

Leave Your Hat On? Head Of State Immunity and Pinochet

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INTRODUCTION

The *Pinochet* decision provides a recent and striking example of the inherent tension between head of state immunity and international human rights.¹ These principles are drawn from very different schools of international law. Head of state immunity represents the classical theory of international law. It is a long established principle that is based on and protects the equality and sovereignty of states. In contrast, international human rights law represents the modern school of international law. It is largely a post World War II development.² As consensus amongst the international community has grown on human rights issues, this body of law has matured both in its jurisprudence and scope, encompassing an expanding list of universally condemned crimes such as torture and genocide. When a state or head of state commits these crimes, as in *Pinochet*, these powerful doctrines clash in spectacular fashion.

This article begins with a general factual background, explaining Pinochet's alleged crimes and the extradition regime which led to Pinochet's appearance in the courts of the United Kingdom ('UK'). It then moves on to an assessment of the various types of state immunity and their justification, as an understanding of the rationale for immunity is crucial in analysing the *Pinochet* decision. This article attempts to draw out the competing values of head of state immunity and international human rights, assessing jurisdictional and extradition issues to place the *Pinochet* decision within its international criminal law context, and examining Pinochet's regime to place it within its human context. The next section of the article examines the decisions of the various courts in *Pinochet*, then goes on to explain the practical implications of the decision and potential future developments.

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¹ T Scheffey, 'Civil and Criminal Courts Target Tyrants', *The Connecticut Law Tribune*, 19 April 1999.

² I Brownlie, *Principles of Public International Law* (5th ed, 1998) 568-581.

HOW PINOCHET CAME TO COURT

The Basis of Extradition

Criminal jurisdiction is typically territorially based. This creates problems when the offender is beyond the territory of the state. One solution to problems arising from a lack of jurisdiction in criminal matters has been the development of cooperative arrangements between states for the extradition or handing over of individuals from one state to another.³ It has been said that asylum ends where extradition begins, meaning that a state has a right (but not a duty) to grant asylum to an individual, unless that state is obliged to extradite under a treaty.⁴

Both the UK and Spain are parties to the 1957 European Convention on Extradition ('Extradition Convention'), and the UK ratified the Extradition Convention through the enactment of the *Extradition Act* 1989 (UK) ('*Extradition Act*'). Article 1 of the Extradition Convention imposes an obligation on states parties to extradite accused persons subject to the Extradition Convention's provisions and conditions.

Although not a rule of international law,⁵ a common feature of domestic extradition legislation is the principle known as the double criminality rule.⁶ This requires that the criminal offence that is the basis of the extradition order be a crime under the law of both the requesting state and the extraditing state. This rule is justified on the basis that 'a state should not be required to surrender a person to a foreign state, and allow its criminal process to be used, for conduct which it does not itself consider criminal.'⁷ It is also justified on the basis of reciprocity, so that 'the rule ensures that a state is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand'.⁸

The *Extradition Act* provides in particular circumstances for extradition of a person by the UK to a requesting state where an offence has been committed in the territory of the requesting state.⁹ The *Extradition Act* also provides for

³ *R v Bow Street Stipendiary Magistrate; Ex Parte Pinochet* ('*Pinochet (No 1)*') (1999) 38 ILM 68, 71. See generally WC Gilmore, *Mutual Assistance in Criminal and Business Matters* (1995); D McClean, 'Mutual Assistance in Criminal Matters: The Commonwealth Initiative' (1988) 37 ICLQ 177.

⁴ P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, 1997) 117.

⁵ cf Brownlie, op cit (fn 2) 319.

⁶ E P Aughterson, *Extradition — Australian Law and Procedure* (1995) 60; See eg *Extradition Act* 1989 (UK) c 33 and C van den Wyngaert, 'Double Criminality as a Requirement to Jurisdiction' in N Jareborg (ed), *Double Criminality. Studies in International Criminal Law* (1989) 43.

⁷ Aughterson, op cit (fn 6) 59-60 citing: SA Williams, 'The Double Criminality Rule and Extradition: A Comparative Analysis' (1991) 15 *Nova Law Review* 581, 582; IA Shearer, *Extradition in International Law* (1971) 37; van den Wyngaert, op cit (fn 6) 52.

⁸ Op cit (fn 7), cited in Aughterson op cit (fn 6), 60. See also: *R v Bow Street Stipendiary Magistrate; Ex Parte Pinochet* ('*Pinochet (No 2)*') [1998] 4 All ER 897, 920 (Lord Lloyd) 'The underlying principle of all extradition agreements between states, including the Extradition Convention, is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.'; and van den Wyngaert, op cit (fn 6) 52.

⁹ *Extradition Act* 1989 (UK) c 33, s 2(1)(a).

extradition of a person by the UK where the offence was not committed in the territory of the requesting state, but that state claims extra-territorial jurisdiction over the offence.¹⁰ This is the relevant category of extradition crime in the *Pinochet* decision. Under this category, so far as is relevant, an extradition crime arises where two conditions are satisfied. First, the conduct constitutes an extra-territorial offence in the requesting state punishable with imprisonment for a term of 12 months or more. Secondly, 'in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment'.¹¹

The Pinochet Regime

On 11 September 1973, General Augusto Pinochet headed a military coup that ended a 46 year era of constitutional government in Chile.¹² He was appointed president of the governing junta the next day. By decree dated 11 December 1974 Pinochet assumed the title of President of the Republic of Chile. Pinochet established a secret group of military officers (which later became known as the National Intelligence Directorate ('DINA')) to eliminate opposition, particularly left-wing groups.¹³ DINA's tactics included summary executions, torture, disappearances, prolonged incommunicado detention, and forced exile.¹⁴ Agents of the junta killed at least 2115 civilians in the first five years after the military coup.¹⁵

On 19 April 1978, the junta passed a decree granting an amnesty to all persons involved in criminal acts between 11 September 1973 and 10 March 1978.¹⁶ 'The purpose of the amnesty was stated to be for the "general tranquillity, peace and order" of the nation.'¹⁷ In 1980 a new constitution came into force in Chile, approved by national referendum. Democratic elections were held in December 1989. As a result, Pinochet handed over power to President Aylwin on 11 March 1990. On 9 February 1991, a report from the Commission for Truth and Reconciliation detailed human rights abuses including more than 2,200 deaths under the Pinochet regime. In March 1998, Pinochet stepped down as commander of the army and entered the

¹⁰ *Extradition Act 1989* (UK) c 33, s 2(1)(b).

¹¹ *Extradition Act 1989* (UK) c 33, s 2(1)(b), s 2(2).

¹² For some information on the United States backing of the coup and the US role in damaging the Chilean economy under Allende's government see: E Negin, 'Pardoning Pinochet's Pals — United States role in dictator's rise to power' (1999) 63(2) *The Progressive* 30; L Komisar, 'Kissinger Declassified' (1999) 63(5) *The Progressive* 24 and P Kornbluh, 'Kissinger and Pinochet' (1999) 268(12) *The Nation* 5.

¹³ P Berryman (trans), *Report of the National Commission on Truth and Reconciliation* (1993) 62.

¹⁴ Id 35-39, 44, 63, 495-98, cited in R Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model' (1994) 62 *Fordham Law Review* 905, 912-13.

¹⁵ Berryman, op cit (fn 13) 899. Between September 1973 and March 1990 there were 3877 confirmed or unresolved cases of death or disappearance.

¹⁶ Decree Law No. 2191 (Apr. 18, 1978), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978); Quinn, op cit (fn 14).

¹⁷ *Pinochet* (No 2) [1998] 4 All ER 897, 920.

senate as an unelected member for life, thus taking advantage of a provision he inserted into the new constitution. This position carries legal immunity from prosecution under Chilean law.¹⁸

Request for Extradition of Pinochet

On 16 October 1998, the Central Court of Criminal Proceedings No 5, Madrid issued an international warrant for the arrest of Pinochet.¹⁹ This warrant requested the urgent provisional arrest of Pinochet and was sent to the UK authorities the same day.

There are several steps in the process of extraditing a person from the UK to another state upon request by that state. Typically, this involves an initial extradition request,²⁰ an authority to proceed by the Home Secretary,²¹ and an arrest²² followed by committal before a court if it is satisfied that the crime alleged is an 'extradition crime'²³ and 'that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court'.²⁴ The Home Secretary then makes the final decision as to whether the individual should be returned.²⁵ However, in the case of an urgent request by a foreign state (such as that made by Spain in respect of Pinochet), a metropolitan magistrate may issue a provisional warrant for arrest of the individual²⁶ subject to review by the Home Secretary, who may cancel the warrant or issue an authority to proceed.²⁷

It was in this way that a stipendiary magistrate, Mr Nicholas Evans, came to issue a provisional warrant for the arrest of Pinochet on 16 October 1998 ('First Provisional Warrant') on the basis of the arrest warrant issued the same day by Spain. The First Provisional Warrant stated that Pinochet: 'Between 11 September 1973 and 31 December 1983, within the jurisdiction of the Fifth Central Magistrates' Court of the National Court of Madrid, did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain.'²⁸ The warrant was executed that day, and on 19 October 1998 notice of the arrest was given to the Home Secretary.

It appears that the Spanish prosecution was aware of defects in the first international arrest warrant, and on 18 October 1998 Spain issued a second international arrest warrant. On 22 October 1998, a different stipendiary magistrate, Mr Ronald Bartle, issued a second provisional warrant ('Second Provisional Warrant') on the basis of the second Spanish warrant. The Second Provisional Warrant disclosed five offences:

¹⁸ *Constitution of Chile*, article 58.

¹⁹ For more information on the Spanish proceedings see: R Wilson, 'Prosecuting Pinochet in Spain' (1999) 6 *Human Rights Brief* 3; N Bhuta, 'Justice Without Borders? Prosecuting General Pinochet' (1999) 23 *Melbourne University Law Review* 496, 508.

²⁰ *Extradition Act 1989* (UK) c 33, s 7(2).

²¹ *Extradition Act 1989* (UK) c 33, s 7(4).

²² *Extradition Act 1989* (UK) c 33, s 8(1)(a).

²³ Defined in *Extradition Act 1989* (UK) c 33, s 2(1), discussed in 'The Basis of Extradition' above.

²⁴ *Extradition Act 1989* (UK) c 33, s 9(8).

²⁵ *Extradition Act 1989* (UK) c 33, s 9(8).

²⁶ *Extradition Act 1989* (UK) c 33, s 8(1)(b).

²⁷ *Extradition Act 1989* (UK) c 33, s 8(4).

²⁸ *Pinochet (No 1)* (1999) 38 ILM 68, 76 (Lord Bingham of Cornhill CJ).

1. Torture — between 1 January 1988 and December 1992, the applicant, being a public official, intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties;²⁹
2. Conspiracy to Torture — between the same dates, the applicant conspired to commit the acts referred to in (1);
3. Hostage taking — between 1 January 1982 and 31 January 1992, the applicant detained ‘hostages in order to compel such persons to do or abstain from doing any act in pursuance of which he threatened to kill, injure or continue to detain the hostages’;
4. Conspiring to take hostages — between the same dates, the applicant conspired to commit the acts referred to in (3); and
5. Murder — between January 1976 and December 1992, the applicant conspired together with other persons to commit murder in a country a party to the Extradition Convention.

Pinochet was rearrested under the second provisional warrant on 23 October 1998. Pinochet challenged this warrant and his arrest under it, and brought four applications before the Queen’s Bench. The decision of the Queen’s Bench and subsequent courts will be described further in ‘The *Pinochet* Judgments’ below. In addition to issues concerning whether the alleged offences constituted extradition crimes under the *Extradition Act*, central to these decisions was the doctrine of head of state immunity and the issue of whether this doctrine prevented the UK from acceding to the request for extradition. It is therefore useful to assess this doctrine and its implications in the face of the ongoing development of international human rights law before considering the *Pinochet* decisions themselves.

HEAD OF STATE IMMUNITY AND INTERNATIONAL HUMAN RIGHTS

Types of Immunity

The Origins of Immunity

International law recognises certain categories of persons as immune from the jurisdiction of municipal courts.³⁰ The principal categories of immunity are state immunity, head of state immunity, diplomatic immunity and consular immunity.³¹ Although the origins of these immunities are uncertain,³² they can

²⁹ As noted by Lord Lloyd, ‘[t]he reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of s 134 of the *Criminal Justice Act* 1988 which itself reflects art 1 of the Torture Convention.’

³⁰ Malanczuk, *op cit* (fn 4) 118.

³¹ *Ibid.* Other immunities apply to public ships of foreign states, the armed forces of foreign states and international institutions: I A Shearer, *Starke’s International Law* (11th ed, 1994) 191.

³² H Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 *British Yearbook of International Law* 220, 228.

be traced to the protection given to heralds (representatives of the sovereign) based on pragmatic considerations. In particular, the immunity of heralds facilitated communication between parties and was particularly useful during periods of hostilities.³³ However, it did not originally apply to sovereigns themselves, who could be ransomed or killed if captured.³⁴ In time, personal sovereignty and the doctrine of the divine right of kings³⁵ altered the justification of the immunity, and the dignity and independence of sovereigns became the basis of this immunity.³⁶ This philosophy clearly necessitated the extension of the immunity to the sovereign him or herself. As states developed a legal existence independent from that of their sovereign, the doctrine was extended to protect the dignity of the state.

Head of State Immunity

Head of state immunity creates a procedural bar to the jurisdiction of the court, meaning that a court can exercise jurisdiction over a head of state if the relevant state waives the immunity.³⁷ If Chile (rather than Spain) had been seeking the extradition of Pinochet, the immunity would have been waived *ex hypothesi*.³⁸ Head of state immunity encompasses two types of immunity: a broad immunity *ratione personae*, and a narrower immunity *ratione materiae*.

In general, under customary international law, heads of state and heads of diplomatic missions, their families and servants enjoy absolute immunity from the civil and criminal jurisdiction of courts of foreign states.³⁹ This immunity is based on the official status of the individual, and therefore is not available once that individual no longer holds office.⁴⁰ This form of immunity is termed immunity *ratione personae*. Because of its apparent absolute nature, the judges in *Pinochet* unanimously agreed that had Pinochet been a current head of state, he would have been entitled to immunity *ratione personae*.

³³ C Lewis, *State and Diplomatic Immunity* (3rd ed, 1990) 15.

³⁴ *Ibid.*

³⁵ 'The idea that a sovereign rules by divine ordinance, or perhaps that he is himself a divinity In a speech before parliament in 1610, James I argued that "Kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God himself they are called gods," adding that kings "exercise a manner or resemblance of divine power on earth".': R Scruton, *A Dictionary of Political Thought* (2nd ed, 1996) 148. The fact that the sovereign was recognised as a juristic personality well before the state may explain why the rule of jurisdictional immunity used to be stated in terms that only applied to foreign sovereigns: Shearer, *International*, op cit (fn 31) 191-192. Lewis, op cit (fn 33) 15 refers to the expression "L'Etat, C'est moi."

³⁶ *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 417 'I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted principles of international law and you will search in vain for any set propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States.' See also *Barbut's Case* (1737) 25 ER 777.

³⁷ *Pinochet (No 2)* [1998] 4 All ER 897, 923 (Lord Lloyd).

³⁸ *Ibid.*

³⁹ *R v Bow Street Stipendiary Magistrate; Ex Parte Pinochet ('Pinochet (No 3)')* [1999] 2 WLR 827, 905D-E (Lord Millett); *Mighell v Sultan of Johore* [1894] 1 QB 149.

⁴⁰ *Pinochet (No 3)* [1999] 2 WLR 827, 902E (Lord Saville).

Once an individual who enjoys immunity *ratione personae* no longer holds their official status, their immunity from the jurisdiction of foreign courts is replaced with a different and more limited immunity. This form of immunity is termed immunity *ratione materiae* and turns on the nature of the act performed by the individual. It distinguishes between private acts on the one hand, for which there is no immunity, and public, official or governmental acts on the other, for which there is immunity from civil and criminal jurisdiction.⁴¹ It is also available to individuals who may have never enjoyed immunity *ratione personae*. This includes any individual 'whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official.'⁴²

The immunities that a head or former head of state enjoys under international law are given statutory force in the UK through the *State Immunity Act 1978* (UK) ('*Immunity Act*'). Section 20(1) of the *Immunity Act* provides:

- 20(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to —
- (a) a sovereign or other head of State; . . .
- as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

Reading this section in conjunction with the *Diplomatic Privileges Act 1964* (UK) Art 39(2), it is clear that a former head of state does not enjoy immunity in respect of personal or private acts (immunity *ratione personae*), but continues to enjoy immunity in respect of public acts performed in his or her capacity as head of state (immunity *ratione materiae*). The scope of this immunity was a central question in *Pinochet*.

*Act of State*⁴³

Under the act of state doctrine,⁴⁴ courts will not assume jurisdiction to determine the legality of certain governmental acts.⁴⁵ This doctrine reflects the recognition by courts of certain questions of foreign affairs as non-justiciable, and in the United States that 'judicial intervention in foreign relations may trespass upon the province of the other two branches of government.'⁴⁶ While there is no formal separation of powers in England, its existence in Australia and the United States might mean that the act of state doctrine develops differently there. In those countries, a court's invocation of the act of state doctrine may be equivalent to declaring that it is constitutionally impermissible for the court to make a decision on that matter because it is properly an exercise of executive power. The act of state doctrine relates to the type of act done, and

⁴¹ *Pinochet (No 2)* [1998] 4 All ER 897, 923-924 (Lord Lloyd).

⁴² *Pinochet (No 3)* [1999] 2 WLR 827, 905H-906B (Lord Millett).

⁴³ PE Nygh, *Conflict of Laws in Australia* (6th ed, 1995) 128-130; Malanczuk, op cit (fn 4) 121-123.

⁴⁴ Lord Lloyd preferred the term non-justiciability: *Pinochet (No 2)* [1998] 4 All ER 897, 923. Nygh, op cit (fn 43) 128.

⁴⁶ *Pinochet (No 2)* [1998] 4 All ER 897, 937g-h (Lord Nicholls); *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398.

not the character of the defendant.⁴⁷ It is a substantive bar to adjudication. This means that if a court decides that a particular act constitutes an act of state falling within the doctrine, the court cannot exercise jurisdiction regardless of whether the relevant state agrees to its exercise.⁴⁸

Justifications for Immunity

Although the justifications for immunity of heads of state were occasionally identified in *Pinochet*, they were accepted uncritically. For example, Lord Slynn merely stated that the 'reasons for this immunity as a general rule both for the actual and a former head of state still have force'.⁴⁹ In order to balance the claim to head of state immunity against the need for enforcement of international human rights, it is necessary to examine the justifications for immunity in more depth. References in this section to 'immunity' encompass both state immunity and head of state immunity, although the latter is more relevant to *Pinochet*.

A common justification for immunity is that it protects the dignity of the state — 'that it is inconsistent with the dignity and independence of sovereigns if they are made subject to foreign jurisdictions'.⁵⁰ This justification has been criticised as archaic,⁵¹ and in the context of human rights abuses it is not apparent that the dignity of the state should prevail over the dignity of the victim.⁵² Another justification for immunity is the sovereign equality of states.⁵³ If two sovereigns are theoretically equal, they cannot exercise jurisdiction over each other, only inferiors.⁵⁴ The maxim *par in parem non habet jurisdictionem* is based on this concept.⁵⁵ However, the doctrine of sovereign equality of states does not necessarily require an acceptance of immunity, since 'the equality principle works both ways; a total disposal of the immunity rule would also be compatible with the equality notion'.⁵⁶

Another argument is that a state will make a grant of immunity in return for the grant of corresponding immunity by that state.⁵⁷ In other words, 'each state protects the immunity concept so that its own head-of-state will be protected when he or she is abroad'.⁵⁸ However, the existence of such comity or

⁴⁷ Nygh, *op cit* (fn 43) 128.

⁴⁸ *Pinochet (No 2)* [1998] 4 All ER 897, 923 (Lord Lloyd).

⁴⁹ *Id* 911 (Lord Slynn).

⁵⁰ Lewis, *op cit* (fn 33) 1; *Id* 909 (Lord Slynn).

⁵¹ T Hill, 'A Policy Analysis of the American Law of Foreign State Immunity' (1981) 50 *Fordham Law Review* 155, 165; Lauterpacht, *op cit* (fn 32) 220, 231: 'these strained emanations of the notion of dignity are an archaic survival and ... they cannot continue as a rational basis of immunity.'

⁵² J Bröhmer, *State Immunity and the Violation of Human Rights* (1997) 10.

⁵³ Australian Law Reform Commission, *Foreign State Immunity — Report No 24* (1984) 23.

⁵⁴ *Par in parem non habet imperium*. Lewis, *op cit* (fn 33) 16; Shearer, *International*, *op cit* (fn 31) 192.

⁵⁵ Brownlie paraphrases the principles as follows: 'legal persons of equal standing cannot have their disputes settled in the courts of one of them.'

⁵⁶ Bröhmer, *op cit* (fn 52) 11; ALRC, *op cit* (fn 53) 23.

⁵⁷ *Pinochet (No 2)* [1998] 4 All ER 897, 909 (Lord Slynn); Shearer, *International*, *op cit* (fn 31) 192 cf *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, 613 (Lord Porter).

⁵⁸ *Lafontant v Aristide* 844 F Supp 128, 132 (1994).

reciprocity does not explain why immunity should be the rule — it simply indicates the consequences of the exercise of jurisdiction. Namely, if a state exercises jurisdiction over another state, the second state is likely to retaliate in kind.⁵⁹ A related, but more compelling, reason for granting immunity is that immunity assists in the maintenance of international relations.⁶⁰ Indeed, one of Chile's submissions in the course of *Pinochet* was that adjudication of or intervention in a dispute concerning a head of state or former head of state will cause conflict in international relations.⁶¹ This is a valid concern. The question, of course, is whether the need to maintain good international relations can be achieved by some means other than immunity when it comes to upholding human rights.

International Human Rights and Crimes

The Tension Between Human Rights and State Sovereignty

Although international concern for human rights is nothing new, attempts to provide comprehensive protection for the human rights of all individuals have largely occurred since 1945.⁶² This has redefined notions of state sovereignty, so that serious human rights violations are no longer regarded as falling within the exclusive domain of the state.⁶³ In particular, some international human rights violations (crimes) may give rise to universal jurisdiction,⁶⁴ allowing any state to prosecute the violation regardless of where it occurs. This is clearly at odds with the traditional concept of state sovereignty, which maintains that acts occurring within a state's territory are matters for that state alone to govern.⁶⁵ To understand this tension better, it is necessary to consider the position of the crimes of which Pinochet was accused vis-à-vis the doctrine of head of state immunity.

Jus Cogens⁶⁶

A number of jurists have identified certain basic principles of international law, known as *jus cogens*, from which states cannot derogate. These principles stand at the top of the international law hierarchy above other norms and principles.⁶⁷ A norm will not reach the status of *jus cogens* until it is 'accepted and recognised by the international community of States as a whole as a norm from

⁵⁹ ALRC, op cit (fn 53) 24.

⁶⁰ *Pinochet (No 3)* [1999] 2 WLR 827, 916H (Lord Phillips).

⁶¹ *Ibid.*

⁶² Malanczuk, op cit (fn 4) 209.

⁶³ *Ibid.* 220. Cf Article 2(7) of the UN Charter.

⁶⁴ Discussed in 'Erga Omnes and Universal Jurisdiction' below.

⁶⁵ H Osofsky, 'Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches' (1998) 11(1) *New York International Law Review* 35, 39.

⁶⁶ Brownlie, op cit (fn 2) 514-517; Malanczuk, op cit (fn 4) 57-58; Shearer, *International*, op cit (fn 31) 48-50.

⁶⁷ MC Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 *Michigan Journal of International Law* 768, 801-09.

which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶⁸ In other words, a rule of *jus cogens* cannot be set aside by mere treaty or acquiescence.⁶⁹

While there is general agreement about the existence of *jus cogens*, there is less agreement about its content.⁷⁰ Bassiouni suggests a crime will be part of *jus cogens* if it: (i) affects the interest of the world community as a whole because it threatens the peace or security of humankind; and (ii) shocks the conscience of humanity.⁷¹ Conduct caught by this definition is likely to involve states and state policies.⁷² In particular, in respect of the first criterion a state is more likely than an individual⁷³ to be capable of acting on a scale that affects the 'world community as a whole'. The integral role of state conduct in this formulation of *jus cogens* further illustrates the tension between traditional conceptions of sovereignty and human rights.⁷⁴ In addition to these two fundamental criteria, Bassiouni suggests other indications of crimes of *jus cogens*, namely the number of international agreements that condemn or prohibit the conduct, the number of states that have made the conduct a crime under their national law, the number of prosecutions for the crime and their characterisation.⁷⁵

Bassiouni and other writers have identified such conduct as aggression, genocide,⁷⁶ crimes against humanity, war crimes, piracy and slavery as crimes of *jus cogens*.⁷⁷ More relevant to the *Pinochet* decision are the *jus cogens* crimes of torture and hostage taking,⁷⁸ both of which are the subject of international human rights treaties: the Torture Convention⁷⁹ and the Hostage Convention.⁸⁰ They have been incorporated into UK law by the *Criminal*

⁶⁸ Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/27; 8 ILM 679, 699 art 53.

⁶⁹ Brownlie, *op cit* (fn 2) 515.

⁷⁰ *Id* 516-17; MC Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63, 67; Shearer, *International*, *op cit* (fn 31) 49.

⁷¹ Bassiouni, 'International Crimes', *op cit* (fn 70) 69.

⁷² *Ibid*.

⁷³ That is not to say that individuals or other entities could not commit a crime of *jus cogens*. Multinational corporations, for example, operate on a scale which could allow this: see, eg, F Johns, 'The invisibility of the transnational corporation: an analysis of international law and legal theory' (1994) 19 *Melbourne University Law Review* 893, 903-9.

⁷⁴ Osofsky, *op cit* (fn 65) 40.

⁷⁵ Bassiouni, 'International Crimes', *op cit* (fn 70) 70; MC Bassiouni, 'From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court' (1996) 10 *Harvard Human Rights Journal* 1.

⁷⁶ Genocide was accepted as a *jus cogens* crime in *Nulyarimma v Thompson* (1999) 165 ALR 621, [18] per Wilcox J, [36] Whitlam J, [78] Merkel J.

⁷⁷ Bassiouni, 'International Crimes', *op cit* (fn 70) 68; *Restatement (Third) of Foreign Relations Law* (1987) § 702.

⁷⁸ Bassiouni, 'International Crimes', *op cit* (fn 70), 68. Hostage taking is a crime against humanity: *Director of Public Prosecutions v Doot* [1973] AC 807.

⁷⁹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 10 December 1984, UN General Assembly Resolution 39/46, Doc A/39/51 which defines torture as severe pain or suffering intentionally inflicted for specific purposes, 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

⁸⁰ The International Convention Against the Taking of Hostages 1979.

Justice Act 1988 ('Torture Act') and the *Taking of Hostages Act 1982 ('Hostages Act')*.

*Erga Omnes and Universal Jurisdiction*⁸¹

The term *obligatio erga omnes* concerns the legal implications of a crime's characterisation as *jus cogens*.⁸² There is some uncertainty as to these implications, and whether *obligatio erga omnes* involves the imposition of obligations and duties on states or merely the granting of certain rights. For example, if a crime is characterised as *jus cogens* does this mean that a state is under a duty to prosecute or extradite the perpetrator of the crime, or simply that the state has the right to do so? Given that *jus cogens* comprises, by definition, peremptory norms of international law, it would seem that the characterisation of a crime as *jus cogens* should be understood as imposing duties on states. This view is supported by Bassiouni, who considers that one of the consequences of such a characterisation is that states must recognise the universality of jurisdiction over such crimes and must not grant immunity to the perpetrators of such crimes.⁸³

The notion of universal jurisdiction, which allows a nation to assert extra-territorial jurisdiction where an accused person has participated in a *jus cogens* crime,⁸⁴ clearly contravenes the traditional view that states have sovereignty over what occurs within their territory.⁸⁵ Moreover, the denial of head of state immunity gives rise to further problems of theory and practice given the origins and justifications for immunity. However, the unconditional nature of *jus cogens* means that the commission of such a crime should overrule any other rule of international law that might provide immunity. 'Once the impediment of state immunity has been overcome by a rule's *jus cogens* character, the rule's *erga omnes* character then permits national courts to enforce the rule by asserting jurisdiction.'⁸⁶

⁸¹ Brownlie, op cit (fn 2) 514-517; Malanczuk, op cit (fn 4) 57-58; Shearer, *International*, op cit (fn 31) 48-50.

⁸² Bassiouni, 'International Crimes', op cit (fn 70) 63, 63; T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 188-97; C Annacker, 'The Legal Regime of "Erga Omnes" Obligations and International Law' (1994) 46 *Australian Journal of Public International Law* 131.

⁸³ Bassiouni, 'International Crimes', op cit (fn 70) 66; D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2542; M Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1, 4; R Weiner, 'Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties' [1995] *St Mary's Law Journal* 857, 867.

⁸⁴ Brownlie, op cit (fn 2) 308 distinguishes between jurisdiction under (i) the universality principle and (ii) crimes under international law. Under the first, international law gives a liberty to all states to punish the perpetrators of certain acts, but does not itself declare the acts criminal. Under the second, international law declares the acts criminal and the breach of international law is being punished. Here, universal jurisdiction is being used in this second context.

⁸⁵ Osofsky, op cit (fn 65) 39.

⁸⁶ M Byers, 'Book Review. State Immunity and the Violation of Human Rights. By Jurgen Brohmer' (1998) 92 *American Journal of International Law* 165, 167.

This discussion illustrates the essential dilemma of whether sovereign immunity should protect the perpetrators of crimes recognised as *jus cogens*. On the one hand, basic notions of equity demand accountability by those responsible for a criminal act, rather than merely those who executed their policies.⁸⁷ This is particularly important for crimes qualifying as *jus cogens*, and crimes involving human rights violations. On the other hand, criminal prosecutions in these contexts have 'enormous foreign policy implications' and raise the possibility of opportunistic human rights litigation.⁸⁸ More importantly, they represent a potential threat to longstanding principles of state sovereignty. An understanding of these competing concerns assists in analysing the different judgments in *Pinochet*.

THE PINOCHET JUDGMENTS

Queen's Bench (No 1)⁸⁹

Extradition Crimes

Pinochet brought four applications before the court, two of which are relevant to this article.⁹⁰ The first was an application for judicial review against Mr Evans for the issue of the First Provisional Warrant and the failure of the Home Secretary to cancel that warrant. The court accepted Pinochet's submission that the offence described in the First Provisional Warrant was not an extradition crime.⁹¹ The second application was for leave to move for judicial review against Mr Bartle for the issue of the Second Provisional Warrant. In relation to the fifth offence described in the Second Provisional Warrant, the court accepted Pinochet's submission that no extraditable offence was disclosed because Chile was not a party to the Extradition Convention.⁹² Pinochet made several other submissions in relation to the exercise of discretion by the Home Secretary⁹³ and Mr Bartle⁹⁴ but these were rejected.

Pinochet made a further submission that for most of the dates during which the first four offences described in the Second Provisional Warrant were alleged to have been committed, these offences were not extradition crimes. His submission was that the alleged acts had to be criminal under English law

⁸⁷ Osofsky, *op cit* (fn 65) 40.

⁸⁸ *Ibid.*

⁸⁹ [1998] All ER (D) 629; (1999) 38 ILM 68 (Lord Bingham of Cornhill CJ, Collins and Richards JJ).

⁹⁰ The third and fourth applications were for a habeas corpus against the Commission of the Metropolitan Police: *Pinochet (No 1)* (1999) 38 ILM 68, 71 (Lord Bingham of Cornhill CJ).

⁹¹ *Id* 77 (Lord Bingham of Cornhill CJ).

⁹² *Pinochet (No 2)* [1998] 4 All ER 897, 901.

⁹³ Specifically that the Home Secretary should have cancelled the warrant under s 8(4) on the basis that it was obviously flawed because it disclosed no extradition crime and the applicant was entitled to sovereign immunity.

⁹⁴ Specifically that the stipendiary magistrate wrongly exercised his discretion by denying the applicant an inter partes hearing before issuing the warrant.

not at the date of the request for extradition ('request date'), but at the time the acts were done ('conduct date'). In other words, while the double criminality rule required the crime to be imagined in a different location — within the jurisdiction of the UK — it could not also be imagined to occur at a different time.⁹⁵

Specifically, Pinochet argued that torture only became an extradition crime when it became a crime under English law by virtue of the *Torture Act* in 1988, and hostage-taking only became an extradition crime with the enactment of the *Hostages Act* in 1982. Accordingly, Pinochet could not be extradited in respect of offences of torture or hostage-taking alleged to have been committed prior to those dates. The court rejected this submission, holding that to constitute an extradition crime the conduct need only be a crime in English law at the time of the extradition request. 'Otherwise section 2(1)(a) [of the *Extradition Act*] would have referred to conduct which would at the relevant time "have constituted" an offence, and section 2(2) would have said "would have constituted".'⁹⁶ Although the Queen's Bench quickly dismissed this point, it became a key issue in the final decision of the House of Lords.⁹⁷

The end result of these arguments was that the first four counts of the Second Provisional Warrant were 'extradition crimes'.

Head of State Immunity

Pinochet argued in relation to both Provisional Warrants that 'a court in the United Kingdom will not exert criminal or civil jurisdiction over a former Head of State of a foreign country in relation to any act done in the exercise of sovereign power.'⁹⁸ The prosecution argued that while a former sovereign is immune from some crimes, immunity does not extend to crimes against humanity⁹⁹ — such as torture and the taking of hostages — since they cannot be a function of any head of state. In support, the prosecution referred to the International Military Tribunal at Nuremberg in 1945 and the Statute of the International Tribunal for the Former Yugoslavia in 1993 which explicitly stated that heads of state were not excused from punishment for crimes against humanity which those tribunals were designed to prosecute.

⁹⁵ The two different positions relate to whether double criminality rules should be interpreted *in abstracto* or *in concreto*. Using the *in abstracto* approach, it is sufficient for that the crime is punishable in both the requesting and requested state and the question of whether prosecution and/or punishment could occur is not considered. However, using the *in concreto* approach, the substantive and procedural elements must be considered which either justify or excuse the act: van den Wyngaert, op cit (fn 6) 51 'In extradition law, the abstract model seems to prevail, at least as far as the substantive elements are concerned.'

⁹⁶ *Pinochet (No 1)* (1999) 38 ILM 68, 79 (Lord Bingham of Cornhill CJ).

⁹⁷ See 'Extradition Crimes and Retrospectivity' below.

⁹⁸ *Pinochet (No 1)* (1999) 38 ILM 68, 80 (Lord Bingham of Cornhill CJ).

⁹⁹ 'A person who commits a crime against humanity is *hosti humani generis* (an enemy of all humankind) and is thus amenable to the jurisdiction of all states: *Attorney-General (Israel) v Eichmann* (1961) 36 ILR 5.' Peter Nygh and Peter Butt (gen eds), *Butterworths Australian Legal Dictionary* (1997) 303.

¹⁰⁰ *Pinochet (No 1)* (1999) 38 ILM 68, 83 (Lord Bingham of Cornhill CJ).

Lord Bingham of Cornhill CJ conceded that this argument had 'some attraction'¹⁰⁰ but found that the prosecution's reference to these tribunals worked against it for two reasons.¹⁰¹ First, these tribunals did not violate the principle that a state will not implead another state in relation to its sovereign acts, because they were established by international agreement. Secondly, 'it was evidently thought necessary to provide that there should be no objection to the exercise of jurisdiction by the tribunal over foreign sovereigns.'¹⁰² His Lordship therefore held 'that the applicant is entitled to immunity as a former sovereign from criminal and civil process of the English courts.' Collins J agreed with the Chief Justice and added:

The submission was made ... that it could never be in the exercise of [the functions of head of state] to commit crimes as serious as those allegedly committed by the applicant. Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups ... There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.¹⁰³

Richards J agreed with both judgments.¹⁰⁴

Appeal

As a result of the court's view that Pinochet was entitled to immunity, as well as the absence of an extradition crime, the First Provisional Warrant was quashed.¹⁰⁵ The Second Provisional Warrant was also quashed but its quashing was stayed pending an appeal by the Crown to the House of Lords for which leave was given on an undertaking that the Commissioner of Police and the government of Spain would lodge a petition to the House on 2 November 1998. It was ordered that Pinochet was not to be released from custody other than on bail which was granted subsequently. The Queen's Bench certified:

A point of law of general public importance is involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.¹⁰⁶

Subsequently, Spain presented a further formal request for extradition relating to a large number of alleged crimes said to be in breach of Spanish law relating to genocide, torture and terrorism.¹⁰⁷

¹⁰¹ *Id* 84 (Lord Bingham of Cornhill CJ).

¹⁰² *Ibid*.

¹⁰³ *Id* 86 (Collins J).

¹⁰⁴ *Ibid* (Richards J).

¹⁰⁵ *Pinochet (No 2)* [1998] 4 All ER 897, 901.

¹⁰⁶ *Pinochet (No 1)* (1999) 38 ILM 68, 89-90.

¹⁰⁷ See the order of Spanish Court, Criminal Division dated 5 November 1998. Referred to *Pinochet (No 2)* [1998] 4 All ER 897, 942a (Lord Nicholls).

House of Lords (No 2)¹⁰⁸*Extradition Crimes*

Lord Lloyd was the only member of the Committee to express a view on Pinochet's submission that the alleged offences of torture and hostage-taking did not become extradition crimes until they were crimes under English law. Like the Queen's Bench, his Lordship rejected the submission. Lord Lloyd considered that the submission involved:

a misunderstanding of s 2 of the [*Extradition Act*]. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would* have constituted an offence *then*.¹⁰⁹

Again, it is interesting to keep in mind this straightforward rejection of Pinochet's submission when examining the judgments of the House of Lords in the rehearing of the appeal.¹¹⁰

*Act of State*¹¹¹

The majority of the Committee found the act of state doctrine inapplicable.¹¹² Lord Steyn felt it was '[p]lainly not appropriate for the House to take into account ... political considerations' such as 'adverse internal consequences in Chile and damage done to the relations between the United Kingdom and Chile.'¹¹³ The argument is essentially that it is not for the courts to refuse to decide a matter on the basis of the resultant impairment of foreign relations. With respect, this argument seems to misunderstand the rationale for the doctrine. Indeed, it is precisely because courts are not suited to adjudicating political questions that they employ the act of state doctrine, thereby leaving the matter to be dealt with by the executive.¹¹⁴

The stronger argument for refusing to apply the act of state doctrine is that its rationale 'yields to a contrary intention shown by Parliament. Where Parliament has shown that a particular issue is to be justiciable in the English courts, there can be no place for the courts to apply this self-denying principle.'¹¹⁵ Here the majority considered that Parliament had specifically indicated that the offences of torture and taking hostages are justiciable, and this jurisdiction could therefore not be declined. In relation to torture, s 134(1) of the *Torture Act* clearly required 'investigation into the conduct of officials

¹⁰⁸ *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 3 WLR 1456; 4 All ER 897.

¹⁰⁹ *Pinochet (No 2)* [1998] 4 All ER 897, 921e-f (Lord Lloyd).

¹¹⁰ See 'Extradition Crimes and Retrospectivity' below.

¹¹¹ See *Pinochet (No 2)* [1998] 4 All ER 897, 918c-919f (Lord Slynn), 933f-935f (Lord Lloyd), 937f-938e (Lord Nicholls), 946f-947f (Lord Steyn).

¹¹² *Id* 947f (Lord Steyn).

¹¹³ *Id* 946h (Lord Steyn). See also 918a-b (Lord Slynn), 941h (Lord Nicholls).

¹¹⁴ Cf the interpretation of the case given by H Fox, 'The First *Pinochet* Case: Immunity of a Former Head of State' [1999] 48 ICLQ 207, 211.

¹¹⁵ *Pinochet (No 2)* [1998] 4 All ER 897, 938a (Lord Nicholls). Refer to discussion in the 'Act of State' section for why this may not always be the case in Australia or the United States.

acting in an official capacity in foreign countries.¹¹⁶ In relation to hostage taking, the 'contrary intention' was implied by s 1(1) of the *Hostages Act*.¹¹⁷ That Act implemented the Hostage Convention, which was agreed against the background of a number of hostage taking incidents in which a state was or was suspected of being involved.

A minority of the Committee was prepared to apply the act of state doctrine. Lord Lloyd considered matters such as the relationship between England and Chile, and allegations that Chile was participating with other states in 'Plan Condor', as favouring the decline of jurisdiction.¹¹⁸ Lord Slynn's application was more reserved — his Lordship only applied the act of state doctrine as a corollary of his finding that Pinochet enjoyed former head of state immunity.¹¹⁹

Head of State Immunity

All of the Law Lords agreed that if Pinochet was still head of state he would clearly enjoy immunity in relation to the alleged offences — immunity *ratione personae*.¹²⁰ Their Lordships accepted that the core issue was the proper scope of the immunity granted to a former head of state and the effect that the recognition of international crimes has on that immunity. Lord Slynn mapped the two extreme positions. One extreme is that international crimes have no effect on a former head of state's immunity for official acts.¹²¹ The other extreme is that immunity is automatically withdrawn in relation to anything recognised as an international crime.¹²² Unfortunately there was no agreement on how this issue should be determined and the judgments landed at different points on Lord Slynn's map. Therefore it is necessary to consider each judgment individually.

Lord Slynn of Hadley

Lord Slynn accepted Bingham CJ's view in the Queen's Bench decision that a head of state can commit an illegal act while carrying out one of his functions, and quoted Sir Arthur Watts QC:

The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State.¹²³

¹¹⁶ Id 938b (Lord Nicholls), 947b (Lord Steyn).

¹¹⁷ Ibid.

¹¹⁸ Id 934c-5a (Lord Lloyd).

¹¹⁹ Id 919e (Lord Slynn).

¹²⁰ Id 940h (Lord Nicholls), 943f (Lord Steyn).

¹²¹ Id 913j (Lord Slynn).

¹²² Id 914c (Lord Slynn).

¹²³ Sir Arthur Watts QC, *Hague Lectures* ('Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des Cours* pp 56-57) cited in *Pinochet (No 2)* [1998] 4 All ER 897, 908g-h (Lord Slynn).

His Lordship therefore concluded that immunity could not be ruled out on the basis that the alleged crimes fell outside the ambit of the functions of head of state.¹²⁴ His Lordship also considered that no rule of international law required that immunity be denied.¹²⁵

It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any *jus cogens* in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden.¹²⁶

However, his Lordship considered that it was possible for some international crimes to limit immunity. This requires an international convention (in force independently or by virtue of domestic legislation)¹²⁷ that clearly establishes an international crime, gives the parties universal jurisdiction, declares that immunity cannot be pleaded and to which the requesting and extraditing states are parties.¹²⁸ Applying this test to the charges relating to torture, Lord Slynn found that the states parties to the Torture Convention had not agreed that head of state immunity should be denied in respect of alleged crimes of torture. Similarly, his Lordship could not find anything in the Extradition Convention or the *Hostages Act* that supported an intention to deny head of state immunity in relation to hostage taking.¹²⁹

Lord Lloyd

Lord Lloyd adopted the first extreme position outlined by Lord Slynn. Lord Lloyd considered that the acts performed by a head of state can be categorised in one of two ways. They are either 'personal or private acts ... or official acts done in the execution or under colour of sovereign authority'.¹³⁰ Since Pinochet was not alleged to have carried out the crimes with his own hands, they were necessarily not personal or private acts but acts done in a sovereign capacity.¹³¹

Where a person is accused of organising the commission of crimes as the head of the government, in co-operation with other governments, and carrying out those crimes through the agency of the police and secret service, the inevitable conclusion must be that he was acting in a sovereign capacity and not in a personal or private capacity.¹³²

¹²⁴ *Pinochet (No 2)* [1998] 4 All ER 897, 908j (Lord Slynn).

¹²⁵ *Id* 908b-d (Lord Slynn).

¹²⁶ *Id* 908d-e (Lord Slynn).

¹²⁷ *Id* 915f-h (Lord Slynn).

¹²⁸ *Id* 915c-e (Lord Slynn).

¹²⁹ *Id* 917j (Lord Slynn).

¹³⁰ *Id* 926j-927a (Lord Lloyd).

¹³¹ *Id* 927c (Lord Lloyd).

¹³² *Id* 927j (Lord Lloyd).

His Lordship also rejected the Crown's submission that the horrific nature of some crimes, such as those alleged in this case, create an exception to immunity. In particular his Lordship was troubled, like Bingham CJ and Collin J in the Queen's Bench, as to where to draw the line. In other words, exactly how horrific must a crime be before immunity is denied? Acceptance of this submission would also lead to the nonsensical situation of crimes of a head of state being attributed to the state only up to a certain level of seriousness.¹³³

Lord Lloyd then considered the submission that an exception should be made to the general rule of immunity in the case of crimes which have been made the subject of international conventions. Finding nothing in any of the conventions touching on state immunity,¹³⁴ and no 'inconsistency between the purposes underlying these conventions' and former head of state immunity,¹³⁵ his Lordship rejected this submission.

Lord Nicholls

Lord Nicholls considered that the effect of s 20 of the *Immunity Act* was to confer immunity upon a head of state for acts performed in exercising functions which international law recognises as functions of head of state. Although his Lordship said that this formulation was 'not the subject of controversy' before the Committee,¹³⁶ Lord Slynn expressly rejected that international law prescribes a list of the functions of a head of state, noting that those functions vary greatly between countries.¹³⁷ Lord Nicholls stated that torture and the taking of hostages are not regarded by international law as functions of a head of state:

International law has made it plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.¹³⁸

Lord Nicholls' approach was very similar to that of Lord Slynn. Of course, while Lord Slynn recognised the potential for state immunity to be denied in relation to international crimes, his Lordship found no evidence that the relevant United Kingdom legislation intended to deny that immunity. In contrast, Lord Nicholls found that the relevant legislation evinced a parliamentary intention that immunity be denied. That the same approach could lead to two different outcomes indicates the difficulties in determining parliamentary intent, even in circumstances involving grave human rights violations.

¹³³ Id 928d (Lord Lloyd).

¹³⁴ Id 928f-j (Lord Lloyd) particularly noted that Article 4 of the Genocide Convention was omitted when the Convention was incorporated into English law. His Lordship postulated that it would be reasonable to assume that had an equivalent article existed in the other two Conventions they also would have been omitted.

¹³⁵ Id 929a (Lord Lloyd).

¹³⁶ Id 939h (Lord Nicholls).

¹³⁷ Id 908c (Lord Slynn).

¹³⁸ Id 939j-940a (Lord Lloyd).

Lord Hoffmann concurred with the reasons given by Lords Nicholls and Steyn.¹³⁹

Lord Steyn

Lord Steyn, in considering what can be regarded as official acts of head of state, rejected certain of Collin J's statements in the Queen's Bench. In particular, he rejected the suggestion that the criminal nature of the acts was incapable of limiting state immunity:

It is inherent in this stark conclusion that there is no or virtually no line to be drawn. It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state.¹⁴⁰

Instead, his Lordship stated that which acts can be performed in the course of official functions is a question of law which invites classification.¹⁴¹ Certain acts, including those alleged to have been committed by Pinochet, cannot be regarded as official functions of a head of state:

Qualitatively, what he is alleged to have done is no more to be categorised as acts undertaken in the exercise of the functions of a head of state than the examples already given of a head of state murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it.¹⁴²

This reasoning is not entirely convincing. His Lordship provides examples of acts which are intended, and can *only* serve a personal purpose — they *could not* be considered political acts. However, Pinochet's alleged crimes *could* serve a political purpose. That is not to say that Lord Steyn's examples and the alleged crimes do not share similarities. They would both be considered illegitimate exercises of power. But divining which acts are legitimate or illegitimate would make Lord Steyn directly confront the 'political considerations' that he was so concerned to avoid.¹⁴³ A clearer explanation might be that Pinochet's alleged crimes are not acts of state because they are recognised as *jus cogens* crimes, and Lord Steyn's examples are not acts of state because they are not done for a political purpose or state objective.

The Objection¹⁴⁴

In the result, the Crown's appeal from the Queen's Bench decision to quash the Second Provisional Warrant was upheld on the basis of a 3:2 majority finding that neither head of state immunity nor the act of state doctrine were

¹³⁹ Id 947j (Lord Hoffmann).

¹⁴⁰ Id 945b (Lord Steyn).

¹⁴¹ Id 945c (Lord Steyn).

¹⁴² Id 946d (Lord Steyn).

¹⁴³ *Ibid.*

¹⁴⁴ [1999] 2 WLR 272; 1 All ER 577. See also Editorial, 'Justice and Prejudice' (1999) 149 *New Law Journal* 77; M Zander, 'Who Judges Matters' (1999) 149 *New Law Journal* 5; P Young, 'More Pinochet' (1999) 73 *ALJ* 162; J Caldwell, 'The Pinochet saga' (1999) NZLJ 103.

applicable. The two minority judges, Lords Lloyd and Slynn, held that both head of state immunity and the act of state doctrine would defeat the appeal. Pinochet was required to remain in the UK to await the decision of the Home Secretary on whether to authorise the continuation of the proceedings for his extradition under s 7(1) of the *Extradition Act*.

However, 14 days after the House of Lords decision was handed down, Pinochet discovered that Lord Hoffmann was a director and chairperson of Amnesty International Charity Ltd ('AICL'), which had been incorporated to carry out Amnesty International's ('AI') charitable purposes.¹⁴⁵ On 10 December 1998, Pinochet petitioned the House to set aside the order of 25 November 1998. Although the only previous instance of the House setting aside one of its own orders merely involved the variation of an order for costs,¹⁴⁶ the Committee was prepared to reopen the appeal in this case. The relevant principle was *nemo iudex in sua causa* — that a man may not be a judge in his own cause.¹⁴⁷ Here Lord Hoffmann had a longstanding involvement in the cause of AI through his involvement with AICL, and AI (who had been granted leave to intervene in the appeal) was effectively a party in *Pinochet*. As Lord Hoffmann's decision had the potential to lead to the promotion of AI's cause, he was disqualified. The petition was therefore granted and the matter was referred to another Committee of the House of Lords for rehearing.

House of Lords (No 3)¹⁴⁸

The appeal from the Queen's Bench decision was reheard on 18 January 1999. The Home Secretary permitted extradition proceedings to proceed under s 7 of the *Extradition Act*. However, the Home Secretary did not authorise the extradition proceedings to proceed on the charge of genocide and accordingly, for the purpose of this decision, genocide was no longer alleged.

¹⁴⁵ As a result of the decision in *McGovern v Attorney-General* [1982] Ch 321 which 'held that a trust established by AI to promote certain of its objects was not charitable because it was established for political purposes; however ... a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable.': *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet (No 2)* [1999] 1 All ER 577, 583 (Lord Browne-Wilkinson).

¹⁴⁶ *Cassell & Co Ltd v Broome (No 2)* [1972] AC 1136.

¹⁴⁷ *Dimes v Proprietor of Grand Junction Canal* (1852) 3 HL Cas 759, 793; 10 ER 301, 315 (Lord Campbell).

¹⁴⁸ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet (No 3)* [1999] 2 WLR 827; 2 All ER 97 ('*Pinochet (No 3)*').

*Extradition Crimes and Retrospectivity*¹⁴⁹

Lord Browne-Wilkinson

Pinochet revived his submission that a number of the charges brought against him were not extradition crimes until they became crimes under English law.¹⁵⁰ Lord Browne-Wilkinson gave the lead judgment on this issue.¹⁵¹ His Lordship first considered the other two categories of extradition regulated by the *Extradition Act*. The first is extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the Extradition Convention. Section 9(8) requires the committal court to consider whether ‘the evidence would be sufficient to warrant his trial if the extradition crime had taken place within jurisdiction of the court’. Here, his Lordship considered that ‘had taken place’ referred to the conduct date. This interpretation is consistent with the wording in s 2 of the *Extradition Act*. However, that wording is ambiguous and this interpretation is no better than interpreting it as referring to the request date. His Lordship found support for his conclusion from the requirement that the magistrate consider whether the evidence was sufficient ‘to warrant his trial’ which he considered not an ‘abstract concept whether a hypothetical case is criminal’ but ‘a hard practical matter’ of determining whether committal could occur. This is unconvincing, since the double criminality rule is inherently abstract and at its least involves considering the hypothetical situation of the alleged act occurring where it did not. His Lordship concluded that ‘these provisions clearly indicate that the conduct must be criminal under the law of the United Kingdom at the conduct date and not only at the request date.’

The other category of extradition is cases where an Order in Council is in force under the *Extradition Act 1870* (UK) (*1870 Extradition Act*). The *1870 Extradition Act* unambiguously requires the conduct to be criminal under the English law at the conduct date. His Lordship stated that ‘[i]t would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another.’ This is not necessarily so extraordinary. Indeed, where Orders have been made in relation to specific countries it may be entirely appropriate for the relevant date to remain the conduct date until appropriate arrangements are made with those countries which can then fall within the general provisions of the *Extradition Act*. However, the most conclusive evidence highlighted by Lord Browne-Wilkinson in support of his interpretation of s 2 of the *Extradition Act* was its legislative history. The discussions and debate that led to the *Extradition Act*

¹⁴⁹ *Pinochet (No 3)* [1999] 2 WLR 827, 836F-839H (Lord Browne-Wilkinson); 850D-851B (Lord Goff).

¹⁵⁰ Lord Browne-Wilkinson explained that this was because the Crown Prosecution Service was now alleging that Pinochet had committed crimes before and after becoming Head of State and therefore former of head of state immunity, even if it applied, would no longer have protected him: *ibid*.

¹⁵¹ Most of the other Lords concurred with Lord Browne-Wilkinson’s reasoning on this issue: 850G (Lord Goff); 870E (Lord Hope); 887H (Lord Hutton); 902C (Lord Saville); 915D (Lord Phillips).

disclosed 'no discussion as to changing the date on which the criminality under English law was to be demonstrated. It seems to me impossible that the legislature can have intended to change that date from the one which had applied for over a hundred years under the Act of 1870 (ie the conduct date) by a side wind and without investigation.'¹⁵² It may be surprising that there was no debate on this issue, but this is not necessarily conclusive. The absence of debate could merely mean that the change was not considered contentious. Indeed, in many other countries, the request date is clearly the relevant date.¹⁵³

Other techniques of statutory interpretation, in particular the purposive approach, would seem to suggest that the request date would be the relevant date. In *Government of Belgium v Postlethwaite*, Lord Bridge stated that in relation to the interpretation of extradition treaties:

it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose.¹⁵⁴

It should also be noted that the common law's general presumption against retrospectivity is not at issue here.¹⁵⁵ The UK was not prosecuting Pinochet, only deciding whether to extradite him. Further, countries have implemented conventions on international crimes at different times, and Lord Browne-Wilkinson's approach means that extradition can be restricted to the lowest common denominator.¹⁵⁶

The judgment of Lord Hope analysed the main consequence of this construction, which was to substantially reduce the number of charges that could be brought against Pinochet.¹⁵⁷ The only extraditable charges became charges of conspiracy to torture, one act of torture and conspiracies to murder and torture in Spain.

¹⁵² *Pinochet (No 3)* [1999] 2 WLR 827, 839G-H.

¹⁵³ Eg *Extradition Act 1988* (Cth) s 19(2)(c) which requires that 'the magistrate is satisfied that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place ... at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia' (emphasis added). See also van den Wyngaert, op cit (fn 6) 48 'Most domestic laws do not restrict their universal jurisdiction to the condition of double criminality.'

¹⁵⁴ *Government of Belgium v Postlethwaite* [1988] 1 AC 924, 947. See also MC Bassiouni, *International Extradition, United States Law and Practice* (2nd ed, 1987) 88: 'Where a provision is capable of two interpretations, either of which comport with the other terms of the treaty, the judiciary will choose the construction which is more liberal and which would permit the relator's extradition, because the purpose of the treaty is to facilitate extradition between the parties to the treaty.'

¹⁵⁵ Also note *International Covenant on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171, ATS No 23, art 15 which states that no person is to be convicted of an offence which did not constitute an offence at the time of the relevant act or omission, or to be subjected to a heavier penalty than was applicable at that time.

¹⁵⁶ *Economist* (27 March 1999), 65-66.

¹⁵⁷ *Pinochet (No 3)* [1999] 2 WLR 827, 879E-G (Lord Hope).

Lord Millett

Lord Millett developed an interesting alternative argument that did not depend upon statute at all. His Lordship stated that crimes prohibited by international law attract universal jurisdiction if they both infringe a *jus cogens* and are ‘so serious and on such a scale that they can justly be regarded as an attack on the international legal order.’¹⁵⁸ His Lordship considered that systematic torture as an instrument of state policy met both of these criteria, being an international crime of universal jurisdiction by 1973.¹⁵⁹ Accordingly, since customary international law was part of the common law,¹⁶⁰ English courts already possessed extraterritorial jurisdiction over the alleged crimes and did not require statutory authority to exercise it.¹⁶¹ This interpretation means that even if the *Extradition Act* requires the existence of a crime at the conduct date, the alleged acts were crimes under English law for some time before the enactment of the *Torture Act* and the *Hostages Act*, including at the relevant conduct dates.¹⁶²

*Head of State Immunity*¹⁶³*Lord Browne-Wilkinson*

Lord Browne-Wilkinson found that Pinochet’s immunity *ratione materiae* did not protect him in relation to the alleged acts of torture. This conclusion was reached in four steps. First, the Torture Convention provides worldwide universal jurisdiction.¹⁶⁴ Secondly, it requires all member states to ban and outlaw torture.¹⁶⁵ Thirdly, a feature of the crime is that it must be committed ‘by or with the acquiescence of a public official or other person acting in an official capacity’. Therefore it is clearly intended that a head of state, as the person possibly most responsible, cannot escape liability.¹⁶⁶ Finally, since immunity *ratione materiae* applies to all state officials who have been involved in carrying out state functions, granting immunity to a former head of state would involve extending immunity to all those who could fall within the definition of torturers. ‘It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its . . . officials’ immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention — to provide a system under which there is no safe haven for torturers — will

¹⁵⁸ Id 911F (Lord Millett).

¹⁵⁹ Id 912E (Lord Millett).

¹⁶⁰ Id 912B (Lord Millett).

¹⁶¹ Id 912E (Lord Millett).

¹⁶² For a discussion of whether *jus cogens* crimes become part of the common law of Australia see *Nulyarimma v Thompson* (1999) 165 ALR 621 and Mitchell, ‘Genocide, Human Rights Implementation and the Relationship between International Law and Domestic Law: *Nulyarimma v Thompson*’ (2000) 24 *Melbourne University Law Review* 15.

¹⁶³ Id 844B-848D (Lord Browne-Wilkinson); 855B-863H (Lord Goff).

¹⁶⁴ Id 847D (Lord Browne-Wilkinson).

¹⁶⁵ *Ibid.*

¹⁶⁶ Id 847E (Lord Browne-Wilkinson).

have been frustrated.¹⁶⁷ Lords Saville and Millett essentially concurred with Lord Browne-Wilkinson on this issue.

Lord Goff

Very early in his judgment, Lord Goff recorded his agreement with the analysis and conclusions of Lord Slynn in the House of Lords,¹⁶⁸ and in the process dashed any hope for a unanimous ruling on immunity. His Lordship stated that as a matter of both domestic and international law, a state's waiver of immunity by treaty must be express. 'Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.'¹⁶⁹ Lord Goff considered that the Torture Convention contained no express waiver by Chile, and therefore head of state immunity applied. With respect to Lord Goff's concern to avoid 'international chaos', it should be remembered that whatever the ruling of the House of Lords, the courts of different states parties to the treaty could reach different conclusions on whether Chile had waived immunity under the Torture Convention. Further, there certainly seems to be a waiver of immunity in the Torture Convention, since it applies only to acts of official torture — clearly contemplating former heads of state. Lord Saville's judgment suggested that Lord Goff may have reversed the burden:

Indeed it seems to me that it is those who would seek to remove such alleged official torturers from the machinery of the Convention who in truth have to assert that by some process of implication or otherwise the clear words of the Convention should be treated as inapplicable to a former head of state, notwithstanding he is properly described as a person who was '*acting in an official capacity*.'¹⁷⁰

Lord Goff then considered whether this principle could be circumvented on the basis that, for the purposes of the Torture Convention, torture does not form part of the functions of a head of state.¹⁷¹ His Lordship rejected this approach, stating that it was well established that a head of state's governmental acts could include serious crimes.¹⁷²

Although then the lack of an express waiver was decisive,¹⁷³ his Lordship went on to consider whether there could be an implied term in the Torture Convention excluding immunity *ratione materiae*. His Lordship stated that the continued availability of the immunity was not inconsistent with the obligations of the states parties to the Torture Convention for three reasons.¹⁷⁴ First, in most cases the public official will be in his or her own country and no

¹⁶⁷ Id 847H-848A (Lord Browne-Wilkinson).

¹⁶⁸ Id 850A-B (Lord Goff).

¹⁶⁹ Id 858F (Lord Goff).

¹⁷⁰ Id 904B (Lord Saville).

¹⁷¹ Id 858H (Lord Goff).

¹⁷² Id 859A-B (Lord Goff).

¹⁷³ Id 859E (Lord Goff).

¹⁷⁴ Id 860B (Lord Goff).

question of immunity will arise.¹⁷⁵ Secondly, when the public official is overseas, it would only be in unusual cases, like the present, that a state would be expected to assert immunity.¹⁷⁶ Indeed, his Lordship felt that immunity protected former heads of state from the 'fear of being the subject of unfounded allegations emanating from states of a different political persuasion.'¹⁷⁷ Finally, the lack of mention of immunity in the documents recording the Torture Convention's negotiation further supported the retention of immunity.¹⁷⁸

Lord Goff's argument that it would only be in unusual cases that a state would be expected to assert immunity is curious, since the obligation to extradite or punish is imposed precisely because the offending state cannot be relied upon to do so and may frustrate prosecution.¹⁷⁹ Moreover, the absence of discussion on the matter while negotiating the Torture Convention is inconclusive. Lord Saville noted that 'if there were states that wished to preserve such immunity in the face of universal condemnation of official torture, it is perhaps not surprising that they kept quiet about it.'¹⁸⁰

Lord Hope

Lord Hope concluded that the obligations which were recognised by customary international law by 30 October 1988 (when Chile ratified the Torture Convention) in respect of international crimes as serious as those alleged against Pinochet were so strong as to override any objection by Chile on the ground of immunity *ratione materiae*.¹⁸¹

Lord Hutton

Lord Hutton rejected Pinochet's claim to immunity based on Part I of the *Immunity Act* because that immunity does not extend to criminal proceedings.¹⁸² His Lordship also found that the principle of head of state immunity under international law could not protect Pinochet, because certain crimes of which he was accused, namely acts of torture and conspiracy to torture, had reached the status of *jus cogens*.¹⁸³ These were crimes 'so grave and so inhuman that they constitute crimes against international law and . . . the international community is under a duty to bring to justice a person who commits such crimes'.¹⁸⁴ They could therefore not be regarded as having been committed within the ambit of Pinochet's functions as head of state.¹⁸⁵

¹⁷⁵ Id 860C, 862A (Lord Goff).

¹⁷⁶ Id 860D (Lord Goff).

¹⁷⁷ Id 861B-G (Lord Goff).

¹⁷⁸ Id 862F (Lord Goff).

¹⁷⁹ See eg, Id 913G (Lord Millett).

¹⁸⁰ Id 904D (Lord Saville).

¹⁸¹ Id 886H-887A (Lord Hope).

¹⁸² Id 892H (Lord Hutton).

¹⁸³ Id 898E (Lord Hutton).

¹⁸⁴ Id 897E (Lord Hutton).

¹⁸⁵ Id 895F, 901C (Lord Hutton).

Lord Phillips

Lord Phillips first examined the sources of international law to determine whether they gave rise to a rule of criminal immunity for former heads of state.¹⁸⁶ His Lordship found no support in either custom, judicial decisions or general principles of international law to support this immunity.¹⁸⁷ Instead his Lordship stated that international crimes trumped immunity *ratione materiae*, adopting the narrowest view of immunity amongst the Committee:

International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can co-exist with them. The exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail.¹⁸⁸

This of course begs the question — if state immunity *ratione materiae* cannot co-exist with international crimes, how can state immunity *ratione personae* do so? Unfortunately his Lordship did not answer this question. It was clearly accepted in all decisions that had Pinochet been head of state he would have enjoyed absolute immunity as such.¹⁸⁹ However, how can the difference between an existing head of state and a former one be justified if the focus is the nature of the crime?¹⁹⁰

Lord Phillips adopted a different interpretation of the provisions of the *Immunity Act* from the other members of the Committee. His Lordship considered that s 20 of the *Immunity Act* has no application to the conduct of a head of state outside the UK.¹⁹¹ However, even if this view were mistaken, his Lordship stated that actions prohibited under international law could not constitute official functions under the *Immunity Act*.¹⁹²

Summary and Subsequent Developments

The Crown's appeal from the Queen's Bench decision to quash the Second Provisional Warrant was upheld on the basis of a 6:1 majority, with Lord Goff dissenting. The majority judges denied head of state immunity to Pinochet. However, all members of the Committee save Lord Millett (who relied on the common law) found that the *Extradition Act* required that extradition crimes

¹⁸⁶ Id 917E (Lord Phillips).

¹⁸⁷ Id 918F, 919G, 924F (Lord Phillips).

¹⁸⁸ Id 924F-G (Lord Phillips).

¹⁸⁹ Id 905H (Lord Millett), 913E (Lord Millett), 915H-916A (Lord Phillips).

¹⁹⁰ H Gibson, 'Decision Time, Again', *Time*, 5 April 1999, 42; Id 860E (Lord Goff) 'I comment that it is not suggested that it is inconsistent with the Convention that immunity *ratione personae* should be asserted; if so, I find it difficult to see why it should be inconsistent to assert immunity *ratione materiae*.' See also Pinochet's submission quoted in id 915H-916C (Lord Phillips) 'It is therefore the nature of the conduct and the capacity of the applicant and the time of the conduct alleged, not the capacity of the applicant at the time of any suit, that is relevant.' (emphasis added). See also G Bindman, 'Lessons of Pinochet' (1999) 149 *New Law Journal* 1050, 1050.

¹⁹¹ *Pinochet (No 3)* [1999] 2 WLR 827, 927A (Lord Phillips).

¹⁹² *Ibid* 917C (Lord Phillips).

be a crime in the UK when the alleged act was committed rather than at the date the request was made. Since the UK had only recently passed legislation recognising universal jurisdiction over the crimes alleged to have been committed by Pinochet, and most of Pinochet's alleged crimes were committed before that date, the Second Provisional Warrant was cut down to a much narrower range of charges.

Home Secretary Jack Straw announced on 15 April 1999 that he had issued a new authority to proceed.¹⁹³ Pinochet lodged an appeal to this decision on 6 May 1999 which was rejected by Ognall J in the High Court.¹⁹⁴ On 8 October 1999, Mr Bartle ruled in the Bow Street Magistrates' Court that Pinochet could be extradited to Spain on torture and conspiracy charges, and committed Pinochet to await the decision of the Secretary of State.¹⁹⁵ On 22 October 1999, Pinochet lodged an application for judicial review of Mr Bartle's decision which will be heard in the High Court. A formal request by Chile on 14 October 1999 to permit Pinochet to return to Chile because of his age and failing health was refused by the British Government.¹⁹⁶ Spain has also rejected a request by Chile for bilateral arbitration on the question of whether a Spanish Court has the right to try Pinochet under the Torture Convention. The matter may go before the International Court of Justice.¹⁹⁷

IMPLICATIONS OF PINOCHET

Practical Implications

One of the practical implications of *Pinochet* is said to be that the narrow interpretation of head of state immunity will discourage dictators from relinquishing power in future.¹⁹⁸ The argument is that whereas a dictator may have been

¹⁹³ 'Letter from Jack Straw about the Extradition of Pinochet' <<http://www.derechos.org/nizkor/chile/juicio/straw.html>>. See also TR Read, 'Pinochet Extradition Case To Proceed in Britain', *Washington Post* (Washington, United States of America), 16 April 1999, A30; 'Lawyers Committee Welcomes Jack Straw Decision' <www.ilchr.org/media/pino0499-3.htm>. The first authority to proceed was 'United Kingdom Home Secretary: Response of Her Majesty's Government Regarding the Spanish Extradition Request' (1999) 38 ILM 489.

¹⁹⁴ *R v Secretary of State for the Home Department; ex parte Ugarte* (Unreported, High Court, Queen's Bench Division, Ognall J, 27 May 1999); 'Pinochet Lawyers File Formal Appeal' *Associated Press Online*, 6 May 1999 (available on Westlaw).

¹⁹⁵ *The Kingdom of Spain v Augusto Pinochet Ugarte*, (Unreported, Bow Street Magistrates' Court, Mr Ronald Bartle, 8 October 1999) <<http://www.open.gov.uk/lcd/magist/pinochet.htm>>. Mr Bartle also ruled that he could entertain the material subsequently supplied by Spain after the Secretary of State had issued his authority to proceed on 14 April 1999. Judge Garzon had amended his extradition request to include a number of new acts of torture allegedly committed after the crime of torture had been established within the United Kingdom: 'Extradition of Chilean Former President Pinochet' (1999) 93 *American Journal of International Law* 487, 489.

¹⁹⁶ W Hoge, 'Britain: Plea for Pinochet Rejected', *NY Times*, 16 October 1999, A6.

¹⁹⁷ K DeYoung, 'Chile Asks Spain for Arbitration on Pinochet Case', *Washington Post*, 10 August 1999, A20; T Burns, 'Spain Unlikely to Accept Chile Request', *Financial Times*, 4 August 1999, 4.

¹⁹⁸ 'Questions and Comments' (1999) 11 *Pace International Law Review* 193, 197; 'Ex-dictators are not immune' *The Economist*, 28 November 1998, 13, 13.

willing to stand down knowing that head of state immunity would continue to protect him or her, now he or she will remain in power. As a result, the transition in these states from dictatorship to democracy will not be achieved peacefully, but will be violent and absolute.¹⁹⁹ However, granting absolute immunity to heads of state may indicate that it is acceptable for those persons to commit barbarities, and that these acts will be without consequence.²⁰⁰ The risk of prosecution highlighted by this decision may encourage dictators not to commit these international crimes in the first place.²⁰¹ Furthermore, it is unrealistic to assume that dictators' decisions to step down are based in any real measure on the presence or absence of immunity:²⁰² '[t]hey leave power — almost invariably — because their ability to hold on to it has become exhausted.'²⁰³

Some commentators have suggested that *Pinochet* will open the floodgates to prosecutions against former heads of state.²⁰⁴ *The Economist* rhetorically asks '[w]hat is to stop some left-wing European magistrate from charging George Bush for civilian deaths inflicted during the United States invasion of Panama, or Henry Kissinger for the bombing of Cambodia?'²⁰⁵ Another commentator warns that the *Pinochet* decision means that universal jurisdiction is expanding unchecked, and that CEOs of multinationals could soon be subject to prosecution.²⁰⁶ However, there are significant restrictions on the expansion of universal jurisdiction, which only accrues as an incident of *erga omnes* after a crime reaches *jus cogens* status. As discussed above, a crime of *jus cogens* will only arise from consensus by members of the international community as a whole. Further, the floodgates argument oversimplifies and perhaps overestimates the mechanics of justice. The *Pinochet* decisions involved years of investigation alongside complex and ongoing extradition requirements. Rather than a flood of prosecutions, 'cases will continue to be rare, in part because they are difficult to make.'²⁰⁷ The *Pinochet* decision has certainly made the prosecution of grave international crimes easier, and although there is no evidence of a flood of prosecutions arising as a result of the decision, a number of new prosecutions have been brought.²⁰⁸ However, not least for the political

¹⁹⁹ Editorial, 'Prosecutorial Indiscretion', *New Jersey Law Journal*, 2 November 1998, 22.

²⁰⁰ 'Ex-dictators are not immune' *The Economist*, 28 November 1998, 13, 13-14.

²⁰¹ J Fowler, 'Pinochet Arrest Is a Step Toward World Justice', *The National Law Journal*, 22 February 1999, A26.

²⁰² R Brody, 'Bringing Tyrants to Trial', *Legal Times*, 7 December 1998, 28.

²⁰³ Fowler, op cit (fn 201) A26.

²⁰⁴ 'Ex-dictators are not immune' *The Economist*, 28 November 1998, 13, 13.

²⁰⁵ 'The Pinochet Case — Brining the general to justice', *The Economist*, 28 November 1998, 19, 22.

²⁰⁶ John Bolton, 'Universal Jurisdiction Too Easily Sweeps Political Differences into Legal Arena', *Legal Times*, 11 January 1999, 21.

²⁰⁷ Fowler op cit (fn 201), A26.

²⁰⁸ For example the Italian Government has requested the extradition of the former head of the Chilean secret police, General Manuel Contreras (ret): 'Italy Requests Extradition of Chilean General on Assassination Attempt' (1999) 15(11) *International Enforcement Law Reporter*. On 2 November 1999, Baltasar Garzon, the Spanish judge who issued the extradition request for General Pinochet, issued an extradition request for 98 Argentines in connection with 600 "disappearances" during Argentina's period of military rule during 1976-1983: 'Closing in', *The Economist*, 6 November 1999, 46.

and economic considerations involved in the prosecution of another country's head of state, states will be 'reluctant to undertake them, except in the most compelling cases.'²⁰⁹

Another criticism of *Pinochet*, which seems contrary to the floodgates argument, is that its principles are inconsistently applied and overly selective.²¹⁰ Pinochet is clearly not the only former dictator accused of committing international crimes. Jean-Claude 'Baby Doc' Duvalier, former Haitian dictator lives in France. Emmanuel Constant, the leader of Haiti's FRAPH death squad, lives in the United States.²¹¹ Idi Amin, under whose despotic rule an estimated 300,000 Ugandans were killed, lives in Saudi Arabia. Ethiopia's Mengistu Haile Mariam, who ruthlessly eliminated rival left-wing political groups, lives in Zimbabwe.²¹² It is unlikely that all these men will face trial. Does this mean that strong states will exercise universal jurisdiction in respect of crimes of *jus cogens* only in respect of weak states and as it suits their political or other unrelated purposes?²¹³ Fowler states:

The reality is that we are lurching in fits and starts toward effective international justice. And this lurching quality necessarily means that like cases will not be treated in a like manner for some time to come. But that is not a reason to stop the movement forward.²¹⁴

Imperialist Intervention

Related to the issue of selectivity and political motivations for pursuing former heads of state is the potential for imperialist intervention in domestic solutions. *Pinochet* has been criticised as allowing and encouraging states 'remote from the misery of the conflict' to untie 'imperfect settlements' that contending domestic parties have made in the name of peace.²¹⁵ Chile is attempting to come to terms with its past, with initiatives such as the National Commission on Truth and Reconciliation²¹⁶ and the prosecution of certain military

²⁰⁹ J Charney, 'Progress in International Criminal Law?' (1999) 93 *American Journal of International Law* 452, 457–458.

²¹⁰ This is an objection of some commentators on the right, who believe that other despots will never be brought to justice because the liberals that pursued Pinochet divide the world up into "good" (left-wing) and "bad" (right-wing) dictators: V Llosa, 'What about the "good" dictator? Cuba's Fidel Castro', *New Statesman*, 23 October 1998, 8. Of course, Castro is not yet a former head of state. However, Ms Llosa may feel that her view of the prosecution of Pinochet as the revenge of the left is supported by the fact that the Spanish complaint that triggered the Spanish magistrate's jurisdiction seems to have been filed by members of the Communist Party of Spain: Editorial, 'Prosecutorial Indiscretion', *New Jersey Law Journal*, 2 November 1998, 22. She may also take comfort from the fact that Pinochet has apparently encouraged a suit in France against Castro: 'Victims of Castro File Suit in France', *National Law Journal*, 18 January 1999, A12.

²¹¹ See generally, M Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1.

²¹² Brody, op cit (fn 202) 28.

²¹³ R Lagos and H Muñoz, 'The Pinochet Dilemma' <<http://foreignpolicy.com/pinochet.htm>>.

²¹⁴ Fowler, op cit (fn 201) A26.

²¹⁵ Editorial, 'Prosecutorial Indiscretion', *New Jersey Law Journal*, 2 November 1998, 22. See also Bolton, op cit (fn 206) 21. See L Huyse, 'Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past' (1995) 20 *Law and Social Inquiry* 51 in relation to the arguments on whether to punish or pardon.

²¹⁶ Berryman, op cit (fn 13).

officials,²¹⁷ but its decision to grant immunity to Pinochet²¹⁸ would be rendered nugatory by his prosecution in Spain.²¹⁹ The United States State Department spokesman Jamie Rubin likened Chile's amnesty for Pinochet to South Africa's Truth and Reconciliation Commission,²²⁰ saying that Chile too has 'wrestled' to 'balance justice and reconciliation.'²²¹ On this view, it is inappropriate for Spain to step in and disturb this balance.

However, the analogy is weak. While South Africa's Commission was based on 'a broad consensus that included victims of apartheid', Pinochet's immunity was 'forced on the nation by the general's allies.'²²² Moreover, the degree of public support within Chile for Pinochet's prosecution suggests that any genuine reconciliation has been seriously lacking.²²³ Finally, this argument stems from the notion of state sovereignty, bringing into sharp relief the tension between state sovereignty and human rights referred to above.²²⁴ Once it is accepted that the types of crimes alleged against Pinochet are matters of international concern,²²⁵ the issue of how remote Spain is in a geographical sense from the location of the crimes becomes irrelevant. Rather than insisting on head of state immunity to maintain state sovereignty and autonomy, the issue becomes how to respect the rationales behind state sovereignty while maintaining respect for human rights.

The International Criminal Court

It is likely that prosecutions against heads and former heads of state will remain haphazard and disorderly at least until the International Criminal Court ('ICC') comes into operation. The conflict between state sovereignty and human rights may remain unresolved until that time.²²⁶ However, the ICC provides a potential solution for preventing inappropriate selectivity of prosecutions of former heads of state and inappropriate foreign intervention into domestic affairs. The establishment of the ICC was agreed to in Rome in

²¹⁷ Two generals have been convicted in relation to the 1976 murder Orlando Letelier: Human Rights Watch, *Human Rights Watch World Report 1996 (1995)* 75.

²¹⁸ Decree Law No. 2191 (Apr. 18, 1978), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978).

²¹⁹ C Alexander, 'Let Chile decide Pinochet's fate', *Daily Telegraph*, 16 January 1999 <http://www.reconcile-chile.co.uk/more_information_2.html>; J Hickman, 'Send Pinochet Back to Chile — Where He Belongs', *Daily Telegraph*, 18 January 1999 <http://www.reconcile-chile.co.uk/more_information_4.html>.

²²⁰ See generally, <www.truth.org.za>.

²²¹ Brody, op cit (fn 202) 28.

²²² Ibid; J Dugard, 'Reconciliation and Justice: The South African Experience' (1998) 8 *Transnational Law and Contemporary Problems* 277, 288.

²²³ Fowler, op cit (fn 201) A26; N Roht-Arriaza, 'Truth Commissions and Amnesties in Latin America: The Second Generation' (1998) 92 *American Society of International Law Proceedings* 313, 313.

²²⁴ See 'The Tension Between Human Rights and State Sovereignty' above.

²²⁵ Fowler, op cit (fn 201) A26.

²²⁶ Ibid.

1998,²²⁷ and the court will have jurisdiction over persons charged with genocide,²²⁸ crimes against humanity²²⁹ and war crimes.²³⁰ Like any internationally negotiated instrument, the operation of the ICC is unlikely to be perfect.²³¹ However, it does go a significant way towards addressing the key issues raised in *Pinochet*.

The ICC statute limits the immunity that can be claimed by human rights violators, but it also ensures that its processes are fair and voluntarily accepted by all countries.²³² The ICC's investigations, to be conducted by an independent prosecutor,²³³ will not be limited to cases brought by particular states. Rather, cases may be referred to the ICC by members of the UN Security Council,²³⁴ non-governmental organisations,²³⁵ and victims of alleged crimes.²³⁶ State sovereignty is upheld by a number of mechanisms. For example, the ICC is based on the principle of complementarity — it only assumes jurisdiction when a national legal system is unable or unwilling to do so.²³⁷ States are to be informed of relevant ICC investigations and given the opportunity to investigate the crimes themselves, and the ICC cannot undertake an investigation if the alleged crimes were committed in a state that has not ratified the ICC treaty.²³⁸

That is not to say that state sovereignty will be absolute or the primary consideration for the ICC. On the contrary, state sovereignty will be limited and subject to the need to uphold fundamental human rights. Accordingly, the preamble states that nations are '[d]etermined to put an end to impunity for the perpetrators of [serious international] crimes' and article 27 specifically states that head of state immunity will not limit the ICC's jurisdiction.²³⁹ Importantly, this may allow the ICC to go beyond *Pinochet* in denying the applicability of not only immunity *ratione materiae* (for former heads of state)

²²⁷ The Statute was adopted by the Plenary of United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. Yes: 120; No: 7; Abstention: 21. Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9. ('Rome Statute') <<http://www.un.org/law/icc/statute/rome.htm>>. See P Kirsch and J Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 2.

²²⁸ Rome Statute, article 6.

²²⁹ *Ibid*, article 7. This includes murder, torture and disappearance when part of 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

²³⁰ *Ibid*, article 8.

²³¹ Kirsch and Holmes, *op cit* (fn 227) 11.

²³² Lagos and Muñoz, *op cit* (fn 213).

²³³ Rome Statute, article 42.

²³⁴ *Ibid*, article 13.

²³⁵ *Ibid*, article 15.

²³⁶ Lagos and Muñoz, *op cit* (fn 213).

²³⁷ Rome Statute, article 17.

²³⁸ *Ibid*, article 12; Lagos and Muñoz, *op cit* (fn 213).

²³⁹ Rome Statute, article 27. '(1). This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

but also immunity *ratione personae* (for current heads of state) in the case of universally condemned crimes. These limitations on immunity may cause some concern to particular states and to believers in absolute autonomy free from broader international considerations.

But as the Pinochet debacle amply demonstrates, sometimes a nation must relinquish a degree of sovereignty to gain better control over its own affairs . . . if nations are to deal with the tyrants in their midst, they should retain the option to do so within the confines of their own laws, with a functioning international-law regime as a backup instrument against impunity.²⁴⁰

A hope for the ICC is that it will contribute to 'consistency and the development of international standards. It will thereby help make the world better for being turned upside down.'²⁴¹ It also means that no one nation has to play the 'world's avenger.'²⁴²

CONCLUSION

Pinochet represents a victory for international human rights law. Faced with the traditional doctrine of head of state immunity, *jus cogens* crimes have triumphed. The House of Lords has recognised that certain crimes cannot be excused, and thus marked the beginning of the end of the age of impunity. The implications of the decision extend far beyond Pinochet's trial. They include the possibility of other perpetrators of serious international crimes being brought to justice. However, the decision also heralds a new uncertainty. A broad head of state immunity has been replaced with the potential for a somewhat indeterminate and uncodified set of *jus cogens* crimes being applied selectively and interpreted differently by the national courts of powerful countries. While it is easy to overstate the potential disruptive effect the decision could have on international relations, it is certainly true that it underscores the need for the new ICC, with its defined crimes, independence and jurisdiction based on the consent of states. While states may have originally viewed the ICC as an unwelcome intrusion into state sovereignty, the *Pinochet* decision could well change that view. States may consider it better to concede some sovereignty to the ICC than to lose even more through the enforcement of international human rights by the national courts of other states. Governments have repeatedly said that crimes such as hostage taking and torture are unacceptable and that those responsible should be called to justice. The House of Lords has given substance to that rhetoric, but national courts are a poor second choice in the prosecution of international crimes. Now it is up to governments to support the ICC and move these matters to a truly international forum.

²⁴⁰ Lagos and Muñoz, *op cit* (fn 213).

²⁴¹ Fowler, *op cit* (fn 201) A26.

²⁴² Brody, *op cit* (fn 202) 28. This was the complaint of Spanish Foreign Minister Abel Matutes after Chile withdrew its ambassador to Madrid in November 1998.