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

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

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

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

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

[42] *R v Jones*, 158–159.

[43] *R v Jones*, 162.

Now, given the extremely brief, unelucidated and declaratory way in which Bingham presents this rather astonishing (at first glance) state of exception, it is both very difficult to identify the reasons supporting, and yet very easy to extrapolate therefrom. As to the first, we might remark that the Lords' decision in *R v Knuller Pub.* pertained only to domestic criminal law, and did not consider international law. Different considerations might apply, whatever they may be. Hence Bingham's observation about legislative practice in relation to customary international law crimes. Moreover, as a judicial decision, it could be subject to a narrower reinterpretation or even overruling, as circumstances and the law change. As to the second, we might consider the general constitutional role of the common law courts in society that confers upon them an irrevocable kernel of power over public order, so much so that it seemingly allows them exceptionally to override the "democratic principle". And we could begin to consider just what type of facts and "compelling reasons" would justify an exceptional incorporation into domestic common law of an international law crime. We might also speculate whether a dualistic perception of national and international legal orders might again be at work, whereby the nature and scope of an international law crime engage courts and a justice system in a substantially different and constitutionally distinguishable way from domestic criminal law. While certain parallels and overlap may exist in ordinary circumstances, international criminal law is not necessarily bound to or by democratic, parliamentary criteria for law-making.

It is tempting to arrange these propositions within the conceptual divide between "validity" and "legitimacy". An approach which suggests that, but for legislation, customary international law is directly applicable as domestic law within the national legal order, characterises the legislative requirement and process as one conferring legal status on an already valid norm. Legislative approval represents a formal validity criterion here. The constitutional optic would refer to a recalibration of focus from international to national, to a legal norm passing largely unchanged in nature and substance through the constitutionally prescribed medium. Whatever the constitution may stipulate as the required path, whether legislature or courts or indeed some other state organ, the medium is a mere instrumentality in service of the legal norm which derives its legitimacy and authority elsewhere. The legitimacy of the law—at least for international law—does not originate in Parliament or in the courts. Hence the retention of some juridical power to create offences at common law speaks to a formal conception of the separation of powers, rather than a substantive one. On the other hand, there is the approach which conceives of Parliament holding all generative power for (criminal) law—without exception—so that whatever the status of international law, it can have no direct application without legislative approval. This would suggest that the interposition of a parliamentary criterion goes beyond mere formality criteria to the legitimacy of the norm itself as law. Hence converting international law into domestic law through statute and legislative power presents the constitutional optic as a transformative event which infuses (legal) meaning and value, as well as formal validity, legality. It converts "non–law" into "law".

The perspective on what counts as law obviously and inescapably prescinds from a national constitutional and legal order.

The constitutionalism optic therefore reminds us that we should be careful not to be led astray by the dualism concept and the view that it permits no rights not first adopted by municipal law. We should miss a crucial element of the relationship between the separation of powers and international law by focussing exclusively on some sort of normative disjunction. As with treaties, dualism does not necessarily imply the inapplicability of international law in the domestic legal system. What it does mean, as seen already in *The Zamora, Commercial and Estates Company of Egypt*, and *R v Keyn*, is that rights and duties purportedly originating or subsisting in the international plane enter the domestic through the optic of the national constitution. Those rights and duties must be seen to fit as law into the domestic legal system. And the manner of recognising and fitting them in must also occur in and through the current constitutional framework. This means to say more than simply a cryptic asseveration of the trivial propositions that the national legal system will decide how it treats norms of international law, and that the courts are primarily responsible for transliterating those norms. This is, at best, only one half of the story—and the last half at that. It omits inconveniently the matter of how those international norms are generated in the first place. It omits how the underlying values, ideas, interests, objectives, and such like, all making up the cortex, the guts, of the international norm are brought into the international plane. That is, the constitutional optic requires us to consider international law itself from a constitutional, separation of powers perspective.

The courts will not, in principle, interpret and apply customary international law to impose private rights and duties on the Crown, not otherwise expressly adopted in legislation. We have already seen a like principle in operation regarding treaties, in Chapter 3. *West Rand Central Gold Mining v The King* stands for the proposition that the courts will not enforce, as against the conquering state, liabilities arising from personal rights and obligations said to have arisen between subject and the former, conquered state.[44] Settled authority held that in the constitutional law of the UK, it was within the Crown's prerogative to grant or refuse capitulation, and on such terms and conditions as it desired,[45] and such were unreviewable and unenforceable before the municipal courts. Even if a well-understood rule of international law that a change of sovereignty should not affect private property, it could not be equally stated that there existed a like rule, settled and established in international law or in common sense, saddling a conquering power automatically and in the ordinary course with all the debts and liabilities of the conquered state. Hence the claimants could not seek recovery from the UK of a quantity of gold in kind or in value which the Republic of South Africa had seized from the claimants just before the outbreak of war with the UK, in which the latter defeated and annexed the former.

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[44] *West Rand Central Gold Mining v The King* [1905] 2 KB 391 (CA).

[45] *Campbell v Hall* (1774) 1 Cowp 209.

4.3.2 Sovereign Immunity: Constitutional Powers Supreme?

Absent the constitutional optic, it might be not a little ironic that the prime exemplar for customary international law as part of national law, sovereign immunity, has had its principal terms established by statute in the UK. The initial foundation for the rule, the Statute of Anne (1709) c.12, came about just because the English courts had not declined jurisdiction in an action against a Russian diplomatic emissary.[46] The vocal dismay of Russia and other continental states prompted a swift, and apologetic, legislative response. With this legislative prompt, the courts could then proceed comfortably with assertions regarding the statute being declaratory of the law of nations and the transcribing of customary international law into national law.[47] The lead voice setting the refrain of the law of nations being part of "our law" was Lord Mansfield, in *Triquet v Bath* and *Heathfield v Chilton.*[48] All the same, however, as the practice of states moved away from a general and unlimited immunity for states and state officials in purely commercial matters, the UK courts declined to follow suit in this law of nations, to adjust the principle, to re-interpret precedent, and to acknowledge a more restrictive range of immunity. By the time sufficient judicial momentum had built up to drive such a paradigm shift in the common law rule, parliamentary initiative overtook judicial evolution in the form of the State Immunity Act 1978, itself modelled on the 1972 European Convention on State Immunities.[49] This second legislative prompt formed the backdrop in 1983 to the House of Lords claiming the restrictive theory of state immunity for the common law.[50]

The legislative cue must be understood in conjunction with the role of domestic precedent to set the legal rule and its parameters in that progression of cases on sovereign immunity—and more generally in cases raising a potential issue of (customary) international law. Reference to comparative and international works gives the impression (rightly or wrongly) of a court searching for the common ground of, the consensus in, principles of (customary) international law for

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[46] *Viveash v Becker* (1814) 105 ER 619, p. 621; see also Jones 1940 and Adair 1928.Yet see *Munden v Duke of Brunswick* (1847) 116 ER 248 (initial failure to plead sovereign status bars later motion for immunity).

[47] See, e.g., *Novello v Toogood* (1823) 107 ER 204, 207 (no immunity against distraint by landlord in separate personal lodgings of private servant to ambassador); *Duke of Brunswick v King of Hanover* (1844) 49 ER 725 (that foreign sovereign also English subject no bar to claim of immunity for deeds done and over property situate in that foreign jurisdiction); *Wolff v Oxholm* (1817) 105 ER 1177 (confiscation of debt in Denmark contrary to law of nations);.

[48] *Triquet v Bath* (1764) 97 ER 936, 937 (and having no less than Blackstone as counsel pleading the immunity point); *Heathfield v Chilton* (1767) 98 ER 50.

[49] Bird 1979. The US shift to the restrictive principle, first officially signalled by the 1952 Tate letter, and then formalised into the Foreign Sovereign Immunity Act 1976, also contributed to the growing momentum for change in the UK rule.

[50] *The Playa Larga v The I Congreso del Partido* [1983] 1 AC 244, pp. 261–2 (Lord Wilberforce), 272 (Lord Diplock), 277 (Lord Keith), 278 (Lord Bridge).

adoption in the municipal legal order. Thus, for example perhaps, the canvassing of authorities on sovereign immunity by Phillimore J in *The Charkieh*, and by Lord Atkin in *Chung Chi Cheung v The King* regarding jurisdiction over a public armed ship in foreign territorial waters.[51] These international authorities, however, rarely figure in the final judgment in a decisively substantive, positive law, way. At its highest, the court settles thereby upon some definition of the commonly held principle which it can then transpose into the national constitutional and legal framework. More commonly, however, international legal materials serve as guides for framing or interpreting municipal law in cases involving an international element, and in particular, asserting or declining jurisdiction in claims touching upon foreign sovereignty or prerogatives. Hence in *The Charkieh*, Sir Robert Phillimore uses his examination of Bynkershoek's *Opera Omnia* and a number of US cases to draw out of UK precedents—albeit obiter—a sovereign immunity principle more precisely framed with an exception for non-public, non-governmental acts.

Cases on sovereign immunity have nonetheless exhibited a heavy reliance on domestic precedent to articulate the operative rule. As for any entirely domestic matter, the courts extract and interpret the rule primarily from a set of their previously decided cases. The effect is to emphasise an overarching character of municipal law whose parameters and horizons appear exclusively bounded by the national legal and constitutional framework. The rule becomes detached, as it were, from a relativising, reflexive perspective that arises from comparing foreign with domestic cases. It is that perspective which grounds the reciprocity inherent in (customary) international law, in reconciling national and foreign sovereignties. In other words, the courts become caught up in the positive law represented by previous cases. In *The Parlement Belge*, the Court of Appeal simply read prior cases (including US ones) as not justifying or admitting Sir Robert Phillimore's suggestion, first developed in *The Charkieh*, to exempt from immunity state owned trading ships. Hence a Belgian mail packet did not lose immunity from a damages claim arising out of a collision, just because it also happened to carry freight and passengers for hire as well. The high-water mark of the expansive reading to sovereign immunity, *The Porto Alexandre*, shows a Court of Appeal alive to the problems immunity for state-owned trading vessels but nonetheless reading the law from within an entirely municipal context.[52] Likewise in *USA v Dollfus Mieg* and *Rahimtoola v Nizam of Hyderabad*, the House of Lords could find nothing in decided UK cases to support a narrower application of sovereign immunity.[53]

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[51] *The Charkieh* (1872–1875) LR 4 A&E 59 (because the Khedive was held not be a sovereign authority, Phillimore J's suggestion of a restrictive reading to immunity was never tested); *Cheung Chung Chi v The King* [1939] AC 160 (PC).

[52] *The Porto Alexandre* [1920] P 30 (CA) (immunity from suit to recover salvage services rendered to commercial vessel owned by Portuguese government; only *The Parlement Belge* discussed).

[53] *USA v Dollfus Mieg* [1952] AC 582 (sovereign immunity applies to stay an action against the Bank of England holding certain gold bars recovered by Allied forces on their behalf); *Rahimtoola v Nizam of Hyderabad* [1958] AC 582 (immunity applies to stay proceedings to

Certainly counsel continue to refer in argument to the widest range of international and comparative authorities, as the case reports evidence. But their place in UK reasons for judgment dealing with customary international law had diminished, at least until recent renewed attention in matters dealing primarily with human rights.[54] In their stead stands a larger list of domestic precedent.[55]

Legislative cues and the conservative, narrowing facet to reasoning from precedent have their explanation in the separation of powers. It is an undisputed characteristic of the common law system that in pronouncing on the law, the courts (and this includes the US and Commonwealth ones as well) have the power to make law. The reasons for decision articulate, with varying degrees of clarity and precision, what the common law is. Development and evolution of legal rules therefore proceeds incrementally as past decisions are interpreted and expanded or contracted to meet new facts and circumstances. Significant, immediate change, a paradigm shift so to speak, is more frequently left to the legislature (as, for example, with rights review jurisdiction and Human Rights Act 1998).

This judicial law-making power takes as its principal sources for law decided cases and legislation, and the practices, values, and interests widely current in the polity, both of them grounding the constitutional order. This makes sense, if only because the courts are one of the domestic organs of government. Precedent is the starting point for the articulation of a legal rule. Legislative cues, meaning both the existence of or the absence of legislation, can signal the current mindset of the Legislative Branch in an area of law, its accord (or not) with a particular direction the law is taking.[56] Customs and practices rooted in the polity evidence the norms and values organising and managing the various facets of social relations. Evidence of law and social practice elsewhere must find accordingly some anchor or reflection in these local instances. Yet for all the various sources brought to the court's attention by counsel's considered argument and seeking to influence the

(Footnote 53 continued)
recover a sovereign's bank deposits transferred without authority to the Pakistan High Commissioner, acting on instructions of his government).

[54] In matters concerning treaty interpretation, the situation is somewhat different, as reviewed above in Chap. 3.

[55] To the extent foreign practice signified, US case law had (and has) pride of place. Not that this focus on national precedent was a peculiarly British sentiment, for a similar trend is manifest as well in the US.

[56] As it progressed from the *fons et origo* of *The Schooner Exchange v McFaddon* 11 US 116 (1812) through, e.g., *Republic of Mexico v Hoffman* (1945) 324 US 30, to the Foreign Sovereign Immunities Act 1976, the US situation for sovereign immunity also included a not insignificant participation of the Executive Branch before the courts regarding its view of reciprocal relations and state immunity (in part due to the procedure for claiming state immunity). Specifically this crystallised in the 1952 "Tate Letter" (an interdepartmental circular) whereby the US declared the restrictive theory to be its policy in matters of immunity. Nevertheless, judicial doubts as to the legal effect of this statement of intent—and the resultant mix of outcomes—brought about the Congressional response of the FSIA.

current statement of a common law rule, precedent remains the clearest, most transparent declaration of a legal rule for the courts.

The significance of previously decided cases is reflected in a second, institutional, facet to the court's law-making power. A UK court is bound to the articulation of a rule as stated in a previous decision unless it can be shown that the rule is incorrectly or imprecisely stated, or wrongly discerned from the authorities, or is otherwise distinguishable on the facts. Legislation may of course supervene at any point. Those grounds afford sufficient discretion to courts to adjust common law rules to social change. But it is for a higher court, ultimately the House of Lords or now Supreme Court, to determine whether a common law rule is wrongly stated or subject to (significant) change. If a supreme court has endorsed a rule, it is for that court to change the rule. This is the doctrine of precedent, *stare decisis*, a means of ensuring the certainty, stability, and objectivity of the common law in accordance with the idea of the rule of law.

The sovereign/state immunity in the UK illustrates this separation of power points nicely. International law can be regarded as a source for the common law, especially in matters involving an international element. It may thus provide relevant factors to guide and adjust the current articulation and application of the applicable national common law rules. Of course the legal rule is stated as rule of English (UK) law, and that legal order is said to be responding to the changes and pressures of the international legal order. Now the crystallisation of a principle of international law into domestic law results in domestic practice and interpretation supervening. Once the rule has settled and fit into the constitutional and legal order, there is less pressure or impetus for the courts to consider international legal materials in the articulation and application of the rule.

So when the drive to recast sovereign immunity in more restrictive form arrived finally in 1976 at its highest judicial level yet, the Privy Council, the move itself appeared to take place within the framework of precedent, particularising, distinguishing, and re-interpreting it. That is, the common law appeared to be evolving on its own terms in response to changes in social, economic, and political circumstances. The Court was not adopting and applying customary international law as law, but rather acknowledging and internalising a relevant change of circumstances, a change of practice, which figured in framing the rule. The MV Philippine Admiral had been built and paid for under the terms of a war reparations treaty between Japan and the Philippines. The Reparations Committee, a government agency, held title subject to its conditional sale to the Liberation Steamship Co. which was deeply in arrears, if not in default thereunder. A dispute between Liberation and the vessel's charterer concerning repairs made in Hong Kong led to Hong Kong proceedings by the charterer and the unpaid shipwright against Liberation, and the arrest of the Philippine Admiral. The Philippine government purported to retake control of the vessel under the conditional sale agreement, and claimed immunity for it and the vessel according to the rule in *Porto Alexandre.* The Hong Kong Supreme Court denied immunity on the basis of the restrictive theory. The Privy Council dismissed the appeal, also adopting the restrictive theory—for cases dealing with government owned or controlled trading vessels. Featuring in the

reasons of Lord Cross (for the Board) were the older UK precedents, US precedents moving to the restrictive theory, as well as the 1926 Convention on the Immunity of State owned Ships and the 1972 European Convention on State Immunities. The UK was a signatory to both pacts. Supported by the doubts expressed in *The Cristina* as to the breadth of the absolute theory held in *Porto Alexandre*, the practice outside the Commonwealth reflected in the US cases, and the liability to suit of the State in the UK and abroad, the Board held that a close reading of the *Parlement Belge* did not justify the expansive articulation given to it in *Porto Alexandre*. In the interests of justice, the Board declined to follow the case as determinative of the issue. Lord Cross also expressly rejected a suggestion that the courts should, in deference, await a parliamentary initiative to incorporate the two Conventions into law.

It might be assumed that the Privy Council could treat the argument of deferring to legislation as not signifying or not decisive because the Board did not truly declare law for the UK itself, only for the colonies and overseas territories. True, Privy Council opinions are nevertheless very persuasive authorities in UK matters, but they do not have, strictly and technically, the same legal and constitutional status for UK common law as House of Lords opinions. But this did pose a problem when the same plea to recast the UK common law rule on sovereign immunity in restrictive terms arose before the courts in *Trendtex v Central Bank of Nigeria*.[57] For no binding authority in the form of a House of Lords decision existed approving the restrictive approach, even though in practice and in reality, the Privy Council decision could and would be understood to express the view of the House of Lords on the issue. Nor did a legislative prompt yet exist.

Trendtex supplied cement to Pan-African, which in turn had sold it to the Nigerian Ministry of Defence. Payment was to be made by letter of credit, and in the end result the Central Bank of Nigeria duly opened an irrevocable letter of credit in favour of Trendtex covering the amounts due under the contract. Owing to the political and economic conditions in Nigeria at the time, not least being the scale of concrete imports into Nigeria, there was a change of government in Nigeria and a consequent change in policy regarding concrete imports. The new government refused to accept and pay for existing shipments and demurrage. The Central Bank accordingly refused to pay out sums under the letter of credit. Trendtex sued in the UK for breach of contract and for breach of the letter of credit, and obtained an order retaining the letter of credit funds in the UK. The Central Bank claimed immunity from suit following the expansive rule, relying in part on the Court of Appeal's restatement of that rule in *Thai–Europe v Pakistan*[58] decided a year earlier (but before *The Philippine Admiral*). The Court of Appeal allowed the Trendtex appeal against a stay on the grounds of sovereign immunity. It relied on two grounds. All three members of the Court, Denning MR and Stephenson and Shaw LLJ, did not regard the Central Bank as a department or arm

[57] *Trendtex v Central Bank of Nigeria* [1977] QB 529 (CA).

[58] *Thai-Europe v Pakistan* [1975] 1 WLR 1485 (CA).

of the Nigerian government such as to benefit from sovereign immunity. But both Denning MR (as his principal grounds) and Shaw LJ also accepted the restrictive theory to apply generally to states involved in commercial transactions, and not only in matters of state-owned trading vessels. To summarise their reasoning, sovereign immunity was a rule of international law, not municipal law, to be applied by national courts. That rule had now evolved into a restrictive form. International law does not know of *stare decisis*, such that municipal courts were not bound by prior national decisions in the face of a changed international rule. For Stephenson LJ, on the other hand, *stare decisis* was determinative of this issue. He considered himself bound—as with the Court in *Thai-Europe*[59]—by the articulation of the rule in previous UK decisions despite the evidence of a changed approach to immunity in other jurisdictions.

The attempts of Denning MR and Shaw LJ to reconcile the doctrine of precedent with the more fluid state in international law deserve closer attention. Shaw considered that *stare decisis* applies—as a matter of English, not international, law—only where the rule of international law was shown not to have changed. Domestic courts would apply the same rule, and accordingly, must decide like cases alike. If however international law had changed on the point, then the courts would be invoking a "fresh" rule, one not caught by prior decisions. English courts are obliged to apply the law of nations: this is an immutable principle of English law. So the courts must discover what the prevailing international law is at any time, and apply it irrespective of any intention or agreement of the parties. In doing so, international law does not become an integral and permanent part of English law, preserved in a "sort of judicial aspic". The normal tests for adjusting domestic precedent could produce the awkward result that current international law would have to be introduced by statute, unless the opportunity first presented itself to the House of Lords.[60] Putting to one side the creatively disingenuous solution of a changed rule of international law being one not yet captured by precedent, Shaw's approach must differentiate international law as a separate, valid, co-ordinate body of substantive law. The courts are the instrumental channel through which (customary) international law passes through into the domestic legal system irrespective of domestic legal and constitutional peculiarities. But the courts do not transcribe or transform international law into rules of domestic law. This view is also echoed in the Netherlands.

For Denning MR, the notion of the consensus of nations grounding international law, and sovereign immunity in particular, is a fiction. Every jurisdiction differs in its application of the rule. Each state defines for itself what the rule is, delimiting the bounds of immunity and creating for itself any exceptions. In defining the rule, the courts are guided by foreign authorities and the principles of justice.[61] This said, Denning distinguishes between the incorporation of

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[59] *Thai-Europe v Pakistan*, p. 1493 (Lawton LJ), p. 1495 (Scarman LJ).

[60] *Trendtex*, pp. 578–9.

[61] *Trendtex*, pp. 552–3.

international law, of law automatically part of English law unless in conflict with legislation, and its transformation, of it becoming part of English law through decisions of judges, legislation, or long established custom. He accepts the doctrine of incorporation as correct, such that the courts can recognise and apply changes in international law without an intervening Act of Parliament. Moreover, *stare decisis* does not prevent a court from applying prevailing international law even if different from past articulations internationally and nationally. The court does not need to wait for the House of Lords to approve the change. Indeed, the rules of international law are not rules of English law on which the House of Lords has the final say, although it remains open for the House of Lords to reverse these decisions of the lower courts.[62] Thus like Shaw LJ, Denning MR disconnects the international legal order from the domestic, leaving the courts to act as a channel or gatekeeper of sorts.

Both *The Philippine Admiral* and *Trendtex* evidence that common law courts can be moved to establish or recast legal rules drawn from customary international law given pressures of sufficiently consistent practice in other jurisdictions, especially favoured ones. But *Trendtex* would go further in making explicit that domestic mechanisms for establishing or amending common law may not inhibit applying international law or changes to rules of international law already recognised domestically. *Trendtex* relies on two main propositions in support. First, domestic (constitutional) precedent has declared that international law is part of domestic law and is so to be applied. It follows that precedent may likewise specify how, when, and to what extent international law may be brought into the domestic legal order, as well as its legal status. Recognising this entails by consequence recognising also that it is the national constitutional and legal order that is setting conditions and limitations, the validity and legitimacy criteria, for the entry of customary international law into municipal legal order. Moreover, there is nothing inconsistent with this idea that the rules of international law thus internalised might also become subject as such to national processes and mechanisms for amending law. (Even Denning's proposition of each state defining for itself the rule, however inconsistent with his analysis following, would acknowledge this.) This of course raises the spectre of current international practice moving away from the rule petrified in domestic "judicial aspic". The second proposition is that customary international law forms a co-ordinate, separate body of law. Hence the courts are not bound by *stare decisis* or like municipal doctrines in respect of its precepts, nor has a supreme court the final say on those precepts. This is the only way to make sense of Denning's distinction between "incorporation" and "transformation". How else does international law make its way into the municipal legal system other than by Act or judicial decision? The role of the courts, however, differ. Under the incorporation hypothesis, they act as an instrument, a channel or voice for those precepts, already law. Rather than being a source for

[62] *Trendtex*, pp. 553–554, 557.

national law, international law is a co-ordinate body of law.[63] Under the transformation one, the courts confer validity and legitimacy on those precepts as (municipal) law, because the courts are organs of government: they are part of the *trias*. This is where *Trendtex* trenches most clearly on the separation of powers.

Perhaps fortunately, the constitutional questions which *Trendtex* raised were rendered largely moot—at least in terms of state immunity—by decisive and clear parliamentary action in the form of the State Immunity Act 1978. This Act, modelled on the European Convention on State Immunity 1972, codifies into UK law the restrictive theory of sovereign immunity. Thus, when a case on the very issue of the restrictive reading to immunity came before the House of Lords in 1983, the Law Lords could claim for the common law the restrictive theory.[64] The proceedings in *The Playa Larga v The Il Congreso* had arisen during the *Trendtex* hearings before the Court of Appeal, relating to events that spanned the timeframe of those in *The Philippine Admiral* and in *Trendtex* (1973–1975). The House accepted for UK common law the rule as stated in *The Philippine Admiral*, relating to state-owned trading ships, and as developed in *Trendtex*, concerning all commercial matters involving state entities. The Law Lords did not, however, endorse Lord Denning's construction of incorporation and transformation, nor its ramifications.[65] At its highest, the House left the matter open.

When the next challenge to sovereign immunity appeared, in the form of the impact of the 1984 International Convention against Torture,[66] the majority in the House of Lords dealt with the question in its statutory context.[67] In London for medical treatment, former Chilean Head of State Augusto Pinochet was arrested in 1998 pursuant to the Extradition Act 1989. An international arrest warrant had been issued from Spain, alleging conspiracy to murder, attempted murder, torture, conspiracy to torture, and conspiracy to take hostages, all on multiple occasions and all between a period of January 1972 (before taking power) and January 1990 (shortly before stepping down). Pinochet claimed immunity under the State Immunity Act 1978 in the extradition proceedings. Under the Extradition Act, only those crimes punishable in the UK could form the basis for a valid extradition order.

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[63] See also Lord Hoffmann in *Jones v Saudi Arabia* [2007] 1 AC 270, p. 306: "… state immunity is not a "self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt" and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another." (quoting in part Lord Millett in *Holland v Lampen Wolff* [2000] 1 WLR 1573, p. 1588).

[64] *The Playa Larga v The I Congreso del Partido* [1983] 1 AC 244.

[65] *The I Congreso*, pp. 261–2 (Lord Wilberforce) (accord Lords Diplock, p. 272; Edmund-Davies, p. 276; Keith, p. 277, and Bridge, 278).

[66] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 65.

[67] *R v Bow St. Met. Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147. *Ex. p. Pinochet (No. 1)* [2000] AC 61 regarding the immunity question was set aside by *ex. p. Pinochet (No. 2)* [2000] 1 AC 119 on the grounds of a perception of bias, because of one of the Law Lords in *ex. p. Pinochet (No. 1)* was an unpaid director and chairman of a charity wholly controlled by Amnesty International, an intervenor against Pinochet in that first case.