liquid was found mixed together, which he said were intended to set fire to the wheels of a bomber. He stated that he had intended to take this action in order to stop a crime in that the bombers were taking part in an illegal war.

The Preparatory Hearing

3. The defence statements for the purposes of the trials were based on the assertion that the attack on Iraq was an unlawful act which they were attempting to prevent. As a result, each submitted that they were entitled to rely upon three defences:

a. duress of circumstance/necessity;

b. the defence of lawful excuse under Section 5(2)(b) of the Criminal Damage Act 1971, which provides as follows:

> "A person charged with an offence to which this section applies shall …. be treated as having a lawful excuse –
>
> ….
>
> (b) if he destroyed or damaged or threatened to destroy or damage the property in question, or in the case of a charge of an offence under Section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right to an interest in property which was or which he believed to be vested in himself or another at the time of the act or acts alleged to constitute the offence he believed –
>
> (i) that the property, right or interest was in immediate need of protection, and
>
> (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances:

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

c. the prevention of crime under section 3 of the Criminal Law Act 1967, which provides:

> "A person may use such force as is reasonable in the circumstances in the prevention of crime."

4. The prosecution sought rulings from the judge in relation to the following questions:

> "(i) Can a defendant facing criminal proceedings in an English court challenge the legality of the use of force by the UK Government and/or the government of the USA and other states, against Iraq in March 2003 in reliance upon UN Security Council Resolutions? (justiciability)"
>
> a) If the answer to question 1 is "No", is the defence of necessity available to the defendant as a matter of law, on the most favourable view to him on the material available and likely to be available?
>
> b) If the answer to question (i) is "No", is the defence of use of reasonable force in the prevention of crime under Section 3 of the Criminal Law Act 1967 available to either of the defendants on the most favourable view to them on the material available or likely to be available?
>
> ii) Is the defence of lawful excuse under Section 5 of the Criminal Damage Act 1971 available to the defendant on the most favourable view to him of the material available or likely to become available?
>
> iii) Does the defence provided by Section 3 of the Criminal Law Act 1967 extend to the reasonable use of force by them against the person?"

5. The judge declined to give a ruling on the basis of any assumptions as to the facts. No one suggests that he was wrong to take that course. As far as the question relating to Section 3 of the Criminal Law Act was concerned, that confined itself in argument to an issue of what, if any, crime or crimes could be relied upon by the defence.

<u>The judge's decision</u>

6. The judge concluded that the issue of the legality of the war was not justiciable in domestic courts on the basis that the United Kingdom government was exercising its prerogative powers in relation to foreign policy and the deployment of the armed forces, which were issues into which the courts would not enquire. As far as the defence under Section 5 of the Criminal Damage Act 1971 was concerned,

he concluded that the only matters which were relevant were those expressly set out in the sub-section, so that a defendant had a lawful excuse if he acted in order to protect property, and at the time he so acted he believed that the property was in immediate need of protection and that the means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances as the defendants believed them to be. He ruled that there was no requirement that the damage to the property which the defendants sought to prevent was the result of an illegal act. As far as Section 3 was concerned, he ruled that this must mean a crime in domestic law. He rejected the defendants' submissions that there was an international crime of aggression which was triable in domestic courts. But he ruled that under the International Criminal Court Act 2001, certain war crimes committed by individuals were triable in domestic courts, so that the defendants were entitled to argue that they had not acted unlawfully in so far as they were able to establish that they believed that any force they used was reasonable force to prevent such offences from being committed. As to necessity or duress of circumstance, he said as follows:

> "49. As it seems to me, for the defence of necessity to be available, a defendant must show:
>
> (i) that he committed what would otherwise be an offence of criminal damage in order to prevent an act of greater evil. There is no requirement that the act of greater evil should be unlawful, nor that it take place within the jurisdiction.
>
> (ii) that the greater evil was directed to those whom the defendant reasonably believed he had responsibility or for whom the situation made him responsible. It would be a matter for the jury to decide whether a defendant could reasonably believe he was responsible for the citizens of Iraq against whom his own government had decided or might decide (in the exercise of prerogative power) to use force.
>
> (iii) that the actions were reasonable and proportionate to the evil to be avoided.
>
> (iv) that on the facts the defendants believed them to be he was driven to act as and when he did to avert harm that was about to happen."

7. He concluded that the actual legality or illegality of the war against Iraq was accordingly not a relevant issue in the trial. He gave leave to each of the defendants to appeal against his ruling on justicability, and gave leave to both the prosecution and the defence to appeal his rulings on the specific defences.

The Appeals

8. The defendants have appealed against the judge's ruling on justiciability and his conclusion that the alleged crime of aggression is not a crime for the purposes of Section 3 of the Criminal Law Act 1967. The prosecution has appealed against his ruling in relation to the defences of duress of circumstance and lawful excuse under Section 5 of the Criminal Damage Act 1971 in so far as that permitted the jury to take into account in determining the reasonableness of the defendants actions the inevitable consequences of a declaration of war. The prosecution do not appeal against the judge's ruling that the jury is entitled to consider a defence based upon the prevention of alleged offences under the International Criminal Court Act 2001.

The Issues

9. We have heard extensive argument on domestic and international law, a substantial proportion of which has been directed to the issue of justiciability. That is a difficult and controversial topic which has already been the subject of a decision of this court in relation to what was then the threatened war in Iraq in *The Campaign for Nuclear Disarmament –v- The Prime Minister of the United Kingdom & Others* [2002] EWHC 2759 (QB). The Campaign for Nuclear Disarmament sought to obtain in judicial review proceedings a declaration as to the true meaning of Resolution 1441 adopted by the United Nations Security Council on the 8th November 2002 and a declaration as to whether or not it authorised States to take military action in the event of non-compliance by Iraq with its terms. A Divisional Court of three, presided over by Simon Brown LJ, dismissed the application. The Court held that the questions raised by the allegation were non-justiciable. Simon Brown LJ gave as his reasons, firstly that the court had no jurisdiction to declare the true interpretation of an international instrument which had not been incorporated into English domestic law and which it was unnecessary to interpret for the purposes of determining an individual's rights or duties under domestic law; secondly that the court would in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international security or defence.

10. Maurice Kay J gave as his principal reason for rejecting the claim the fact that the subject matter of the application was one which was within forbidden area for the courts, citing a passage from the speech of Lord Fraser in *CCSU –v- Minister for the Civil Service* [1985] AC 374 at page 398:

> "Many of the most important prerogative powers concerned with the control of the armed forces and with foreign policy and with matters which are unsuitable for discussion or review in the Law Court."

11. Richards J considered that the claim was an attempt to limit the Government's freedom of movement in relation to the actual use of military force, so that took it squarely into the fields of foreign affairs and defence. He said at paragraph 59:

> "In my view it is unthinkable that the national courts would entertain a challenge to a government decision to declare

> war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision."

12. This echoes a comment by Simon Brown LJ at paragraph 15:

> "CND must inevitably recognise that any future decision to take military action would plainly be beyond the courts' purview."

13. These passages neatly identify the respective arguments put before us. The defendants submit that unlike the CND, they are not asking for a declaratory judgment, but are seeking to obtain the court's ruling on matters which affect their rights or duties under domestic law. It is accordingly necessary for the court to enquire into the lawfulness of the government's actions in declaring war; or to be more exact, it will be necessary for the judge to direct the jury as to the ingredients of the international crime of aggression, which is the basis of the defendant's contention that the Government's action was unlawful, so as to enable the jury to determine whether or not the defendants' beliefs as to the facts justify the conclusion that that crime was about to be committed. It is further submitted that to assert that that enquiry was non-justiciable on the grounds that it related to the exercise of the executive's undoubted prerogative powers in relation to foreign affairs and the disposition of armed forces would be, in effect, to grant the executive immunity from the criminal law. The prosecution on the other hand submit that this would involve the court through the respective roles of the judge and the jury in the trial, in enquiring into subject matter which is quintessentially incapable of being explored by the courts for the reasons given by the judges in the *CND* case.

14. There is, it seems to us, considerable force in the argument that the *CND* case does not, in itself, provide the answer to the issue of justiciability in the present case for both of the fundamental reasons advanced by the defendants. But that issue simply does not arise if the judge's other rulings are correct. If he is right that under Section 3 of the Criminal Law Act 1967, a crime must be a crime in domestic law and the alleged international crime of aggression was not part of domestic law, that answers the question in relation to the proposed defence under Section 3. If he is right that the lawfulness or otherwise of the executive's actions were irrelevant to the jury's considerations under Section 5 of the Criminal Damage Act, and in relation to the defence of duress of circumstance, again the issue simply does not arise. It seems to us, therefore, that it is essential to determine the correctness of those parts of the ruling by the judge in order to determine whether the issue of justiciability is one which needs to be addressed, and if so its context.

Section 3 of the Criminal Law Act 1967

15. The first question is whether or not the word "crime" in Section 3 means a crime in domestic law, or has some wider meaning. Mr Lewis, QC on behalf of Jones and Milling submits that we should give a broad meaning to the word. He has referred us to Smith and Hogan's Criminal Law, 10th Edition, in which Sir John

Smith cites at page 19, from the judgment of Lord Atkin in *Proprietary Articles Trade Association –v- A-G for Canada* [1931] AC 310 at 324:

> "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?"

16. Further on at page 22, Sir John Smith says that when asking the question how, in effect, is a judge to determine whether or not any actions are criminal; the answer must be:

> "Surely, only by ascertaining whether the legislature (or the courts in the case of a common law crime) have prescribed that the proceedings shall be criminal; and this must depend, primarily, upon whether it is intended to be punitive."

17. It seems to us that the citation from Smith and Hogan begs the question. Whilst accepting that an international crime may exist independently of any procedure proscribed by general consent or treaty for their trial and punishment, it can only be a crime if the consequences to the perpetrator amount to punishment, which can only be the case if what is described as the international crime is, in the absence of any international tribunal given jurisdiction in relation to that crime, triable and punishable in domestic law.

18. There is no definition of "crime" in the Criminal Law Act. But is seems clear to us that the section, which gives protection in domestic law to those acting to prevent crime can only have intended that protection to apply where a criminal offence in domestic law is involved. If it were otherwise, it is difficult to see how any satisfactory definition of the word "crime" could be arrived at. It could not be intended to refer to something which would amount to a crime in another jurisdiction, for that would give extra territorial effect in England to the criminal laws in another jurisdiction. In the case of an alleged international crime, it could only amount to a crime on Sir John Smith's formulation if it were punishable somewhere. If it was punishable in another jurisdiction but not in the United Kingdom, this would give rise to the same objection.

19. Whether the alleged international crime of aggression is a crime in domestic law depends upon the effect of public international law rules in English Law. Sir William Blackstone in his Commentaries on the Laws of England (1769) (Book 4 Public) Chapter V at page 66 deals with what he describes as Offences against the Law of Nations:

> "The law of nations is a system of Rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world, in order to decide all disputes to regulate all ceremonies and civilities and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to

> each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and in time of war do as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest. But such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual contact or treaties between the respect of community, in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.
>
> In arbitrary states this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land."

20. In *West Rand Central Gold Mining Company –v- Rex* [1905] 2 KB 391 at page 406, Lord Alverstone CJ said:

> "The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to try questions to which doctrines of international law may be relevant. But any doctrines there invoked must be ones really accepted as binding between nations, and the international law sought to be applied, must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it."

21. In *Trendtex Trading –v- Bank of Nigeria* [1977] 1 QB 529 it was accepted that the principles of international law relating to sovereign immunity were part of English law. The debate was over the extent to which that was a static concept.

22. In that context, Lord Denning said at page 554 G:

> "Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law."

23. And finally, if any further citation on this were necessary, Nourse LJ said in *Maclaine Watson & Co –v- Department of Trade* [1988] 3 WLR 1033 at page 1115 H:

> "For up to two and a half centuries it has been generally accepted amongst English judges and jurists that international law forms part of the law of this country. In all events if it can be shown there is an established rule which, first, is derived from one or more of the recognised sources of international law and secondly, has already been carried into English law by statute, judicial decision or ancient custom."

24. There is no doubt, therefore, that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty. The second requirement referred to be Nourse LJ, namely that it has been carried into English law by statute, judicial decision or ancient custom is, it seems to us, more doubtful. Whilst clearly its recognition by statute will ipso facto, give it effect, in so far as it is suggested that there must be either a previous judicial decision or ancient custom, in other words, in effect, some clear acceptance by the court of the existence of the rule as part of English law, that would emasculate the principle. It would in effect prevent any clearly established rule of international law becoming part of English law other than by statute. In our view, the question as to whether or not a rule of international law forms part of English law is governed by the principle of certainty; and the question as to whether or not it constitutes a crime depends upon an analysis of whether or not a breach of the rule can properly result in penal consequences. The mere fact that an act can clearly be established to be proscribed by international law, and is described as "a crime" does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment.

25. The defendants submit that there are essentially five recognised international law crimes which fall into that category. These are war crimes, crimes against humanity, crimes against peace, which include the crime of aggression, piracy and torture. It is submitted that these are all crimes which are recognised in domestic law and are, accordingly, crimes for the purposes of Section 3 of the Criminal Law Act.

26. The defendants have only, however, been able to identify one case as support for the proposition that any of those "crimes" is, merely by virtue of international law, a crime in English law. That is the case of *In re Piracy jure gentium* [1934] AC 586. That case arose out of charges of piracy brought against Chinese Nationals who had pursued and attacked a cargo junk. They were indicted in Hong Kong for the crime of piracy and found guilty subject to the following question of law:

> "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred."

27. The full court of Hong Kong came to the conclusion that robbery was a necessary ingredient of the offence of piracy and the accused were acquitted. The question of the correctness of that order was submitted to the Privy Council, which concluded that a frustrated attempt to commit piratical robbery was equally piracy jure gentium.

28. In considering that question, the Board approached the question on the basis that the offence that was charged was not the domestic offence of piracy as defined in domestic law that is, the statutory laws applying to Hong Kong, but was the international law of piracy. Viscount Sankey stated that the question therefore had to be determined by reference to the principles of international law. He said at page 589:

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals, are left to the municipal law of each country."

29. And later at page 594, having considered domestic authorities in relation to the definition of piracy, he said:

> "These, however, are immaterial for the purpose of this case, because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country but what is piracy jure gentium."

30. We accept that this case is authority for the proposition that a rule of international law is capable of being incorporated into domestic law so as to found an indictment which, if proved, can result in punishment. To that extent we accept the submission that international law is capable of being incorporated into English law so as to create a crime punishable in domestic law. That is clearly so in relation to piracy, which has a history of proscription in international law which was established as early as the 16th Century. For our purposes it is important to note that the decision of the Board was based upon the analysis and development of the concept of piracy over the centuries, so that early statements of the law which suggested that an actual robbery should be proved were no longer valid. At page 600 Viscount Sankey said:

> "A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juris consultances were addressing their opinions."

31. This is an example of the principle which Lord Denning affirmed in *Trendtex,* namely that English law reflects the state of international law from time to time, and does not apply the principle of binding precedent to a determination of its content.

32. On the basis of that authority, the defendants submit that the English courts can and should recognise the international crime of aggression as a crime in domestic law. They submit that it is clearly established as a crime, above all by the proceedings of the Nuremberg Tribunal which was established by the Agreement and Charter which was the exercise of the sovereign and legislative power of the countries to which the German Reich unconditionally surrendered. In the decision as to jurisdiction given by the Nuremburg Tribunal, reported in 41 AJIL (1947) 172, the Tribunal, having set out the provisions of the *Kellogg-Briand Pact* which was binding on the 63 signatories, including Germany, Italy and Japan, and renounced war as an instrument of national policy, said at page 218:

> "In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy, necessarily involves the proposition that such a war is illegal in International Law; and that those who plan and wage such a war, with its inevitable and terrible consequences are committing a crime in so doing."

33. There was debate before us as to the extent to which the Tribunals which were set up thereafter to try individuals were exercising jurisdiction as courts exercising jurisdiction under the Agreement and Charter, or were domestic courts applying international law principles. We were referred, for example, to the decision of the British Military Court in Holland in the case of *In Re Sandrock and Others* 13 International Law Reports 297. It was submitted that this was a court constituted under an Order in Council and was accordingly a domestic court.

34. We do not consider that we need to resolve that issue for the purposes of the present case. For there is no doubt that international law has moved on from the position immediately following the Second World War. The legal landscape is now very different. Pursuant to the Rome Statute of the International Criminal Court, that court has jurisdiction under Article 5 over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Genocide, crimes against humanity and war crimes are defined. The crime of aggression is not. An introductory note to a press release from the court dated the 16th July 2003 states:

> "The court cannot exercise jurisdiction over alleged crimes of aggression until the crime is defined and the conditions for the exercise of jurisdiction are set out."

35. This reflects the position which had been reached in September 2003 when the report of the Second Session of the Assembly of States Parties to the International Criminal Court set out in Annexe II a discussion paper on the definition and elements of the crime of aggression prepared by a working group. The definition of the crime of aggression was put forward for debate in the following terms:

> "1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a state, that person intentionally and knowingly orders or participates actively in the planning, preparation and initiation or execution of an act of aggression which, by its character gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.
>
> Option 1:
>
> Add "such as" particular war of aggression or an act which has the object or result of establishing a military occupation of, or annexing the territory of another state or part thereof."
>
> Option 2:
>
> Add "amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of or, annexing, the territory of another state or part thereof.
>
> Option 3:
>
> Neither of the above.
>
> 2. For the purposes of paragraph 1, "acts of aggression" means an act referred to in United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 which is determined to have been committed by the state concerned,
>
> Option 1: Add "in accordance with 4 & 5"
>
> Option 2: Add "subject to a prior determination by the Security Council of the United Nations.
>
> ….."

36. The present position in domestic law, so far as statutory provisions are concerned, is that the International Criminal Courts Act 2001 has brought into effect in the United Kingdom the offences defined under the Rome Statute. This Act, accordingly, gives a statutory basis for the incorporation of those three crimes in domestic law in the same way as the Geneva Conventions Act 1957 did in relation

to breaches of the Geneva Convention, and the Criminal Justice Act 1988 sections 134, and 135 did in relation to the international crime of torture.

37. We were referred by both the defendants and the prosecution to the decision of the House of Lords in *R –v- Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte* [2000] 1AC 61, sometimes described as *Pinochet No 3*, in the context of the crime of torture. The defendants submitted that properly understood, the decision in this case depended on the extra territorial provisions of the Criminal Law Act 1988 which was the basis for the recognition that charges relating to matters after the passing of that Act laid in Spain were capable of constituting offences under domestic law. The House recognised at least implicitly that torture was an international crime capable of constituting a crime under domestic law, albeit subject to common law jurisdiction or limits. In fact only Lord Millett expressly asserted that torture was always an international crime having effect in domestic law.

38. We accept entirely that the majority of their Lordships in *Pinochet No 3* decided the issue with which we are concerned on the basis that it was only when the Criminal Law Act came into force that domestic law had extra-territorial effect. And we also accept that Lord Hope, with whose speech Lord Hutton agreed, appeared in a passage at page 237 D to accept that the international crime of torture was a crime in domestic law albeit without extra-territorial effect prior to the Criminal Law Act. The decision did not, however, answer the question as to the status of the international crime of aggression, or its effect in domestic law.

39. The only modern domestic law decision to which we have been referred which deals with the effect of a rule of international customary law in this context is the case of *Hutchinson –v- Newbury Magistrates Court* (2000) ILR 499. In that case the appellant was convicted of criminal damage to a fence at the Atomic Weapons Establishment at Aldermaston. Her conviction was upheld on appeal by the Crown Court; and she appealed by way of case stated to the Divisional Court. She maintained that she had acted in order to halt the production of Trident nuclear warheads at Aldermaston and contended that the threat or use of nuclear weapons was contrary to customary international law as reflected in the Advisory Opinion of the International Court of Justice in the *Case Concerning the Legality of the Threat or Use of Nuclear Weapons* (1996) 110 ILR 161.

40. In giving the judgment of the Divisional Court, Buxton LJ, having set out the relevant parts of the Advisory Opinion, concluded that there was no clearly established rule, but nonetheless went on to discuss what would have been the effect in domestic law had such a rule been capable of identification. At page 506 he said:

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

> Mr Mercer contended, after some hesitation, that the rule that he had formulated was in English law a rule of substantive criminal law, making conduct by the Crown or British Government in contravention of it a criminal act. That is a very striking submission in view of the context of the rule in its terms. I say nothing in passing as to the susceptibility of the Crown to criminal process. It is also in my view impossible to reconcile that contention with the debate *Pinochet No 3* which concluded, illuminatingly subject to the specific dissent on this point by Lord Millet, that although state torture had long been an international crime in the highest sense (to adopt the formulation of Lord Browne-Wilkinson [2000] 1AC page 198 A-F) and therefore a crime universally in whatever territory it occurred, it was only with the passing of section 134 of the Criminal Justice Act 1998 that the English Criminal Courts acquired jurisdiction over "international", that is to say extra-territorial, torture.
>
> I hold, therefore, that Mr Mercer is wrong on this point, and that the unlawfulness of the United Kingdom Governments conduct that is established in English Law by the transformation of the rule of International Law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law. What exactly that nature is was never satisfactorily explained to us, despite the courts efforts to seek elucidation."

41. Domestic courts have, however considered the effect of a gross breach of international law in English civil law in the case of *Kuwait Airways Corporation – v- Iraqi Airways Company (Nos 4 and 5)* [2002] 2AC 883. The English courts were there concerned with the effect in English law of an Iraq decree after the annexation of Kuwait by Iraq as to the ownership of certain assets of the Kuwait Airways Corporation in an action for conversion. The question arose in the context of the public policy rule as to the recognition of the provisions of foreign law. It was accepted that the courts of this country could take into account infringements of human rights as an exception to the general rule that the courts of this country would not enquire into the legality of decrees of a foreign state. But it was submitted that that did not extend to breaches of international law. The House of Lords held that the English court could do so where there had been a breach of an established principle of international law committed by one state against another when the breach was plain, and indeed acknowledged: see the speech of Lord Nicholls at page 1081A. In determining that question, the House had regard to the fact that the Iraqi invasion of Kuwait was a clear breach of the United Nations Charter and that the actions of the Iraqi government in passing the relevant decree were clear breaches of a number of resolutions of the United Nations Security Council. The House therefore held that it was entitled to conclude that to give effect to the decree would be contrary to public policy.

42. Although not spelt out expressly as being justified on the grounds that Iraq had been guilty of the international crime of aggression, that was the effect of the decision. It seems to us that this case is therefore authority for the proposition that the rule of international law underlying the concept of the international crime of aggression is capable of having effect in domestic law. But the case does not, it seems to us, go further than acknowledge in accordance with the principles that we have already discussed, that the rules of international law have effect in domestic law. The question that we have to determine is whether or not the relevant rules have effect so as to create a crime of aggression in English law. That requires us to consider the extent to which the rule or rules in question can be said to have been recognised in such a way as to give rise to criminal liability in circumstances such as the present. In determining that question, it seems to us that we have to have regard to the way in which the international community has approached the issue in the context of an individual's responsibility for breaches of such rules and his or her amenability to criminal sanctions.

43. In that context it is necessary to return to the discussion paper to which we have referred in paragraph 31 above. As we have already noted, this is the paper which identified some of the problems which prevent the International Criminal Court from having jurisdiction over the crime of aggression. One of the preconditions to the exercise of the Court's jurisdiction in the definition is, by paragraph 4, that the prosecutor has to ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned. By paragraph 5, one option for discussion enquires whether or not the court can proceed with the case in the absence of any determination by the Security Council or whether it has to dismiss the case. It is difficult to see in these circumstances how it can be said that there is, accordingly, a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law, where there is no consensus as to an essential element of the crime. It follows that, whatever other effects the international rules as to the crime of aggression may have, they cannot constitute a crime for the purposes of Section 3 of the Criminal Law Act, and the judge was right to rule accordingly.

Section 5(2) (b) of the Criminal Damage Act 1971

44. The relevant provisions of this sub-section have been set out by us in paragraph 2 above. The effect of the provisions is that a person is treated as having a lawful excuse if:

i) he acted to prevent damage to property, whether his own or another's. This test requires an answer to the question: "Could the act done be said to be done in order to protect property?" see *R –v- Hunt* 66 Cr App R 105,

ii) at the time he acted, he believed that property was in immediate need of protection, and

iii) he believed that the means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

iv) In determining the answers to ii) and iii), it is immaterial whether the belief was justified, provided that it was honestly held.

45. It is self evident that this provision, on its face, gives considerable latitude to those who are minded to take direct action in the honestly held belief that in so doing they are protecting the property of others. As we have indicated in i) above, the only objective element which the jury would have to consider is whether it could be said that on the facts, as believed by the defendant, the criminal damage alleged could amount to something done to protect another's property: see the judgment of Lord Lane, approving this courts judgment in *R –v- Hunt* in *R –v- Hill and Hall* (1989) 89 Cr App R 74 at page 79.

46. Professor Shaw QC on behalf of the prosecution has sought to persuade us that there is a further objective requirement, namely that, on the facts as believed by the defendant, those facts would establish that the threat was of unlawful damage to his or another's property. He submits that the defendant would not be entitled to take action to prevent damage which would be the inevitable consequences of warfare, provided always that that damage did not amount to a war crime. If it were otherwise, he submits the person could invoke the defence under Section 5 if he damaged or attempted to damage any equipment being used by, for example, a local authority in order to exercise its lawful powers to abate a public nuisance.

47. Whilst there are clearly strong policy arguments for imposing such a further restriction on the availability of the defence, the fact is that the statute does not so provide. Subject to the one objective element to which we have referred, the court and the jury are concerned simply with the question of a defendant's honestly held beliefs. It follows that no issue can arise in relation to this defence which involves consideration of the legality of the war in Iraq.

Necessity.

48. This defence has consistently given rise to difficulties in its application. As Professor Glanville W Williams said in *Criminal Law, The General Part* at page 570:

> "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision."

49. Despite that difficulty, it is a long established defence; and the court has to grapple with the problem of how its essential elements are to be applied in any given case. One of the difficulties for us is that Grigson J declined to give his rulings on the basis of any assumed facts; and neither the prosecution nor the defendants have sought to appeal against his decision on the basis that that approach was wrong. It follows that the argument must, of necessity, be at the level of generalities, which will need to be applied by the judge at the trial to the facts as they emerge.

50. The general principles were stated by Simon Brown J giving the judgment in the court of Appeal in *R –v- Martin (Colin)* [1989] 1 All ER 652 at 653 to 654:

> "First, English law does, in extreme circumstances, recognises a defence of necessity. Most commonly in this defence arises as duress, that is pressure on the accused's

> will from the wrongful threats or violence of another. Equally, however it can arise from other objective dangers threatening the accused or another. Arising thus it is conveniently called "duress of circumstances". Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, compelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness showing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established."

51. This definition was adopted by Rose LJ in *R –v- Abdul-Hussain* [1999] Crim LR 570. In that case, the court identified eleven propositions. These were that:

i) Unless Parliament provides otherwise, the defence of duress, whether by threats or from circumstances is generally available in relation to all substantive crimes except murder, attempted murder and some forms of treason.

ii) The courts have developed the defence on a case-by-case basis and its scope remains imprecise.

iii) Imminent peril of death or serious injury to the defendant, or those to whom he has responsibility, is an essential element of both types of duress.

iv) The peril must operate on the mind of the defendant at the time when he commits the otherwise criminal act, so as to overbear his will, and this essentially is a question for the jury.

v) But the execution of the threat need not be immediately in prospect.

vi) The period of time which elapses between the inception of the peril and the defendant's act, and between that act and execution of the threat, are relevant but not determinative factors.

vii) All the circumstances of the peril including the number, identity and status of those creating it, and the opportunities (if any) which exist to avoid it are relevant, initially for the judge and, in appropriate cases, for the jury, when assessing whether the defendant's mind was affected as in iv) above.

viii) As to vi) and vii), if Anne Frank had stolen a car to escape from Amsterdam and had been charged with theft, the tenets of English law would not have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door.

ix) There is no reason of principle or authority for distinguishing the two forms of duress in relation to the elements of the defence which have been identified.

x) The judgment in *R –v- Martin (Colin)* (supra) affords the clearest and most authoritative guide to the relevant principles and appropriate direction in relation to both forms of duress.

xi) Clauses 25 and 26 of the Law Commission's Draft Criminal Law Bill do not represent the present law (see *Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles* (1993) (Law Com No 218) (CM 2370) Appendix A). Accordingly reference to those provisions is potentially misleading.

52. In *R –v- Shayler* [2001] 1WLR 2206, Lord Woolf CJ giving the judgment of the court, approved the statements of the law set out in both the judgments to which we have referred. In paragraph 49 the court held that from those two decisions:

> "We extract the following ingredients as being required for the defence of necessity to be relied on:
>
> i) the act must be done only to prevent an act of greater evil;
>
> ii) the evil must be directed towards the defendant or a person or persons for whom he has responsibility or we would add, persons for whom the situation makes him responsible;
>
> iii) the act must be reasonable and proportionate to the evil avoided. We make the addition to ii) to cover by way of example, the situation where the threat is made to set off a bomb unless the defendants performs the unlawful act. The defendant may have not have (sic) had any previous connection with those who would be injured by the bomb, but the threat itself creates the defendant's responsibility for those who would be at risk if he does not give way to the threat."

53. After discussing the question of whether or not there is any distinction between the concept of duress and necessity, which the court considered at paragraph 55 had "correctly, been by and large ignored or blurred by the courts", the court said at paragraph 53:

> "So in our judgment the way to reconcile the authorities to which we have referred is to regard the defence as being available when a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody whom he reasonably regards himself as being responsible. That person may not be ascertained and may not be identifiable. However, if it is not possible to name the individuals before hand, it has at least to be possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant. The defendant has responsibility for them because he is placed in a position where he is required to make choice whether to take or not to take the action which it is said will avoid them being injured. Thus if that is to explode a bomb in a building and the defendant does not accede to what is demanded the defendant owes a responsibility to those who would be in the building if the bomb exploded."

54. The question that we have to determine is whether or not on the basis of these decisions, the court will have to grapple with the question of the legality of the government's decision to declare war on Iraq. The defendants say that it is necessary because that is the "evil" which they felt impelled to do their best to obviate by their actions. Alternatively, using the terminology of Simon Brown J in *R –v- Martin (Colin)*, it is only available to them if from an objective standpoint, they could be said to be acting reasonably or proportionately; and a determination of the legality of the war would be necessary in order to answer that question.

55. It seems to us, however, that this approach fails to put the defence in its proper context. Necessity is potentially a domestic defence to a domestic offence. We have already held that no domestic crime is engaged. The executive's action in declaring and waging war is, in itself, a lawful exercise of its powers under the prerogative. The court will accordingly have to consider the extent to which necessity might afford a defence to the defendants in the light of their beliefs on that basis. The extent to which their beliefs as to the facts will enable the defendants to establish any of the elements of the defence, in particular the requirement that they should be so acting in relation to people for whom they could reasonably regard themselves as being responsible is not a question we are called upon to answer.

<u>Conclusion.</u>

56. For the reasons we have given and save to the limited extent to which we have referred in the last paragraph, the question of the legality of the war in Iraq is not therefore a matter which arises in these cases. It is not, therefore necessary in order to deal with the rulings, to consider whether or not that issue is non justiciable. We will hear counsel as to what the consequential orders, if any, should be.