Resolution 1441 had the status of an unincorporated treaty, the case was outside the court's jurisdiction as it involved a question "of international law in no way bearing on the application of domestic law". Subject to certain limited exceptions, treaties to which the Government adheres but which have not been incorporated into our law by statutory legislation cannot usually directly affect the common law, and in this case there was "simply no foothold in domestic law for any ruling to be given on international law".

The problem with the court's position is that if customary international law is part of the common law, the executive must obey it as a matter of law rather than as a matter of choice. The court did not address the relationship between this principle and the rule that unincorporated treaties can have no effect in our law. If the customary rule *including* the treaty qualification is part of the common law, then the court was mistaken to argue that the Resolution operated *purely* on the international plane: it would also give content to a common law exception to a common law prohibition on the use of force. If the customary rule is part of the common law but *without* the treaty qualification, the government would never have the power at common law to rely on Security Council authorisation to use force without Parliamentary incorporation of the relevant resolution. Perhaps the best way to make sense of the court's conclusion that it lacked jurisdiction is to assume that whenever a *ius cogens* rule of customary international law is qualified by an unincorporated treaty, that rule is *not* part of the common law. If the qualified prohibition on the use of force is *not* part of the common law, then CND's challenge would have had to be cast in terms of irrationality rather than illegality and the case law on non-justiciability would properly apply. But the idea that the executive can remove a part of the common law by adhering to a treaty is one that sits uneasily with any traditional conception of the rule of law or the separation of powers.

AMANDA PERREAU-SAUSSINE

DIMINISHED RESPONSIBILITY EXPANDED

ACCORDING to section 2(1) of the Homicide Act 1957 the defence of diminished responsibility is available where the defendant is charged with murder and he was suffering from abnormality of mind which "substantially impaired his mental responsibility" for the killing. The question for the House of Lords to resolve in *Dietschmann*

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[2003] UKHL 10, [2003] 2 W.L.R. 613 was how this defence should operate where the defendant was suffering from a mental abnormality, in that case arising from a grief reaction following the death of his girlfriend (who also happened to be his aunt), but where he was also heavily intoxicated at the time. Over the years a two-stage test has been developed by the courts to deal with such cases: see *Egan* [1992] 4 All E.R. 470. This test required the jury to consider, first, whether the defendant would have killed had he not been intoxicated and, second, whether in such a case his mental responsibility would have been substantially impaired at the time of the killing. Only if there was an affirmative answer to both questions would the defence be successful. The consequence of this was that the defence would be denied to the defendant if he had killed because of the intoxication, regardless of the fact that he was suffering from a mental abnormality which in itself substantially impaired his mental responsibility.

In *Dietschmann* the trial judge had directed the jury with reference to the two-stage test and this was affirmed by the Court of Appeal. However, on appeal to the House of Lords, the test was rejected as being inconsistent with the words of the Homicide Act and with earlier decisions, such as *Fenton* (1975) 61 Cr.App.R. 261 and *Gittens* [1984] Q.B. 698. The court focused on the word "substantially" in section 2 of the Homicide Act and concluded that it was sufficient that the defendant's mental abnormality had contributed to the killing, even though the defendant would not have killed had he been sober. The consequence of this decision is to reject the two-stage test and to resolve the problem of drunken defendants who suffer from mental abnormality by reference to a test of causation (Lord Hutton at paragraph [18]). As long as the mental abnormality was an operating cause of the killing then the defence of diminished responsibility should be available, regardless of the contributory effect of the intoxication. Lord Hutton did acknowledge, however, that in many cases where the jury conclude that the defendant would not have killed had he been sober, then his mental abnormality would not have contributed to the killing.

All the difficulties in this area of the law arise from the unnecessary complications arising from the operation of the two-stage judicial direction. The effect of that direction in this case was to require the jury to ignore the fact of intoxication and to determine what the defendant would have done had he been sober (see *Gittens* [1984] Q.B. 698). But asking the jury to consider such hypothetical questions should be avoided at all costs. The function of the jury is surely to determine what did happen, not what might have happened. They know the defendant was intoxicated, so why

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expect them to predict what the defendant might have done had he been sober? Thankfully we no longer require juries to participate in such absurd speculation, at least in this context. The consequence of *Dietschmann* is that the fact that the defendant was intoxicated need not be ignored. Instead, what the jury need to determine is whether, despite the defendant's intoxication, his mental abnormality can be considered to be a substantial cause of the killing. This is a typical causation question. "Substantial" does not mean sole cause and it does not even mean predominant cause. It is enough that it was an operating cause of the killing, which was more than a trivial cause: *Lloyd* [1967] 1 Q.B. 175.

So the operation of the law is now much clearer. The fact that the defendant was intoxicated cannot of itself constitute mental abnormality (save where this arose from an irresistible craving for drink or drugs: *Tandy* [1989] 1 W.L.R. 350) but this does not prevent him from successfully pleading diminished responsibility, as long as it can be shown that the mental abnormality was a substantial cause of the killing. Although the Homicide Act purports to assess the defendant's mental abnormality with reference to impairment of responsibility for his actions, it is preferable to focus instead on the causative effect of the abnormality. If the abnormality did not contribute to the commission of the crime in any significant way then, surely, it should not be taken into account when determining the defendant's culpability. If I suffer from retarded development of the mind, but the evidence points to the conclusion that I killed only because I was drunk, then my abnormality of mind must be irrelevant. My responsibility should only be diminished if the abnormality of mind was operative. But this focus on causation does raise a nice point of interpretation as to what should constitute an operative cause of a killing. If the defendant would not have killed but for the intoxication, can it really be concluded that any mental abnormality which he suffered contributed to the killing? But that is to ask the wrong question. Rather than considering whether anything else had an operative effect on the defendant's actions, we should only be concerned with whether the mental abnormality had a sufficiently contributory effect. *Dietschmann* adopts a realistic approach to causation which is consistent with that adopted throughout the criminal law, namely a test of an operative rather than the sole cause: *Dyson* [1908] 2 K.B. 454. The defence of diminished responsibility is triggered by mental abnormality. If that abnormality contributed to a killing in any significant way, then it is surely appropriate to take it into account since it reduces the defendant's culpability for the killing regardless of the contribution

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of intoxication (as Lord Hutton acknowledged at paragraph [40]). For it must not be forgotten that the effect of the diminished responsibility defence is not to acquit the defendant but to convict him of the lesser offence of manslaughter, for which the judge has discretionary sentencing powers.

Although not explicitly acknowledged in the House of Lords, a trend in recent decisions of the House concerning homicide is slowly emerging. In the same way that the decision in *Smith* [2001] 1 A.C. 146 resulted in a liberalisation of the defence of provocation, so too *Dietschmann* has expanded the operation of the defence of diminished responsibility, so that it is now available even though the defendant might not have killed had he been sober. Is it reading too much into these decisions to conclude that the judiciary are seeking to preserve some judicial control over sentencing for homicide? I think not.

GRAHAM VIRGO

CIVIL LIABILITY FOR ABUSE OF THE CRIMINAL PROCESS: DOWNSTREAM OF *THREE RIVERS*

IF the criminal justice system malfunctions and causes someone damage, when can the victim sue the person responsible?

To this question, the traditional answer is "almost never". If the malfunction consists of imprisoning someone who was innocent, or prosecuting them without due cause, there is no civil liability except for acts done in bad faith; liability for merely negligent behaviour is excluded, on grounds of public policy. Where the malfunction consists of failing to catch a criminal who celebrates his continued freedom by causing further damage—or in releasing one with similar effect—the same is true *a fortiori*, because the case is further complicated by issues of causation and *novus actus interveniens*. Thus in *Hill* v. *Chief Constable of West Yorkshire* [1989] A.C. 53 the House of Lords ruled that the Yorkshire police, however negligent, were not liable for their failure to catch the Yorkshire Ripper. Nor was the Home Secretary liable for negligently failing to execute a deportation order against a dangerous criminal—a failure castigated as "utterly lamentable" by a judge when later sentencing him for a further string of terrible offences (*K.* v. *Secretary of State for the Home Office* [2002] EWCA Civ 775).

As result of *Akenzua* v. *Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 W.L.R. 741, liability may now be easier to establish than has traditionally been thought.

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