ALBA SEMINAR:

"PUBLIC INTERNATIONAL LAW AND THE ADMINISTRATIVE COURT"

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1. I want to focus on what strikes me as the most immediate and most difficult of challenges facing the English courts when it comes to the application of international law, and that is the reception of customary international law into the common law: think, for example, of the prohibition of torture which features as part of international law independent of any treaty; or, think of the prohibition of inhuman or degrading treatment which, according to the ICJ in the recent *Diallo* case between Guinea and the DRC, is now also part of customary international law.

2. We start from the perspective of a dualist system: international law is not automatically part of our domestic law. Treaties are either incorporated into the domestic law, like the ECHR, and by definition in, or they are unincorporated and so, as a basic rule, are generally out. And that leaves customary international law, which has traditionally been thought to be in, also – to use the words of Lord Denning in the leading *Trendtex* case: "the rules of international law, as existing from time to time, do form part of English law".

3. Can that be right? Can life be as simple as that? Think of the ramifications – if this is right, then why haven't landmark cases such as Al Skeini been to some extent a waste of time? The issue in that case was of course whether Iraqis shot by UK troops in Iraq, or, in one case beaten to death, were within the jurisdiction of the UK for the purposes of Article 1 ECHR. But, if *Trendtex* provides the answer, why did it matter whether Baha Mousa was beaten to death within or outside the jurisdiction of the UK for the purposes of Article 1? Instead, it could have been said that the UK had breached customary international law rules that were directly applicable in the English courts as part of the common law, and that there was no need for the House of Lords to try to reconcile the irreconcilable Strasbourg jurisprudence on Article 1.

4. And this is a line of argument that is now coming up, in various guises, in the many cases alleging ill-treatment by UK troops in Iraq or Afghanistan. Where there is an allegation of Article 3 ECHR ill-treatment, this is often as not accompanied by a claim of breach of the customary international law prohibition of torture, said to apply even if the alleged ill-treatment took place at the point of capture, or on the way to an army base, instead of inside some UK detention facility, as *Al Skeini* would require.

5. A related line of argument is run in the cases aimed at the UK policy on interrogations overseas or alleged UK complicity in torture or other human rights abuses by foreign States. Any determination of complicity would require a prior determination of breach of international law by the foreign State, the sort of determination that English courts have traditionally been very reluctant to make, in particular by considering such matters as non-justiciable. As the Court of Appeal aptly put it in the *CND* case, which was all about the legality of the invasion of Iraq in light of the correct interpretation of an unincorporated international instrument, SCR 1441, it is not for the English courts to act as the International Court of Justice. But the argument now goes, issues of non-justiciability cannot arise because the court is being asked to apply domestic law – customary international law as part of the common law – so there can be no question of judicial no go areas or a lack of judicially manageable standards, as in the *Buttes Gas* case.

6. A first word, I think, in favour of the application of customary international law in such circumstances. What's to be said against it? Torture is unconscionable wherever it is said to occur – whether it is inside a UK detention facility in Iraq, or on a given battlefield, or in an interrogation centre that is outside UK jurisdiction. Why should the historical oddity – that we have a dualist rather than a monist system – stand in the way of customary international law norms being applied by the English courts?

7. One obvious answer, that at least gives pause for thought, is that this is an area in which Parliament has legislated, and that this legislation now occupies the relevant field. We have the Human Rights Act. The lines have been drawn by Parliament as to when and how victims can bring proceedings against public authorities for breaches of their human rights, and it is not readily to be supposed that Parliament's intent was that customary international law should be used to erase or re-define those lines, regardless of the developments in Strasbourg jurisprudence.

8. As Lord Bingham said in *R v. Jones (Margaret)* (at para. 23), which turned on whether the invasion of Iraq amounted to a customary – and therefore common – law crime of aggression: *"It is, I think, true that "customary international law is applicable in the English courts only where the constitution permits"*. The most well-defined feature of our constitution is that of parliamentary sovereignty, and that it is not for the Executive to legislate, whether through its development of customary rules in its relations with other States, or otherwise. Indeed, the 2010 Constitutional Reform and Governance Act can be seen as reinforcing Parliament's sovereignty over international law, as the ratification of treaties is now subject to an extended process involving laying the treaty before Parliament, such that ratification is now, in essence, formally subject to the veto of the House of Commons, and is no longer a matter for the Executive. Under these circumstances, it would seem anomalous if the Executive in assisting – as it inevitably must – in the development of customary international law can then beat a path to international law coming in through the back door of common law. Or suppose the customary rule had developed in a way that was contrary to the position of the UK Executive?

9. Of course, the Human Rights Act must be looked at as a whole, and there is a question as to whether there was any intention to lay down an exclusive code. Section 11 expressly maintains the possibility of relying on "any other right or freedom conferred ... by or under any law having effect in the United Kingdom". So it can be argued that Parliament has expressly decided to leave the door open. But the formulation in section 11 – which no doubt the courts will have to look at more closely in due course – at most begs the question as to whether rules of customary international law are within the expression "any law having effect in the United Kingdom". And there, is to my mind, undoubtedly sufficient force in the argument that domestic statutes now occupy the field so as to exclude the wholesale incorporation of customary human rights norms, that it is necessary to re-visit the underpinnings of the proposition expressed in the *Trendtex* case. I am thinking not just of the Human Rights Act, but also other relevant provisions like s. 134 of the Criminal Justice Act, through which the UK complies with its obligation to criminalize torture under article 4 of the Torture Convention.

10. It is important, first, to remember what *Trendtex* was about. All that was being decided was whether a given State entity (the Central Bank of Nigeria) benefited from sovereign immunity in the English courts. Although that issue was characterised as one of international law, it was evidently an issue that was well-suited to determination by the English courts. Indeed, it is of the essence of the rules of State immunity that they should be applied by domestic courts. And the Court in *Trendtex* was not seeking to identify and apply a precise rule of customary international law. To the contrary, Lord Denning's view was that there was "*no consensus whatever*" on the issue and that: "*Each country delimits for itself the bounds of sovereign immunity.*" [1977] QB 529, 552 G-H. This is worlds away from the Administrative Court having to decide on the precise scope and content of the customary prohibition of torture, and to apply that as part of domestic law.

11. And compare Lord Denning's view on the sort of evidence needed to demonstrate the existence of a new rule of customary international law:

> "Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. "... We must take the current when it serves, or lose our ventures.": *Julius Caesar* , Act IV, sc. III."

with Lord Hoffmann's approach in *Jones v. Saudi Arabia*, where he said [para 63] precisely that: "It is not for the national court to "develop" international law … ."

12. And, what also, could the Court of Appeal in *Trendtex* have had in mind when it thought of customary international law as automatically part of domestic law? The answer to that is a very limited pool of rules indeed. In his excellent article in the

2008 British Yearbook of International Law, Roger O'Keefe traces through the long history of judicial pronouncements on the law of nations being part of the law of England, and finds that there is no basis to these at all. The sole line of consistent application of the doctrine of incorporation concerns sovereign immunity, although there are also two cases dealing with the right of angary, that is the right to compensation where the property of a neutral is requisitioned by the State in times of war. And that is it.[1]

13. And, perhaps this should not come as a surprise, because O'Keefe is in some very good company. In his decision in *ex parte Pirbhai* (107 ILR 461, 474), Woolf J (as he then was) cast very considerable doubt on the broad application of *Trendtex*. He had to consider the rights of UK nationals expelled from Uganda and in particular whether the FCO was right to assert that it could not pursue their claim because of an international law obligation to exhaust local remedies He said that:

> "... the rule of international law which was being considered in the *Trendtex* case was a rule which had undoubtedly been adopted and incorporated into English law. The principle of sovereign immunity is applied as part of the domestic law. All rules of international law are not so applied."

14. That note of caution is undoubtedly correct so far as concerns *Trendtex*, and is entirely in line with Lord Bingham's later caution in *Jones* when he inclined to the view that "*international law is not a part, but is one of the sources, of English law*". Woolf J then develops his thinking:

> "There are rules or principles of international law, for example relating to human rights, which are not part of our domestic law and the domestic courts cannot apply or interpret them in the same way as they apply and interpret domestic law. In a situation of the sort under consideration here, if the Court has any jurisdiction to review, it can only intervene, quite apart from the question of prerogative, if it considers the Secretary of State could not reasonably take the view of international law which he did."

15. Of course, the world has moved on since 1984, the date of *Pirhabi*, but a quarter of a century later, one sees the courts coming to a similar approach – the tenable view approach – in Lord Brown's speech in the *Corner House* case [2008] UKHL 60; [2009] 1 AC 756 at [59]-[69] and more recently in David Lloyd Jones' views in the *ICO Satellite v OfCom case* [2010] EWHC 21010 (Admin) at [88]-[94]. Both Lord

[1] Although Lord Bingham and Lord Mance, in *Jones*, listed the crimes of piracy, violation of safe conducts, diplomatic immunity, and war crimes as international law crimes that have been received and recognised at common law as domestic crimes, in fact all of these have an ancient statutory basis except for piracy, which was only in the 19th century tried as a common law crime and for reasons that have nothing to do with the doctrine of incorporation.

Brown, and now David Lloyd Jones, have adopted the approach proposed by Philip Sales and Joanne Clement in their paper on "International Law in Domestic Courts", finding that the correct question to ask where a decision maker refers to the terms of an unincorporated treaty is whether a tenable view of the relevant treaty has been adopted.

16. So could that also be the right approach when it comes to the application of rules of customary international law in the English courts? After all, however well-established such rules may be in general terms, they're often not in any way well defined: they haven't been the subject of detailed negotiation so are unlikely even to hit the dizzy heights of certainty enjoyed by treaty provisions, which Allot aptly refers to as disagreements reduced to writing (a description picked up by Simon J in the *EMV v. Czech Republic* case).

17. When could a margin of appreciation be appropriate? Take the *Al Haq* case – where the claimant sought a series of findings that Israel had breached human rights and other rules of customary international law in its intervention in Gaza three years ago, and that the UK was complicit in those international law breaches. The court held that it lacked competence to decide whether or not Israel was in breach of its international law obligations – viewing the issues as non-justiciable before the English courts. Clearly correct. The court therefore side-stepped most of the customary international law issues, although Cranston J did pick up on Lord Bingham's comments in *Jones*, and characterised the non-justiciability objection as in itself a constitutional principle militating against the incorporation of customary international law in the *Al Haq* case. A small but important step.

18. The more general issue of whether customary international law should have any purchase in domestic law was expressly left open for another day; but leaving to one side the legal, factual and political difficulties in determining whether Israel had breached international law, could it anyway have been for the court to examine and adjudicate on the complex international law rules to which the UK was said to be subject: the rules on complicity in the unlawful acts of another State, or the obligation to cooperate to bring to an end serious breaches of a norm of *ius cogens*, such as the right of the Palestinian people to self-determination? These are rules that govern the relations between States, not the relations between individuals and the State: and as such, they are not well-suited to adjudication in the domestic courts – a line of argument and a distinction that Lord Denning was willing to accept in *ex parte Thakrar*.

19. My point is not just that there are still limited judicial no go areas such as transactions between States and the UK's conduct of foreign relations, which is what *Al Haq* principally reflects, but that there are also good arguments for saying that customary law is not to be applied by the courts in the context of relations between States or, if that were wrong, then at least that the Executive should be accorded some margin of

appreciation in the interpretation of applicable customary international law norms. Otherwise one has the oddity that, when it comes to an unincorporated treaty the courts, as in the *CND* case, will say that it is plainly not for them to declare the meaning of an international instrument operating on the plane of international law, whilst for customary international law there will be a quite different approach – although the rationale for a cautious approach is the same.

20. What about customary norms that apply as between States and individuals? State A tortures an individual. Here the argument for a margin of appreciation would have to take account of the fact that domestic courts have become very used to identifying where treaty based human rights have or have not been breached. But, in any event, the question must be asked as to whether the constitution permits incorporation, and the starting point should be that customary international law is a *source* of the common law, not that it is to be treated as incorporated without more – because of a series of ancient judicial pronouncements made against a very different international law backdrop, but that were in fact always over-broad.

21. The recent Singapore Court of Appeal case, *Yong Vui Kong v. The Public Prosecutor*, provides a clear cut example of how a constitutional impediment can militate against the incorporation of customary international law. The appellant had been convicted of drug trafficking, and faced a mandatory death penalty. He relied on Article 9(1) of the Singapore Constitution, which reflects the same basic principles as those contained in Articles 2 and 5 ECHR, and provides that "*No person shall be deprived of his life or personal liberty save in accordance with law*". Law in this context is expressly defined to include the common law. The appellant argued that a mandatory death penalty is an inhuman punishment because it precludes the court from considering the circumstances of the offence (sounds right to me), that customary international law prohibits inhuman treatment or punishment, and that this constituted a relevant law for the purposes of the Singapore Constitution. The Court of Appeal rejected this argument, partly because the Government had expressly rejected a prior recommendation of a special commission that there should be a constitutional protection against inhuman treatment. Thus the reception of customary international law would be contrary to the intended scope of the constitution.

22. Here, matters will rarely be so clear cut, but the lists of criteria that commentators have suggested as pre-requisites to a customary law rule becoming part of the common law – lists drawn up separately by Sales/Clement and O'Keefe – do overlap in their emphasis on the question of whether the relevant area is one in which Parliament has legislated or is likely to legislate.

23. Of course, the content of domestic legislation may argue in favour of the reception of customary international law, or the justiciability of matters that might normally be thought of as beyond the competence of domestic courts. A good recent example of this – again I'm afraid from a different jurisdiction – is the *Habib* case, a Federal

Court of Australia decision of February last year. The allegations in this case will sound familiar to anyone who has been involved in the Guantanamo litigation.

24. Mr Habib, an Australian citizen, claims that he was arrested in Pakistan in October 2001, severely ill-treated over a period of one month, before being moved to Egypt, Bagram and ultimately Guantanamo. His case is that Australian officials were aware of and even witnessed his ill-treatment, and so committed the torts of misfeasance in public office and intentional infliction of harm by aiding and abetting his torture. The issue before the Federal Court was whether the determination of these claims, which would require a prior determination of the unlawfulness of acts of foreign States, were justiciable. So, some of the same difficulties as in *Al Haq* are raised, but in the context of a civil claim for damages, with a specific victim as the claimant, and a claim that is based in domestic law, as opposed to customary international law said to be incorporated as domestic law.

25. The Court rejected the Government's non-justiciability arguments and its reliance on the act of State doctrine via the dicta from *Underhill v Hernandez* that "*the courts of one country will not sit in judgment on the acts of the government of another done within its own territory*". Particular weight was placed on the fact that Australia – like the UK – has passed domestic legislation to give effect to its obligations under the Torture Convention and, again like the UK, has a crime of torture directed to the conduct of public officials regardless of where that act takes place and irrespective of the nationality of the torturers or their government. As the court would have jurisdiction to prosecute the agents of a foreign State for an act of torture, so the reasoning went, why should it not have jurisdiction to make an equivalent determination as to the act of torture as a preliminary to determining whether Australian officers had aided or abetted that act, albeit in the context of a civil claim?

26. The court saw no reason to the contrary, although it stressed that it would only be making findings of fact in circumstances where the acts of the foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect. Hence there would be no breach of comity and, it might be added, the court would not be acting as if it were the International Court of Justice, an issue that quite rightly troubled the Divisional Court in *Al Haq*, which was indeed being asked to decide on the international responsibility of two States, and in doing so to apply international law, not domestic law.

27. So far as concerns the English jurisprudence, the court has yet to address the issue squarely. In *Al Saadoon and Mufdhi*, which was primarily a ECHR claim, the claimants introduced a new argument on appeal to the effect that the claimants faced execution by hanging, which represented inhuman or degrading treatment, or a form of torture, and as such was counter to customary international law. And there was a related argument that there is a regional customary international law prohibiting the death penalty. The Court of Appeal rejected both these contentions on the basis that

the claimants had failed to demonstrate the existence of the relevant customary rule, but Lord Justice Laws noted along the way that the "*proposition that a customary rule may be sued on as a cause of action in the English courts is perhaps not so clear cut*".

28. And it must be right to hesitate before concluding that claimants can sue on a customary rule to found a cause of action. On what basis are equivalent mechanics to section 7 HRA incorporated into the common law? Who is the correct defendant – if not the State, which would be the correct and only possible defendant as a matter of international law, on what basis is any concerned public authority to be treated by the domestic courts as if it were the State? So the question may not just be whether the HRA occupies the field in any exclusive way, but also whether or how the common law may be said to imitate the mechanics of the HRA.

29. Add to this the question of who is to foot the bill if the court's jurisdiction is expanding to cover all customary international law causes of actions. That is a very significant expansion, that would presumably go beyond human rights law to all the many dozens of areas where customary law forms a significant part of the corpus of international law. In my view, this all points to the conclusion that the question of whether or not or how customary international law should be applied or should found causes of action in the domestic courts may best be left for Parliament, and not for development in the Administrative Court.