

The UK Supreme Court's approach to customary international law

Lord Sales*

Presentation for Judges at the European Court of Human Rights

Strasbourg, 16 October 2025

Introduction

1. Domestic courts in the UK grapple with the rules of customary international law at two distinct levels. First, the courts are now frequently called upon to adjudicate on the existence of a particular rule of customary international law. Secondly, where the existence of a rule as a matter of international law has been demonstrated, the courts must address the question of whether that international rule has been adopted into the domestic legal order.
2. As the final domestic court of appeal, the Supreme Court has played a significant role in the development of our jurisprudence on both issues. In this talk, I will outline the key features of that jurisprudence and will offer some reflections on the issues which it illuminates.
3. To begin with the basics, it is trite that the rules of customary international law are a source of international law, and that to establish the existence of such a rule, two things are required. First, there must be a uniform (or virtually uniform) practice of states conforming to the proposed rule, reflected in their acts and/or their public statements. Secondly, the practice must be followed on the footing that it is accepted to be required as a matter of legal obligation (*opinio juris*). Determining whether those two criteria are satisfied in relation to any given putative rule is, however, far from straightforward.
4. When it comes to the application of customary international norms in the domestic legal order, a further question must be addressed. According to what principles do the rules of customary international law gain traction and have effect in the domestic legal order?

* I am grateful to my Judicial Assistant, Dana McGibbon, for her excellent assistance in preparing this presentation.

In the United Kingdom, the answer to that latter question is somewhat nuanced, and ultimately turns on the application of domestic constitutional norms and principles.

5. I will begin with the first question – that is, how do the domestic courts in the UK approach the identification of norms of customary international law? - before turning to address the second question of how those courts approach the adoption of such norms into the domestic legal order.

Domestic courts and the identification of customary international law

6. The correct approach to determining the existence of a rule of customary international law can be stated with deceptive simplicity. In English law, the leading summary of the test was given by Lord Sumption in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*:

*“it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio juris).”*¹

7. Lord Sumption went on to explain that although there is no hard and fast rule as to the degree of consensus required, it is clear that *“substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law.”*²
8. Rules of international law are pleaded and determined in the UK as matters of law, not fact. This is in contradistinction to the treatment of foreign national law, which is a question of fact to be determined on the basis of (generally expert) evidence. Addressing this question of law is a demanding and exacting task for a domestic court. As our Court of Appeal has said, determining in any given case whether a particular rule of customary international law exists demands an *“exhaustive and careful scrutiny of a wide range of evidence.”*³ Success in this endeavour is important not only for the purpose of upholding the domestic legal order; it also matters on the international plane, both for reasons of comity and because the decision of the court itself may have a

¹ [2017] UKSC 62; [2019] AC 777, at §31.

² Ibid.

³ *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719; [2019] QB 1075. This sentiment has also been expressed by the ICJ, where Judge Donoghue stated that *“an assessment of the existence and content of customary international law norms is often challenging,”* (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the Suan Juan River (Nicaragua v Costa Rica)*), *Judgment ICJ Reports 2015*, p.782 para 3.

persuasive effect for courts in other jurisdictions and also may have an impact on the emergence or non-emergence of the relevant norm, insofar as the judgment may be taken as an example of state practice or *opinio juris*.⁴

9. Sometimes, it is unnecessary for the UK courts to grapple head-on with the question of whether a particular rule actually exists as a matter of law. There are cases where the courts can appropriately limit themselves to asking whether public authorities in the United Kingdom have acted on a ‘tenable’ view of its international law obligations.⁵ In other cases, however, it *is* necessary for the English court to make a determination about the actual existence of a rule of customary international law. One example of such a case is *Benkharbouche*, which I referred to earlier. In that case the Supreme Court was faced with a hard-edged question as to whether the provisions of the State Immunity Act 1968 were compatible with Article 6 of the European Convention on Human Rights. In order to answer that question, it was necessary to identify the customary international law rules governing state immunity.
10. There are now a number of examples of domestic courts, including the Supreme Court, performing this exercise. Before turning to some general comments, I will outline two examples from the past decade in which the Supreme Court has been required to determine the existence (or non-existence) of a rule of customary international law.
11. In *Mohamed v Ministry of Defence*⁶, the Supreme Court dealt with an appeal in which it was alleged that British forces engaged in peacekeeping operations in Iraq and Afghanistan had unlawfully detained individuals. One of the issues the Court had to determine was whether, in the context of an internal, non-international armed conflict, British forces had the legal power to detain people. The Government argued that one source for such a power was customary international law.

⁴ See e.g. Lord Mance in *Mohamed v Secretary of State for Defence* [2017] UKSC 2; [2017] AC 821 at §148: “just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their *opinio juris* regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.” See also, however, cautioning a more conservative approach, Lord Hoffmann in *Jones v Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270 at §63: “it is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.”

⁵ See e.g. *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), in particular at §118; and the discussion in P Sales and J Clement, “International Law in Domestic Courts: the Developing Framework” (2008) 124 LQR 388.

⁶ [2017] UKSC 2; [2017] AC 821.

12. Ultimately, the majority of the court considered that it was unnecessary to express a concluded view on whether customary international law sanctions the detention of combatants in non-international armed conflict. Lord Sumption (with whom Lady Hale agreed) inclined to the view that such a norm had not crystallised, but noted that there *is* consensus that states have the power to detain in all forms of armed conflict. The reason, in his view, for doubt and divergence as to the existence of the alleged rule of customary international law, was the persistence of “*differences among states about the appropriate limits of the right of detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors.*”⁷ Lord Reed, on the other hand, reached a positive conclusion that the “*developing body*” of customary international humanitarian law had not yet reached a position where there was sufficient practice or *opinio juris* to establish the suggested rule.⁸
13. The next year, in *R (Tag Eldin Ramadan Bashir) v Secretary of State for the Home Department*⁹, the Supreme Court dealt with an appeal concerning the applicability of the 1951 Refugee Convention to the UK Sovereign Base Areas on the island of Cyprus. The appeal raised the question whether there is a rule of customary international law that treaty obligations of a humanitarian nature attach in relation to a territory, rather than to the international person responsible for the territory. The argument made on behalf of the claimants was that this rule existed, with the consequence that such treaty obligations do not cease to apply to a territory which secedes from the state which entered into the treaty, or to a formerly dependent territory which becomes independent from a parent state which entered into the treaty. The respondents cited various instances in which the UK had treated the creation of new colonial entities as leaving unaffected the application of treaties which had previously applied to them.¹⁰ However, the Court noted that state practice on the point is “*too obviously influenced by pragmatic considerations,*”¹¹ and concluded that the distinct instances identified “*do not constitute a sufficient body of state practice to give rise to a rule of customary international law.*”

⁷ Ibid, §16.

⁸ Ibid, §275.

⁹ [2018] UKSC 45; [2019] AC 484.

¹⁰ Ibid, §70.

¹¹ Ibid, §65.

At the most they show that the United Kingdom has not been consistent on this question.”¹²

14. From that brief survey of the legal landscape, two points emerge clearly. First, there are some circumstances in which a domestic court is obliged to take up the mantle of ascertaining the existence (or non-existence) of a rule of customary international law, because some feature of domestic law requires this; and secondly, that is a difficult exercise.
15. In large part, the difficulty stems from the underlying nature of customary international law. Customary international law is inherently fluid, and the rules governing its crystallisation are open-textured and vary according to context.¹³ As Klabbers puts it, “*evidences of custom are, and will remain, controversial.*”¹⁴
16. The type of controversy which can arise is exemplified by the disagreement between the editors of two leading texts on international refugee law (Hathaway and Goodwin-Gill) on the question of whether the principle of non-refoulement is a rule of customary international law.
17. Hathaway perceives the principle of non-refoulement as a “*mechanism*”, rather than a norm of “*substantive meaning*.”¹⁵ He laments that there is a “*long-standing and extensive pattern of refoulement across the world,*” amounting to a “*pervasive state practice that denies in one way or another the right to be protected against refoulement.*”¹⁶ On that basis, he concludes that non-refoulement cannot be said to be a norm of customary international law.
18. Goodwin-Gill, on the other hand, confidently asserts that “*the principle of non-refoulement now forms part of customary international law. Accordingly, even States*

¹² Ibid, §70. Another example is *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2021] AC 937, where the Court rejected the argument made in a written intervention by Professor Christoff Heynes (a former UN Special Rapporteur and member of the UN Human Rights Committee) that there is a rule of customary international law against the facilitation of the death penalty. Per Lord Kerr at §151, “*in the absence of firm, tangible evidence that the process has been completed or that there is a general practice [against the facilitation of torture] it is impossible to accept the appellant’s argument based on customary international law.*”

¹³ See e.g., M Wood and O Sender, *Identification of Customary International Law* (OUP 2024) ch5, explaining how the nature and context of the rule in question influences the requirements for the rule’s identification.

¹⁴ J Klabbers, *International Law* (CUP 4th ed, 2023) p.31.

¹⁵ J Hathaway, *The Rights of Refugees under International Law* (CUP 2nd ed, 2021), p.438.

¹⁶ Ibid, pp450-451.

that are not parties to the relevant refugee and human rights treaties are bound by the principle, and on the whole, respect it.”¹⁷

19. Their difference of opinion appears to have its roots in a methodological difference about the proper approach to ascertaining rules of customary international law. Hathaway is concerned by the many instances of refoulement, and the fact that justifications for such practice, even when they are proffered, are rarely made by reference to the norm of non-refoulement.¹⁸ For Hathaway, these concerns are substantial because customary international law is “*not simply a matter of words, wherever spoken and however frequently recited: custom can evolve only through practice in which governments effectively agree to be bound.*”¹⁹ Goodwin-Gill, on the other hand, adopts an approach which attributes less weight to conflicting practice, and more weight to statements and declarations of the norm.²⁰
20. This underlying methodological difference does not have a clear, single correct answer. A national court called upon to resolve the question would face a difficult task. In the Rwanda case in the Supreme Court - *R (AAA and others) v Secretary of State for the Home Department*²¹ - it was noted in the judgment that the principle of non-refoulement is in various respects a core principle of international law to which the UK government has repeatedly committed itself on the international stage.²² In the context of that appeal, we did not have to determine whether the principle amounts to a rule of customary international law. We did not hear argument on that point. It would have been highly relevant if there were not a number of binding treaty obligations, or if the UK withdrew from those treaties. The significance of the issue is that a state is bound by a norm of customary international law in the absence of treaty obligations. It is not inconceivable that we, or some other national court, could at some point be called upon to determine that question.

¹⁷ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (OUP 4th ed, 2021), p.300 including fn425.

¹⁸ J Hathaway, *The Rights of Refugees under International Law* (CUP 2nd ed, 2021), p.454.

¹⁹ Ibid, p.458.

²⁰ In particular, Goodwin-Gill places significant weight on the declarations and resolutions adopted in the UNHCR Executive Committee and UN General Assembly, which he states are “*not only juridically significant in themselves, but also permit the necessary inferences to be drawn regarding the nature of State practice,*” (Goodwin-Gill and J McAdam, *The Refugee in International Law* (OUP 4th ed, 2021), p.301).

²¹ [2023] UKSC 42; [2023] 1 WLR 4433.

²² Ibid, §26.

21. There are other pitfalls for the domestic courts to be wary of. In particular, there is often a need for the court to be alive to the possibility of self-serving statements, when relied on either as an instance of state practice or *opinio juris*. To some extent, domestic courts must be prepared to deploy a level of scepticism and a willingness to look behind some governmental statement in order to ascertain whether it is expressing a true belief in the existence of a legal obligation. Thus, in the case of *R (Tag Eldin Ramadan Bashir) v Secretary of State for the Home Department* (the Cyprus case which I referred to earlier), the Supreme Court considered the obvious possibility that “pragmatic” considerations could influence the UK’s statements about its belief in the applicability of treaty obligations to former colonies.
22. These are some of the challenges facing domestic courts. Aside from those particular challenges, domestic courts must also be alive to the context within which they make decisions about the existence of customary international law rules. Uncertainty about the content of customary international law in domestic courts also stems from the fact that those courts do not have authority under international law itself simply to decide and declare what customary international law is. That authority is vested in relevant international tribunals, most importantly the International Court of Justice (ICJ). So a determination by a domestic court always has something of the flavour of presentation of a legal argument or opinion, rather than being decisive on the point in terms of international law. This point informs the caution of UK courts in deciding whether to accept that a rule of customary international law, not yet identified by the ICJ, really does exist. That caution reflects the profound significance of a court finding that there is a norm of customary international law, which is to say that a sovereign state is bound by that norm in the absence of clear acceptance of it by negotiating and agreeing clear, written treaty obligations.
23. There is also a perennial risk that different national courts will reach conflicting decisions on the existence of such rules, with resulting confusion and detriment to judicial comity. That risk is not unique to the field of customary international law. A striking recent illustration of the risk is found in the exchange between the UK Supreme Court and the EU courts in the *Micula* litigation.²³ *Micula* did not concern customary international law. The litigation concerned investor state treaties and international

²³

See *Micula v Romania* [2020] UKSC 5; [2020] 1 WLR 1033.

arbitration. It provides a real-life example of the difficulties which can arise at the intersection between the domestic legal order and the international legal order.

24. The Micula brothers (who were Swedish nationals) had invested in food production in Romania in the early 2000s, before Romania's accession to the EU. The investments had been made in reliance on tax incentives offered by Romania. In 2002, Romania and Sweden entered into a Bilateral Investment Treaty providing for reciprocal protection of investments and investor-state arbitration under the ICSID Convention. Romania then entered into accession negotiations with a view to joining the EU. In August 2004, Romania repealed the tax incentives in reliance upon which the Micula brothers' investment had been made. This followed from the EU having informed Romania in the course of the accession negotiations that the incentive scheme was contrary to EU state aid rules. The brothers filed a request for ICSID arbitration under the Sweden-Romania treaty, alleging that the repeal of the incentives was a breach of that treaty. In December 2013, the ICSID Tribunal decided that Romania *had* breached the treaty and awarded the brothers compensation of £70m plus interest.
25. The European Commission, taking the view that payment of the arbitration award by Romania would breach the EU's state aid rules, issued an injunction ordering Romania to suspend any action that might lead to the execution of the award until the Commission had made a final determination on the issue. In March 2015, the Commission made a final decision which concluded that payment of the award by Romania would indeed constitute unlawful state aid. The Micula brothers sought annulment of that decision before the General Court of the EU. The decision was annulled in June 2019. However, the Commission appealed.
26. Meanwhile, the brothers had sought to enforce the award made in their favour by the ICSID Tribunal. Article 54 of the ICSID Convention provides that each Contracting State shall recognise an award rendered pursuant to the Convention as binding, and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. Article 64 provides for referral to the ICJ as a default dispute resolution mechanism for disagreements about the interpretation of the Convention. The UK, Sweden and Romania are all Contracting States under the ICSID Convention.
27. As part of their attempt to secure enforcement of the award, the brothers applied in 2014 for registration of the award in England. Registration was granted, and enforcement

proceedings began in relation to Romanian assets in the jurisdiction of the UK. Romania applied for a stay of the enforcement proceedings in England, pending the General Court's ruling on the Commission's decision. The English High Court and Court of Appeal both granted that stay. By the time the case came to the Supreme Court, the General Court had annulled the Commission's decision;²⁴ but in view of the Commission's appeal the application of EU law remained a live issue.

28. In those circumstances, the Supreme Court allowed the Micula brothers' appeal and lifted the stay on enforcement of the award.
29. One of the central issues in the appeal before the Supreme Court concerned the construction of article 351 of the Treaty on Functioning of the EU (TFEU), which provides that "*the rights and obligations arising from agreements concluded before 1 January 1958, or, for acceding States, before their date of accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*"
30. The Supreme Court approached this as a provision which was intended to establish that the application of the EU Treaties does not affect the duty of a Member State to respect the rights of non-Member States (ie third states) under a prior treaty, and to perform its obligations thereunder.²⁵
31. In turn, this raised the question of whether third states had any rights as against the UK under the ICSID Convention with respect to enforcement of an ICSID award. This required consideration of the meaning and effect of article 54 of the ICSID Convention, a question of public international law. The Supreme Court noted that neither the EU nor domestic courts have competence to give a final authoritative decision, binding between States, as to the existence and extent of obligations under a prior multilateral treaty.²⁶ Nevertheless, the Supreme Court considered that it was incumbent on it in these circumstances to construe the provisions of the Convention in order to determine a justiciable issue regarding the application of article 351 of the TFEU which had been properly raised in proceedings before it and which governed the rights of the parties. The Supreme Court held that, properly construed, article 54 of the ICSID Convention

²⁴ In fact the GCEU annulment decision was made on the day that the Supreme Court hearing was originally scheduled to begin. The Supreme Court hearing was postponed in light of this.

²⁵ Ibid, §97.

²⁶ Ibid, §110.

does create an obligation on the part of a state asked to enforce an award which is owed to all ICSID Contracting states, including third states. This was because if the UK declined to honour its responsibility under the Convention to enforce an award, the burden of doing so would fall on other contracting states. The Court also considered that the travaux préparatoires for the Convention supported this interpretation. It followed from this reasoning that the UK's enforcement obligations under article 54 of the ICSID Convention fell within the scope of article 351 of the TFEU, and EU law therefore did not preclude the UK courts from enforcing the award in favour of the Micula brothers.

32. The European Commission, however, took a different view of the nature of the obligation in article 54 of the Convention, and thus of the effect of article 351 TFEU. It maintained that the UK was bound by EU law to uphold EU state aid rules and that the decision of the Supreme Court placed the UK in breach of EU law. The Commission's position was upheld by the CJEU in infraction proceedings brought against the UK. As to the obligation under article 54, the Commission maintained that a third country has a mere "*factual interest*" in the enforcement of an award, rather than a right to insist on such enforcement, and that that interest does not meet the definition of a "*right*" for the purposes of article 351.²⁷ The UK Government chose not to appear to argue the case. The CJEU found that the Supreme Court had indeed misinterpreted and misapplied article 351, by holding that it was applicable to the UK's obligation under the ICSID Convention to enforce the arbitral award.²⁸ Essentially, this turned on a difference of view about the interpretation of the ICSID Convention, an issue of public international law.
33. The CJEU also noted that the Nacka District Court, Sweden, by a judgment of 23 January 2019, had held that the first paragraph of Article 351 TFEU did *not* apply to the enforcement of the arbitral award, and, therefore, had refused to enforce that award in Sweden.²⁹
34. The *Micula* litigation is thus a saga which illustrates the complications and the divergences which can quickly ensue when domestic courts, or a court like the CJEU,

²⁷ See *Commission v United Kingdom (Judgment of the Supreme Court)* Case C-516/22; [2025] 1 WLR 589, in particular §76.

²⁸ Ibid, §84.

²⁹ Ibid, at §151 and §173.

without the authority to determine a question of international law must nevertheless make such a determination for the purposes of resolving a justiciable domestic legal question raised in proceedings before it.

35. This dilemma arises in the context of customary international law too, but with the added complications that when determining the existence of rules of customary international law national courts are engaging on the demanding and delicate evidence-based assessment I have outlined, and in a context where particular caution in identifying such a rule is called for.

National courts and the adoption of customary international law

36. In a monist legal system, where international law automatically forms part of the domestic legal order, there might be no substantial second part of this talk. Having identified a norm of customary international law, the domestic courts would simply be bound to apply it. However, as an aspect of its constitutional order, the UK has a dualist system. Generally, this is taken to mean that international law does not automatically form part of the domestic legal system.³⁰ But historically norms of customary international law were taken to form part of the common law, so as to be part of domestic law. This created a puzzle. How could this be reconciled with the dualist nature of the constitution?
37. So far as treaty obligations are concerned, they may apply in domestic law, but only by virtue of their adoption into domestic law by legislation. So far as rules of customary international law are concerned, the law has been clarified to make it clear that they are a source for the common law (that is, for binding domestic law), but only if they pass through a conceptual filter of being consistent with the UK's constitutional order. So, for example, a rule of customary international law could not be treated as law if it dealt with a matter which was properly to be determined by the exercise of legislative authority by Parliament.
38. The basis for the UK's dualist approach can be traced to the fundamental propositions of our unwritten constitution, which rests on the principles of parliamentary sovereignty and the separation of powers. These principles permeate the entire legal system, and shape the interaction between the domestic legal order and international law.

³⁰ See Jennings and Watts, *Oppenheim's International Law, Volume 1: Peace* (9th ed 1992) at pp54-55.

39. The outworking of this dualist legal order is simpler in some areas than in others. In the context of treaty-derived rules, there is a clear test which delineates the point at which such a rule is adopted into the domestic legal order. That is, only when a treaty is incorporated into domestic law by legislation do its provisions become enforceable as a matter of domestic law. An example of incorporation is the Human Rights Act 1998, which translated the rights set out in the ECHR into domestic rights for which domestic remedies are prescribed. Other treaties, however, remain ratified but incorporated. The consequence is that they are unenforceable by national courts and do not produce legal effects in domestic law.³¹ The principles underlying this hard-edged rule are clear. The making of treaties is a function of executive power,³² but the executive has no power to change domestic law unless authorised to do so by Parliament.³³
40. The extent to which customary international law forms part of the domestic legal order is, however, a more complex issue.
41. The starting point is that norms of customary international law are materially different from Treaty-derived norms. This is because the executive cannot unilaterally adopt or create a norm of customary international law, and thus the common law is inherently more receptive to the adoption of such norms.³⁴
42. Consistently with this inherent receptiveness, at one time the orthodox view was that (in the absence of a conflict with legislation) customary international law rules were automatically adopted into the common law. This notion is traceable to the decision by Lord Mansfield CJ in 1764 in *Triquet v Bath*,³⁵ but the leading articulation of it in more modern times was in Lord Denning MR's judgment of 1977 in *Trendtex Trading*

³¹ A recent example of this in a case which reached the Supreme Court was *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223. The appellants raised the question of whether the UK had breached its obligations under the United Nations Convention on the Rights of the Child through the two-child limit on entitlement to child tax credit. The argument that the Convention had been breached was rejected by the Court, which remarked that “*although treaties are agreements intended to be binding upon the parties to them, they are not contracts which domestic courts can enforce.... It is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom,*” (§§76-77).

³² *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, §53.

³³ See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500 (Lord Oliver); and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.

³⁴ See *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719 at §117.

³⁵ (1764) 3 Burr 1478.

Corporation v Central Bank of Nigeria.³⁶ Lord Denning stated that “*the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament.*”

43. In the 21st century, however, the position has been substantially refined.
44. The first significant shift occurred in the House of Lords’ judgment in *R v Jones (Margaret)*.³⁷ The House of Lords rejected the submission that, in light of the customary international law crime of aggression, there existed in the domestic legal order a crime of aggression. There were two principal reasons for that decision. First, the rule would not be recognised because it conflicted with the “*democratic principle that it is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence*”.³⁸ Secondly, there is a clear constitutional principle that the question of whether the state has acted unlawfully in the course of exercising the Crown’s discretionary power to make war is inherently non-justiciable, and it would therefore be inappropriate for the customary international law crime of aggression to be adopted into the common law, since that would turn that issue into a justiciable matter.³⁹
45. In line with this more nuanced approach to the adoption of customary international law into the common law, under which norms are only adopted where it is constitutionally and otherwise appropriate to do so, the leading authority is now the Supreme Court’s judgment in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*.⁴⁰
46. This appeal concerned the decision of the Government to refuse to hold a public inquiry into deaths caused by British soldiers in Malaya (now Malaysia) in 1948. The appellants were relatives of victims of persons shot by British troops. They argued that the decision to refuse to hold a public inquiry was unlawful. One of the grounds upon which they argued that a public inquiry was required was that customary international law obliged the UK government to investigate the killings. The Supreme Court unanimously dismissed the appellants’ argument on that ground. The primary reason for this decision was that the killings took place *before* the crystallisation of a norm of customary

³⁶ [1977] QB 519, 544.

³⁷ [2006] UKHL 16; [2007] 1 AC 316.

³⁸ Ibid, §§60-62.

³⁹ Ibid, §§63-67.

⁴⁰ [2015] UKSC 69; [2016] AC 1355.

international law imposing a duty on states to carry out formal investigations into some unlawful deaths.

47. However, the Court went on to hold that even if (as a matter of customary international law) such a duty did exist or had existed at the time, the duty would not be capable of being adopted into the common law. This was because Parliament had itself legislated in a manner which governed and pre-empted the regulation of investigations into historic deaths by expressly providing for investigations through the coroner's courts, under the Inquiries Act 2005 and by the incorporation of article 2 of the ECHR into domestic law under the Human Rights Act 1998.⁴¹ In those circumstances, it would be inappropriate for the courts to take it upon themselves to impose a further duty, particularly one with potentially wide and uncertain ramifications.
48. Lord Mance delivered a short concurring judgment, in which he expanded upon the scope for adoption of customary international law into the common law. He made a clear statement there is no automatic adoption of customary international law rules into the common law. In his words, "*common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings.*"⁴² He went on to suggest that there is, however, a general presumption that "*customary international law, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.*"⁴³
49. From *Keyu*, it thus emerges that (1) customary international law is a source of domestic law, but is not automatically a part of domestic law; and (2) the question of when a norm of customary international law becomes a norm of domestic law rests on the application of a constitutional 'appropriateness' filter to each specific rule.⁴⁴

⁴¹ Ibid, in particular at §151.

⁴² Ibid, §146.

⁴³ Ibid, §150.

⁴⁴ See on this point P Sales and J Clement, 'International law in the domestic courts: the developing framework' 124 LQR (2008) 388.

50. Since *Keyu*, those principles have been applied in a number of other authorities. I will refer to one of these, to illustrate the point: the Supreme Court decision in *Ukraine v Law Debenture Trust Corporation Plc*.⁴⁵
51. In that case, the Supreme Court had to determine an appeal arising out of a contractual dispute between Ukraine and the Law Debenture Trust Corporation plc, acting on behalf of the Russian Federation. In 2013, Russia had lent Ukraine money against Eurobonds issued by Ukraine with a nominal value of US\$3 billion to Russia. The Eurobonds were constituted by a trust deed which was governed by the law of England and Wales and which specified that the courts of England and Wales had exclusive jurisdiction to hear any disputes arising out of it. Ukraine failed to repay the bonds fully. The Law Debenture Trust Corporation therefore issued proceedings against Ukraine, claiming the sums due. One of Ukraine's arguments in its defence was that it was entitled to rely on the public international law doctrine of countermeasures to decline to make payment under the notes, on the grounds that it was reacting to Russian breaches of international law and aggression against it.
52. The Supreme Court, by a majority, held that Ukraine's defence on the ground of countermeasures should be struck out. The first basis on which this conclusion was reached was that there was no applicable rule of the common law which the courts themselves could sensibly adapt in order to reflect this rule of customary international law. This was, in the view of the majority, a "*complete answer*" to Ukraine's argument.⁴⁶
53. The second reason given by the majority was that the subject-matter of such inter-state disputes is inherently unsuitable for adjudication by the courts in this jurisdiction. If the availability of countermeasures at the level of international law were to be accepted as giving rise to a defence in domestic law, national courts would become the arbiter of inter-state disputes governed by international law, which is not their function. Ukraine's case on countermeasures thus fell *prima facie* within the principle of the non-justiciability of inter-state disputes,⁴⁷ and it was therefore inappropriate to adopt into the common law the rule relied on by Ukraine.⁴⁸

⁴⁵ [2023] UKSC 11; [2024] AC 411.

⁴⁶ *Ibid*, §207.

⁴⁷ See Lord Wilberforce in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 at 931-938, and *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964.

⁴⁸ *Law Debenture Trust v Ukraine*, §207.

54. There was a dissent on this issue by Lord Carnwath, who would not have struck out Ukraine's defence on the countermeasures ground. Lord Carnwath found the majority's reasoning as to the inappropriateness of adopting the rule "*unconvincing*."⁴⁹ In relation to the first point (that there is no common law rule which can be adapted for the purpose), he stated that this "*begs the question why an appropriate rule cannot be fashioned by reference to a clearly established principle of international law, as the common law has been able to do in the past*."⁵⁰ As to the non-justiciability point, he said that "*those principles may be departed from in an exceptional case, such as in response to a clearly established breach of international law, uniformly condemned by the international community*."⁵¹
55. In summary, in the UK's dualist legal order the adoption of customary international law rules into the common law depends on the application of a constitutional filter. Sometimes, that will be a relatively straightforward exercise (as where the content of the rule involves an inherently non-justiciable issue and therefore amounts to a 'no-go' zone for the domestic courts). At other times, that will be a much more nuanced issue, calling into question issues of constitutional law which are themselves complex and debatable. As can be seen from the dissent in the *Debenture Trust* case, these are issues of the highest importance upon which reasonable minds may disagree.

Conclusion

56. The realm of customary international law is developing and maturing. It has become far more plastic in modern international law than it was, say, in the eighteenth century or even the early part of the twentieth century. In parallel to those developments in the international legal order, there is a growing demand on national courts to perform robustly their function of identifying rules of customary international law. That exercise is not straightforward. Neither is the separate question which arises in our jurisdiction of whether any given customary international rule should be adopted into the domestic legal order. Nevertheless, it is necessary to address these issues. It is to be hoped that the emergence of high-quality jurisprudence on customary international law rules across the domestic courts of various jurisdictions will be beneficial to all, and will

⁴⁹ Ibid, §226 .

⁵⁰ Ibid, §226.

⁵¹ Ibid, §227.

simultaneously enhance our various domestic legal orders and the international legal order.