CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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THE PINOCHET CASE NO.3

A. Introduction

THE decision of the Appellate Committee of the House of Lords, given on 24 March 1999,[1] confirms, by the impressive vote of 6 to 1, the earlier majority ruling that a former head of state enjoys no immunity in extradition or criminal proceedings brought in the United Kingdom in respect of the international crime of torture.

The decision can be applauded as steering a skilful course between the wholesale prosecution of torturers and the blanket protection of wrongdoers holding high State office. By the introduction of operative dates, 28 September and 8 December 1988, being the dates when the UN Convention on Torture was incorporated into English law and the UK ratified the Convention the Lords achieved a compromise whereby they excluded the filing of charges for atrocities committed more than 10 years ago and thereby radically reduced the number for which request for extradition could be sought.

Given that "the interaction between the various issues is complex"[2] and the seven judgments run to some 100 pages, the evaluation of the full implications of the case will take years. At this stage it is only possible to express a general reaction and indicate areas open to criticism requiring further elucidation.

There is no doubt that the ingenuity of the majority in *Pinochet No.3* produced a result which both supporters and opponents could in some part accept. Why, then, does it produce such a sense of disquiet for an international lawyer? First, despite Lord Browne-Wilkinson's assertion that it was "no concern of your Lordships" "to achieve the best justice,[3] that is precisely what the judgments seek to do. They unashamedly occupy the high moral ground, declaiming:

> "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?"[4]

and again

* This section deals with recent developments in British practice, making some attempt to set the practice against the international and domestic context in which it takes place.

1. *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) (No.3)* (1999) 2 All E.R. 97, hereafter referred to as *Pinochet No.3*. For comment on the earlier decision see Fox, "The First Pinochet Case: Immunity of a Former Head of State" (1999) 48 I.C.L.Q. 207–216.
2. Lord Browne-Wilkinson, *Pinochet No.3*, 100.
3. *Ibid.*, 102.
4. *Ibid.*, 114.

> "If the implementation of the torture regime is to be the official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing".[5]

This contrasts curiously with the protestation that it is the job of the Lords not "to choose between two sides" but to decide "two questions of law";[6] with the acceptance, barring Lord Millett, that the authorisation of murder, it appears, is official business for which a former head of state may claim immunity; and even more astonishingly, that the serving head and his state retain immunity for their official business, even where it concerns the "implementation of torture".

It is difficult in the current politically correct condemnation of torture and all its manifestations to advance the claims of the wrongdoers as essential to the maintenance of the international system without which there can be no protection of life or limb. Yet it has to be recognised and taken into account in any application of international law that the present international order is flawed, unable to support the aspirations of proponents of fundamental human rights because there is no overarching authority to enforce them. As the NATO action in Kosovo currently demonstrates, the United Nations with the mandatory powers of the Security Council can be sidelined; the sole enforcers of legal order and respect for human rights are States and the present international system is based on consent, reciprocity and allocation of jurisdiction by which States both undertake to enforce and to *abstain from enforcement* of the law.

Second, despite a general recognition that international criminal law is in process of developing, only Lords Slynn and Goff in their dissenting judgments show the capacity to recognise that international law is immature, weak in its supporting theoretical structure and based on pragmatic compromise to avoid political confrontation. The majority deploy with confidence in their judgments matters, which are the least accepted and recognised by the international community of the states as a whole, such as offences *contrary* to *jus cogens*, obligations *erga omnes*, crimes contrary to international humanitarian law, and the nature of universal jurisdiction. They set aside established international law rules for allocation of and abstention from jurisdiction of States for the questionable construction of one phrase in an international convention.

Third, the Lords' attempt to steer a middle path returns to the political agenda disputes which the legal bar of state immunity was designed to remove from the intervention of other States. How, if States' responsibility by way of allocation of jurisdiction is set aside, the "order" within the new international community can be maintained so as to deliver the promised justice remains an open question. It is one which the latest decision of the House of Lords did not address, or which, perhaps more alarmingly, they were content to hand over to the Home Secretary.

The course of the proceedings to date can be briefly summarised. On 25 November 1998 the Judicial Committee held. By 3 to 2 (Lords Nicholls of Birkenhead, Steyn, and Hoffman; with Lords Slynn of Hadley and Lloyd of Berwick dissenting), that a former head of state, has no immunity in respect of acts of official torture made crimes by the UK Criminal Justice Act 1988, s.134(1) or

5. *Ibid.*, 115.
6. *Ibid.*, 102.

for hostage taking made a UK criminal offence by the Taking of Hostages Act 1972.[7]

On 10 December a second Judicial Committee of the House of Lords (Lords Browne-Wilkinson, Goff of Chieveley, Nolan, Hope of Craighead, and Hutton) allowed the application made on behalf of General Pinochet for the case to be reheard on the ground that one of the Law Lords, Lord Hoffman participating in the first case, had not disclosed his links with Amnesty International, an intervenor in the proceedings.[8] The original issue of immunity was reheard over three weeks in January and February, leave to intervene as a party was given to the Republic of Chile as the State entitled to claim immunity and Amnesty International and an *amicus curiae* also addressed the court. On 24 March 1999 the Appellate Committee held, by six to one, (Lords Browne-Wilkinson, Hope of Craighead, Hutton, Saville of Newdigate, Millett, and Phillips of Worth Maltravers, with Lord Goff of Chieveley dissenting) that a former Head of State had no immunity in respect of acts of torture or conspiracy, to commit such acts, where such acts constituted international crimes, and were committed after 8 December 1998, the date when the UK ratified the 1984 UN Torture on Convention.

B. The Rule of Double Criminality and Consequent Reduction of the Charges to Acts of Torture Committed after 1988

The offences for which immunity was sought by General Pinochet in the Divisional Court for which the Lord Chief Justice Lord Bingham sought the ruling of the House of Lords differed from those upon which the Lords in *Pinochet No.3* applied its non-immunity ruling. The offences sought in the Divisional Court related to murder, genocide, taking of hostages, torture and attempts and conspiracy to commit such offences. Bingham C.J. deleted murder as not within the requested UK extraterritorial jurisdiction; the Home Secretary on 10 December 1998 deleted genocide in the exercise of his statutory power allowing extradition to proceed.

Somewhat ill advisedly as it turned out, prior to the hearing of *Pinochet No.3*, the Crown Prosecution Service (CPS) on behalf of Spain expanded the list of charges to thirty in number, including some which were alleged to occur prior to the coup and the General's appointment as head of state on 11 September 1973. This reopened a ground for challenge of validity of all the charges both before and after 11 September 1973 by reason of the double criminality rule. Bingham C.J. had construed section 2(1)(a) of the Extradition Act 1989 as sufficiently met if the conduct alleged in the extradition request was a criminal offence in UK law at the

7. *R.* v. *Bow Street Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening)* (1998) 4 A.E.R. 897, hereafter *Pinochet No.1.*

8. *R* v. *Bow Street Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening)* (1999) 1 All E.R. 577, hereafter *Pinochet No.2.* Lord Hoffman was a Director and Chair of Amnesty International Charity Ltd which had been incorporated to fund-raise and conduct research into purposes shared by Amnesty International. None of the Law Lords attributed bias, whether actual or apparent, to Lord Hoffman; they held, however, that the close relationship of the two organisations, one of which was a party to the proceedings, required the Court to treat the other, of which Lord Hoffman was Director, also as a party, and therefore as a matter which should have been disclosed so as to give a party an opportunity to object to Lord Hoffman hearing the case.

time of the request. All the Law Lords in *Pinochet No.3* rejected this construction holding that "the double criminality rule required the conduct to be criminal under English law at the conduct date and not at the request date".[9]

In consequence Lord Hope of Craighead subjected the CPS's revised list of 30 charges to close scrutiny by reference to "a novel type of extraterritorial jurisdiction",[10] which UK law, particularly the Criminal Justice Act 1988 (CJA 1988), had conferred on English courts in implementation of obligations under international conventions.[11] He found 28 September 1998, as the date of the entry into force of the CJA 1998 implementing the 1984 UN Torture Convention,[12] to be the operative date after which, but not before, the international crime of State torture became prosecutable extraterritorially under UK law. In consequence, his scrutiny produced a drastic reduction in the number of alleged charges in the Spanish extradition request that qualified as valid "extradition crimes". He found, and the other Law Lords accepted, that the application of the double criminality rule and the operative date reduced the charges to three counts, comprising one conspiracy to murder in Spain between 1 January 1975 and 31 December 1976, two conspiracies to commit torture by reason of the very wide period over which they were alleged to have taken place, that is 11 September 1973 to 11 January 1990, and one solitary act of torture alleged to have taken place on 24 January 1989. Thus, by application of the rule of double criminality, and by assuming that the identification of the charges for which immunity was sought was a precondition of the determination of immunity, the Lords narrowed the ambit of their ruling on the second issue of immunity. Six of the Law Lords found General Pinochet as a former head of state to have no immunity *ratione materiae* in respect of the three remaining charges relating to torture of a former head of state from criminal proceedings for State torture.

But significantly, in view of the changed "climate" resulting from the reduction in the number of charges and the non-retrospectivity of the 1988 time bar, all the Lords, including Lord Goff who dissented on the finding of no immunity, made a strong plea to the Home Secretary to reconsider the exercise of his discretion in allowing extradition proceedings to continue.

Why did the House of Lords give this precedence to the issue of double criminality? Bingham C.J.'s formulation only sought their views on the issue of Head of State immunity. Could a correction of Lord Bingham's construction not have been made in abstract without applying it to the individual charges in Spain's request? Was that not an exercise essentially to be deferred until extradition proceedings had clarified the facts as to where and when the alleged offence was committed and the degree of participation alleged? Had they done so, rather than concentrating on the construction of the UN Torture Convention, they might

9. *Per* Lord Browne-Wilkinson, *Pinochet No.3*, 107.

10. Lord Phillips, *Pinochet No.3*, 185.

11. The recognition of the extraterritorial scope of the offence of conspiracy at common law *Liangsiripraesert* v. *Govt of USA* (1991) 1 A.C. 225, and by statute, Criminal Law Act 1977, s.1, *Regina* v. *Sansom* (1991) 2 Q.B. 130, also contributed to the widened extraterritorial jurisdiction of the English courts, Lord Hope, *Pinochet No.3*, 138–140.

12. The United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1984, HMSO (UK) Cmnd 9593. 23 ILM 1027, 24 ILM 535, hereafter the UN Torture Convention.

have reviewed the function of immunity across the whole field of international criminal responsibility.[13]

In the event, since the March 1999 judgment, Spain at the instance of Judge Balthasar Garzon is reported as adding 40 more charges alleged to have been committed after 1988,[14] and after reconsideration as requested, the Home Secretary has exercised his discretion and permitted extradition to proceed.[15] The Lords "updating" of the charges may, therefore, be without impact. Save, of course, that it draws attention to the staleness of the bulk of the allegations and in Lord Goff's dissenting view at least, makes proof of a systematic or widespread campaign of torture on the basis of the two surviving isolated incidents after 1988, difficult, if not legally impermissible.[16]

C. Immunity of a Former Head of State

The core issue in the case concerned whether the immunity of a head of state in respect of acts performed in exercise of his official functions extends, after he leaves office, to alleged acts relating to international crimes against fundamental human rights.

The court in *Pinochet No.3* accepted that the applicable law was customary international law or the UK State Immunity Act 1978, (SIA); Lord Phillips alone found the relevant rule in customary international law,[17] and Lords Browne-Wilkinson, Goff and Millett, being doubtful as to the ambit of section 20 also fell back on international law.[18] The others, whilst finding a serving head of state to enjoy absolute immunity under customary international law from the criminal proceedings of another state, accepted section 20(1) of SIA as giving statutory form to the customary international rule. It was consequently treated as the controlling provision.

Section 20 of the 1978 Act confers immunity upon a head of state, his family and servants by reference ("with necessary modifications") to the privileges and immunities enjoyed by the head of a diplomatic mission under the 1961 Vienna Convention which was enacted as a Schedule to the Diplomatic Privileges Act 1964. These immunities include, under Article 31, "immunity from the criminal jurisdiction of the receiving state". Article 39(2) deals with "when the functions of the person enjoying privileges and immunities have come to an end" and provides that immunities shall normally cease; it then reads: "However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunities shall continue to subsist."

There were two possible answers to the construction of this provision; either, as Lords Lloyd, Slynn and Goff, in agreement with Bingham C.J. in the Divisional

13. Lord Goff deplored the lack of such a review and the adoption of the majority of "the simple approach" concentrating on the UN Torture Convention, *Pinochet No.3I*, 117.

14. *The Times*, 9 April 1999.

15. H.L. Debates Vol. 329 Col. 311, 15 April 1999. Leave to judicially review this second authority of the Home Secretary to proceed was refused, *The Times*, 28 May 1999.

16. Lord Goff queried whether reliance could be placed on earlier charges of torture excluded under the double criminality rule to establish that the single act of torture alleged to have occurred on 24 June 1989 was part of a still continuing campaign. *Pinochet No.3*, 131.

17. *Pinochet No.3*, 192.

18. *Ibid.*, 113, 172.

Court, held, immunity from criminal proceedings in the courts of another state continues for all acts, lawful or criminal, performed in exercise of official functions by a head of state even after he ceases to hold office; or, as the Law Lords in the majority held, international crimes prohibited by *jus cogens* performed when in office are not within the immunity afforded to a former head of state from criminal proceedings in the municipal courts of another state in respect of the exercise of official functions.

A concession was made in the case by the Crown Prosecution Service on behalf of Spain that the alleged acts of General Pinochet were performed for State purposes as an exercise of his functions as head of state and not in a private capacity, for private gratification.[19] This disposed of the ambiguity to be found in Lord Steyn's judgment in *Pinochet No.1* that an international crime of the gravity of torture must always be construed as a personal act since no lawful State would authorise it. Some US cases have used this construction to side step the issue whether immunity exists for the commission of an international crime for a State purpose.[20]

Unlike the majority in *Pinochet No.1* which treated the issue as a question of construction of the UK Act, the Criminal Justice Act 1988, s.134 which made State torture a crime in English law, the majority in *Pinochet No.3* directed all their attention to one international instrument, the 1984 UN Torture Convention.

Their line of reasoning is complicated and each Law Lord had an individual approach. But broadly they came to the conclusion that the 1984 UN Torture Convention contained "a fully constituted international crime"[21] and that the construction of that Convention made plain:

> A head of state is included in the term 'public officials or other person acting in an official capacity' defined by Article 1 as the persons liable for the commission of the international crime of torture.
>
> This definition of the offence of torture and the obligation in the Convention to extradite or prosecute offenders is inconsistent with the retention of an immunity for a former head of State for such a crime"; *per* Browne-Wilkinson, *Pinochet No.3*, 114.

All the Law Lords in the majority, except for Lord Hope, adopted 8 December 1988, the date on which the United Kingdom ratified the UN Convention on Torture, as the point in time (the operative date) from which their construction should take effect, while Lord Hope of Craighead chose 30 September 1988 as the date on which Chile as the State entitled to claim immunity, ratified the UN Torture Convention.

There are a number of problems with this approach. They can only be summarised under headings here.

D. The Immunity of a Head of State

It is apparent from the research of the many counsel in the case that there is no clear customary international law relating to the precise nature and scope of the immunities of a head of state. Nevertheless, that research established that no previous local domestic court had refused to afford immunity to a serving or

19. Lord Hope of Craighead, *Pinochet No.3*, 146.
20. *Jumenez* v. *Aristeguieta* 311 F 2d 547, US Ct of Apps. (5th Cir.).
21. Lord Browne-Wilkinson, 114.

former head of state on the grounds that there can be no immunity against prosecution of certain international crimes. That there was no clear international rule in 1978 is made clear from the parliamentary history relating to SIA, s.20.

In introducing the clause in its original form Lord McLuskey explained that:

> "Clause 21 is intended to lay down in statutory form the immunities and privileges of heads of state in their private capacities, their families and their households. The position of such heads is governed by customary international law which is not yet embodied in any international convention. The law lacks the precision which is now given to the law concerning practically all other persons who enjoy international immunities and privileges, namely diplomats, consular officers and persons on diplomatic missions, by international Conventions and United Kingdom legislation giving effect to them."

Lord McLuskey therefore explained:

> "This clause takes the immunities and privileges of heads of state on the analogy of the immunities and privileges of heads of diplomatic missions, which are already covered by legislation in the Diplomatic Privileges Act 1964 . . ."[22]

It is clear from Lord McLuskey's statement that for English law purposes, and in view of problems rarely arising except in relation to a head of state's acts or property in the UK even when not present in the country, the government of the day was of the view that the purpose in hand would best be served by *equating* the status of a head of state to that of the head of a diplomatic mission. It does not follow that such an equation accurately represents the position in customary international law and indeed the International Law Commission's eventual rejection, in its draft Articles on Jurisdictional Immunities of States and their Property, of inclusion of a provision on the lines of section 20, as initially proposed by the Rapporteur, suggests strong indications to the contrary.[23]

Thus, the reading of SIA 20 as an accurate statement of the position of a head of state under customary international law is misleading; it led the Lords not to

22. Hansard HL, 16 March 1978, 1538, col.1

23. The immunity of a head of state was reviewed by the International Law Commission in the course of its preparation over 20 years of a draft convention on the jurisdictional immunities of states and their properties; The Sixth Committee of the UN General Assembly is deliberating over the final draft with a view to convening a conference to achieve its adoption as a multilateral convention. Initially this draft convention included "the sovereign or head of State" in the expression "State" in the draft definition article (1980) ILCYIB vol.II, part 1, p.205, paras.36–7, 2nd report), and set out in a draft article 25 the immunities of "personal sovereigns and other heads of states" in much the same way as SIA s.20 (1986 ILCYB vol.1, part 1, p.5, para.10). The International Law Commission after extensive review of State practice (1981 ILCYB vol.2, part 1, p.136, para.31, 3rd Report) and lengthy debate (1986 ILCYB vol.1, part 1, pp.4–20), deleted the phrase from the definition of "state" and the draft article 25. In the final draft convention, sent to UN, it inserted a saving clause which reads:
"The present articles are likewise without prejudice to the privileges and immunities accorded under international law to Heads of State *ratione personae*" (1991 ILCYB Vol.I, part 2, p.1).
The commentary on this article reads:
The reservation of article 3.2 refers exclusively to the private acts or personal immunities and privileges recognised and accorded in the practice of states without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched (1991 ILCYB vol.2, part 2, p.22).

consider alternative models for head of state immunity rules. Further it led them to assimilate the position of a head of state as regards immunities to that of a head of mission and in so doing to assume that the point at which a line was drawn between the personal and official acts of a diplomat was the same for that of a head of state. It clearly is not; as Lord Phillips recognised, the adoption of the model of section 20 led to the application of a rule designed to deal solely with physical presence, in person or by property, in the forum state of a representative of another State, to one who would rarely visit and whose acts as state acts have validity when performed within the country of which he was head.[24]

E. The Peculiar Role of the Head of State

Unlike the diplomat, the head of state has a constitutional role. There is no doubt that in many constitutions a head of state acts as a component in the constitutional structure of the state; his signature may be essential to the validity as an act of state of legislation, executive decrees or even judicial proceedings such as pardon. The common law doctrine by which a corporation was made liable for the acts of a director, but not of an employee, on the basis that the former acted as the corporation, as its *alter ego* or "directing mind or will"[25] has now been discarded in English law; instead any servant or representative of the corporation may render it criminally liable provided the particular criminal prohibition is formulated so as to include his acts and intentions as the necessary *actus reus* and *mens rea*.[26] But it is highly arguable that international law continues to make such a distinction. The participation of a head of state is a component of the constitutional structure of the state; without his part the State may not be able to act. The inclusion of "the sovereign or other head of that state in his public capacity" within the definition of the State in section 14(1) of the SIA provides recognition of the unique position of a head of state.

This peculiar role of the head of state suggests that more of his acts than those of an official who acts in solely a representative capacity are to be included in his official functions. Accordingly a different immunity from that available to the diplomat is called for; it may be individual to the head of state or, as seems more probable, comprehended within the immunity of the State. Since the large part of the acts of the head of state constitute acts of the State, the head of state must be subsumed into the latter's immunity.

F. Immunity Ratione Personae *and* Ratione Materiae

Even if the Lords were right in equating a head of state to the status of a head of mission so far as his presence in the UK is concerned, it is suggested that they wrongly analysed the distinction between immunity *ratione personae* and *ratione materiae*. Lord Browne-Wilkinson explained how the distinction applied to the diplomat:

24. See Dinstein at (1966) 15 I.C.L.Q. 76 at 88, "[the diplomatic agent] is performing official acts of State, A in the territory of State B with the latter's consent, and these acts of State deserve special consideration and immunity".

25. *Lennard's Carrying Co. Ltd* v. *Asiatic Petroleum Co. Ltd* (1915) A.C. 707.

26. *Meridian Global Funds Management Asia Ltd* v. *Securities Commission* (1995) 2 A.C. 500 at 510.

> "The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed *ratione personae* while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his *official* acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under Article 39(2) the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, *ratione materiae*, is to be contrasted with the former immunity *ratione personae* which gave complete immunity to all activities whether public or private."[27]

Lord Millett described the former:

> "Immunity *ratione personae* is a status immunity. An individual who enjoys its protection does so because of his official status. It ensures for his benefit only so long as he holds office."[28]

He and Lord Saville seized on this explanation to justify retention of immunity by the serving ambassador (and hence the serving head of state) but not by them when they had ceased to hold office. Thus Lord Saville argued, "immunity *ratione personae* attaches to the office and not to any particular conduct of the office-holder".[29]

This explanation is erroneous. Immunities during office are personal to protect the holder and to enable him to carry out his official duties (*ne impediatur legatio*); they relate to his personal inviolability from arrest and immunity from answering for his acts in the receiving state's courts (though for his own safety or the self defence of the receiving state, some temporary exercise of jurisdiction may be allowed).[30] His immunity from civil proceedings is also almost absolute save for three exceptions, private immovable property, matters of succession, and professional or commercial activities exercised outside his official functions.[31]

But the immunity which attaches to his conduct of official business of the state is not his, but that of the State he represents; they are acts performed in exercise of sovereign authority, *de jure imperii*, and are not subject to adjudication by the courts of another state. As Satow writes, citing *Zoernsch* v. *Waldock*:[32]

> "The immunity of a diplomatic agent for his official acts—acts performed in the exercise of his functions as a member of the mission—is on the other hand unlimited in time. Immunity in regard to such acts is not a personal immunity but is in reality the immunity of the sending sovereign. It therefore subsists when the diplomat's immunity has ended along with his mission."[33]

27. *Pinochet No.3*, 112.
28. *Pinochet No.3*, 171. Lord Millett's errors as to the absolute nature of the immunity from civil proceedings of the head of mission (he omits its restriction in respect of three matters specified in article 31 of the Vienna Convention on Diplomatic Relations) and his family and servants (where it is much reduced or non existent dependent on their status as administrative and technical staff, service staff or private servants) is of no significance to the case.
29. *Ibid.*, 169.
30. Denza, *Diplomatic Law* 2nd edn, 211–220, 229–230.
31. *Op. cit.*, 230–253.
32. (1964) 2 Q.B. 352.
33. Satow's *Guide to Diplomatic Practice* 5th edn, 131.

Here, the distinction between status and conduct breaks down. If the State by reason of its sovereign independence enjoys status immunity, it continues unchanged on the departure of one of its diplomats or other representative and in consequence immunity for official acts performed on its behalf should also continue. The immunity of the state from the criminal jurisdiction of local courts is generally recognised today as absolute despite the reduction in a State's immunity in respect of the civil adjudication of local courts which has taken place since the Second World War. It is also to be noted that, even in relation to the restrictive immunity which now generally applies in respect of civil proceedings, absolute State immunity remains as regards the enforcement stage, except where the State has consented or earmarked property as commercial and thus available for enforcement. The immunity *ratione materiae*, then, on this analysis, which the diplomat or head of state after leaving office claims is the status immunity of the State which in respect of criminal proceedings remains absolute. On the other hand, the restrictive doctrine of immunity now suggests that the immunity of the State is no longer personal—it being argued that, unlike the need for personal inviolability of the representative within the forum state, the State is in no way impeded by local courts' ruling that it must honour its commercial debts. By restriction of a State's immunity in civil proceedings, the doctrine acknowledges that immunity depends on the subject-matter of the claim; if the claim relates to a private law or a commercial matter, it is not immune; but claims relating to *acta imperii*, the exercise of sovereign authority, remain immune.

On this analysis, the immunity *ratione materiae* of both diplomat and head of state is identical to the immunity of the State. The device of status immunity does not work and the commission of international crimes, if it is not to remain immune, can only be brought about by the introduction of an exception to state immunity from criminal proceedings in respect of the individuals who commit the crimes. The method to achieve this is examined below.

G. The Construction of the UN Torture Convention

The majority treated their task after the application of the double criminality rule as largely confined to the construction of the UN Torture Convention. Having identified the immunity which General Pinochet sought to rely upon as an immunity *ratione materiae*, they broadly accepted that this immunity covers acts which constitute crimes under local law as well as lawful acts performed for state purposes.[34] They then proceeded to examine whether the position was changed by

34. The Court in *Pinochet No.3* agreed with their Lordships in *Pinochet No.1* that the process of making the "necessary modifications" was difficult; in Lord Browne-Wilkinson's words, "the correct way of applying Article 39(2) of the Vienna Convention to a former head of state is a baffling one" (113). The majority found the section was not limited in its application to heads of state when visiting the UK or to acts performed in a representative character, and applied to "the actions of a head of state in his own country or elsewhere", Hutton, 154. Lord Hope reached this conclusion by defining a head of state's functions by reference to national law, rather than "the lowest common denominator" of international law; "... the functions of a state are those which his own state enables him or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state. These may include instructing or authorising acts to be done by those under his command at home or abroad in the interests of State security" (146).

the terms of the UN Torture Convention which in Article 1 sets out a definition of torture confined to acts (in fact one single act is sufficient) committed by public officials for State purposes. They concluded that it was the governing provision to determine whether the international crime of torture is covered by immunity *ratione personae*; their reasons appear to be based on acceptance of the statement of the Chairman and draftsman of the UN Working Group in the *travaux preparatoires*[35] that the Convention's purpose was not to define torture but, in the absence of international tribunals to provide machinery in States' local courts to ensure that a torturer could find no safe haven in another country.[36]

In part influenced by a concession made on behalf of Chile,[37] they construed a head of state to be included in the term "a public official or other person acting in an official capacity" defined by Article 1 as the persons liable for the commission of the international crime of torture. Although Lords Browne-Wilkinson and Goff declared that this stage in the argument in no way defeated the retention of immunity *ratione personae*,[38] the majority nonetheless held that immunity *ratione materiae* of a former head of state does not bar extradition or criminal proceedings in an English court in respect of the international crime of torture. The reasons given appear to vary. Lords Hutton and Phillips took the simple route of holding the crime as defined by the Convention not to be within the official functions of a head of state.[39] The others in the majority treated the obligation in the Convention to extradite or prosecute offenders including heads of State for the international crime of torture as inconsistent with the retention of such an immunity,[40] or constituting an agreement between the requesting and requested States in the extradition proceedings and the State who enjoys immunity *ratione materiae* that this obligation was inconsistent with the retention of such immunity[41]; or an acknowledgment by Chile that the obligation to extradite or prosecute prevailed over its immunity.[42]

Thus, two consequences were spelt out by the majority by the use of the words in Article 1 of the Convention; first, that "any other person acting in an official capacity" brought a head of state within the persons defined as offenders in state torture; and second, it extended the mandatory exercise of jurisdiction *aut dedere aut punire*, beyond the private criminal law jurisdiction over individuals and corporations under municipal law, to States and their heads of state when exercising official functions. It did so without an express provision in the convention. As Lord Goff impressively affirmed in his dissenting judgment international law requires waiver of State immunity to be express.[43] That this is so is further confirmed by the US Supreme Court in *Amerada Hess* in rejecting as

35. Burgers and Danelius, *Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).
36. *Pinochet No.3*, 109.
37. *Ibid.*, 121.
38. *Ibid.*, 110, 121.
39. *Per* Hutton, Phillips, *Pinochet No.3*, 165, 192.
40. *Per* Browne-Wilkinson, *Pinochet No.3*, 114.
41. *Per* Saville, Millett, *Pinochet No.3*, 169, 179.
42. *Per* Hope, *Pinochet No.3*, 152.
43. *Pinochet No.3*, 123.

erroneous a District Court's ruling[44] that State immunity for breach of a diplomat's immunities were implicitly waived by the USSR when it became a party to the 1961 Vienna Convention on Diplomatic Relations and the Convention on Internationally Protected Persons of 1973.... "Nor do we see how a foreign state can waive its immunity ... by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts."[45]

H. Jurisdiction of States

The majority's construction of conferment of jurisdiction *aut dedere aut punire* as removing immunity confuses immunity in respect of the exercise of territorial jurisdiction and incompetence based on an international law obligation to abstain from intervention in another State's public acts. Although territorial jurisdiction may be asserted as exclusive and comprehensive over all persons and acts within the territory, ever since Marshal CJ's judgment in the *Schooner Exchange*[46] it has been confined to persons acting under municipal law; territorial jurisdiction in inherently limited by the immunity accorded to persons and their acts done in the exercise of sovereign authority, *de jure imperii*. The inability of the territorial state to exercise jurisdiction over another State or its officials in respect of acts committed outside its territory is not attributable to immunity but to lack of jurisdiction; thus a court which refuses to pronounce on the validity of the acts performed by another State does so not by reason of the latter's immunity but by reason of the forum State's incompetence to exercise jurisdiction beyond its territory. Conferment of extraterritorial jurisdiction over acts committed abroad or over non-nationals may be validly based on an extradition agreement with another state or the recognition of universal jurisdiction but it still relates to the exercise of municipal law jurisdiction. Not until the Pinochet case has it been considered to overcome the inherent limitation of one State's territorial jurisdiction from pronouncing on the validity of public acts of another state performed within its own territory. In effect jurisdiction of States under international law is exercisable in relation to domestic local (municipal) law matters over subjects of municipal law, not over States.

The majority decision then represents a confusion between immunity from territorial jurisdiction and absence of jurisdiction and an assumption that the criminal jurisdiction conferred on States by international law extends beyond private criminal law.[47] The Lords treated this distinction as nothing more than a question of construction, applying English contract law analysis based on implied

44. *Von Dardel* v. *USSR* 623 F.Supp. 286 (DDC 1985).
45. *Argentina* v. *Amerada Shipping Corp.* 109 S. Ct 683 (1989) *per* Rehnquist CJ at 693.
46. (1812) 7 Cranch 116 (US).
47. This confusion was heightened by concessions made in the course of the proceedings: that extradition proceedings were to be treated as criminal proceedings and hence the law of immunity of a head of State from criminal proceedings was applicable; and that the words "public official or other person acting in an official capacity" in the prohibition of torture in the 1984 UN Convention included a Head of State.

terms. But this ignored the fundamental distinction between a State's exercise of criminal jurisdiction over individuals and its absence of jurisdiction over the exercise of sovereign functions of another State.

I. The Reception of International Law into English Law and the Operative date

Another ground for criticism relates to the reception of international law. There has been no authoritative pronouncement on the reception of customary international law since the majority decision in the Court of Appeal in *Trendtex*[48] and its apparent approval by the House of Lords in *I Congreso del Partido*.[49] *Trendtex* permits the reception of international customary law as it exists at the date of the proceedings in the English court.[50] Arguably, had the court been prepared to find that the international crime of torture was established as a non immune offence at the date of the extradition proceedings, the inquiry into the precise date when torture crystallised as an international crime by reason of the UN Torture Convention was unnecessary. But, by basing the exclusion of immunity rule on the provisions of the UN Torture Convention, the Lords appear to have ignored the established rules for the reception of treaty into English law. *Trendtex* did not change the rule that statute, which in this case would be the SIA, takes precedence over a rule of customary international law, nor did it in any way change the rule of parliamentary sovereignty, which gives rise to the dualist approach that obligations in a treaty are not binding in English law until incorporated by statute. Lord Saville's finding of an agreement in the 1984 UN Convention which, by reason of the ratification of the interested States, UK, Spain and Chile, obligated all three to exercise the jurisdiction, conferred by the Convention, in disregard of Chile's immunity *ratione materiae* relating to a former head of state, amounts to implementation in English law of unincorporated treaty obligations. This is surely unconstitutional, amounting to an assumption of the powers of both the executive which makes and of the legislature which adopts treaties into English law.

These two concessions were important. To equate extradition to criminal proceedings within the forum state assumes that the jurisdiction in the one is of the same quality as in the other, but in a case of immunity it clearly is not. In the one the performance of official functions within the state as well as the presence of an official gives rise to the need for immunity; in the latter in extradition territorial jurisdiction is limited to the presence of the alleged offender; there are no acts performed within the forum state for which immunity is sought. The plea is more accurately a request for inviolability of the person by reason of official acts performed outside the territory of the forum state and over which that state has no competence. Similarly to concede that a head of state is included as a potential offender in the definition of torture in article 1 does not also mean that the mandatory obligation to exercise jurisdiction based on commission of the offence or nationality or presence of the alleged offender constitutes an assumption of jurisdiction over the validity of official acts of another state performed outside the forum state.

48. *Trendtex Trading Corporation* v. *Central Bank of Nigeria* (1977) Q.B. 529.

49. *I Congreso del Partido* (1983) 1 A.C. 244.

50. *Ibid.*, *per* Shaw LJ at 578.

J. Does the State and Serving Head Continue to Enjoy Immunity from Criminal Proceedings Relating to International Crimes?

By distinguishing immunity *ratione personae* and *materiae* into a status/conduct distinction the majority were able to construe the UN Torture Convention as removing a former head of state's immunity for State torture whilst preserving it for serving heads and their States. Yet, there is nothing in the wording of Article 1 to support such a construction. Once a head of state is construed as a perpetrator of state torture, there is nothing in Article 1 to confine its scope to a former head of State; the retention of immunity in favour of a serving head then becomes equally inconsistent with the *aut dedere aut punire* scheme of the convention. As Lord Goff dryly commented, if "it is not suggested that it is inconsistent with the convention that immunity *ratione personae* should be asserted" it is difficult "to see why it should be inconsistent to assert immunity *ratione materiae*".[51] It is also arguable that the inconsistency identified by the majority should apply equally to the mandatory obligation on States parties to exercise civil jurisdiction in favour of the victims of State torture. Article 14 of the convention requires States parties to ensure that the victim of an act of torture obtains redress; why is this obligation to provide "fair and adequate compensation to the victim" not equally "inconsistent" with the retention of a plea of State immunity and does the inclusion of a head of state as an "official torturer"[52] in Article 1 not activate the Article 14 obligation to provide compensation for his acts?

If one discards the status/conduct distinction, the immunity in issue, as suggested above, becomes that of the State itself. The question then becomes whether an international crime against fundamental human rights which is defined in terms to include a head of state can be admitted as an exception to State immunity, and in respect of both criminal proceedings for prosecution and civil for compensation. Little attention was paid in *Pinochet No.3* to the distinction between acts of a private law or commercial nature and acts in exercise of sovereign authority (*acta imperii* and *acta gestionis*) which forms the basis for the restrictive doctrine of State immunity, though Lord Millett astutely questioned whether the proposed removal of immunity from criminal proceedings would constitute "a parallel, though in some respects, opposite development" to "the inroads" which had taken place by the enactment in the SIA of the restrictive doctrine in respect of civil proceedings.[53] To develop such an exception would indeed be in an "opposite" direction, because to date the justification for all exceptions is that they relate to the exercise of private municipal law; that distinction would seemingly be set aside if State rather than private torture, that is the exercise of sovereign power to commit an international crime is made subject to local jurisdiction. However, if the Lords' ruling is to be accommodated within the existing framework, it can probably only be achieved by recognition of their novel proposition that a State's municipal criminal jurisdiction extends to international State crimes committed by former public officials. On this basis one might advance a new criminal law exception to State immunity on the basis that an

51. *Pinochet No.3*, 127.
52. *Per* Lord Saville, *Pinochet No.3*, 169.
53. *Ibid.*, 171.

international State crime contrary to *jus cogens* incorporated into the municipal criminal code constitutes a municipal crime subject to the forum State's jurisdiction. But unlike the adjudication stage of civil proceedings, criminal proceedings if they are not to be nugatory immediately move to the enforcement stage of jurisdiction by way of arrest and punishment of a State. To allow enforcement, however, would make such "inroads" into the rationale of the restrictive doctrine, that it is likely to spell the abandonment of State immunity as a general bar to local proceedings.

K. Conclusion

Enough has been said to show that there are considerable problems arising from *Pinochet No.3* relating to an immunity for a head of state distinct from that of a diplomat, from the adoption of the status/conduct distinction as an explanation of the distinction between immunity *ratione personae* and *ratione materiae*, from the construction of the UN Torture Convention as encompassing a State's obligation to abstain from exercise of jurisdiction over another State, and the reception of international law into English law.

Given the problems inherent in the adoption of the majority's ruling, must we then abandon it for the dissenting view? That alternative answer in favour of continuing absolute immunity from criminal proceedings respects the principle that "one sovereign state does not adjudicate on the conduct of another".[54] It preserves absolute immunity of the State and its head of state from criminal proceedings of national courts until such time as either by treaty or international custom a rule has been clearly articulated that no immunity from national courts' jurisdiction is available for the commission of international crimes. It has much to commend it. It recognises that the current international order rests on consent of States and a system of bilateral obligations between States, and that the absence of international tribunals with competence to prosecute crimes against humanity cannot be remedied by licensing one State unilaterally to pronounce on the criminality of conduct authorised by another State. This approach is consistent with the underlying rationale of the widely accepted restrictive immunity of States from civil proceedings of national courts in that it preserves immunity for acts performed in the exercise of sovereign authority *de jure imperii*. It avoids the inevitable "knock-on effects" of the majority's decision against a former head of state on the immunity from criminal and civil proceedings of serving heads and their States.

But it provides no outlet for the growing demand that law should be an instrument for the entire international community and permit the prosecution of all who commit torture, regardless of whether the offence is committed on State orders.

The majority approach in *Pinochet No.3* goes some way to respond to this demand, by holding the commission of international crimes as outside the protection afforded by immunity to the official functions of a former head of state. But by limiting this removal of immunity to former heads of state and preserving the absolute immunity of the state itself and its serving head in respect of such

54. *Ibid.*, *per* Goff, 119.

international crimes, the majority decision in *Pinochet No.3* weakens the moral force of its ruling. On this account, if the moral imperative requires the adoption of the second answer, I would respectfully suggest, that the approach of Lord Nicholls of Birkenhead in *Pinochet No.1* is to be preferred to that of the majority in *Pinochet No.3*; Lord Nicholls narrows the issue to the conflict to which the enactment of an offence of State torture in the Criminal Justice Act section 134 gives rise in the construction of section 20 of SIA; which incorporates Article 39(2) of the Vienna Convention on Diplomatic Relations 1961. The enquiry is, thus, reduced to a question of the construction of two statutes, where the later in time, by enacting an offence in terms which cover the official acts of a head of state, creates an ambiguity as to the scope of the "official functions" for which immunity is given in the earlier State Immunity Act. Reference to international law, whether to custom or the obligations under the UN Torture Convention entered into by the UK, is solely in order to resolve this ambiguity. This approach does not avoid the "knock-on" effects on state and serving heads of State immunity referred to above, but at least confines them to questions of statutory interpretation of criminal law statutes and leaves open the possibility of statutory amendment to reconcile continuing difficulties.

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