Note on Pinochet

From European Journal of International Law (1999)

Immunity versus Human Rights: The Pinochet Case

Legal Proceedings in the UK: the Interaction of Municipal and International Law

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The High Court Decision

As is well known, General Pinochet entered the United Kingdom in September 1997. Just before his return to Chile, after undertaking surgery in London, he was arrested on the basis of two provisional arrest warrants issued by UK magistrates, at the request of Spanish courts,[5] pursuant to the European Convention on Extradition.[6] General Pinochet's counsel immediately moved to have the two arrest warrants quashed by the High Court. On 28 October the Divisional Court of the Queen's Bench Division ruled[7] that the first arrest warrant was bad as the crimes for which extradition had been requested by Spain were not extradition crimes under the UK Extradition Act.[8] As regards the second arrest warrant, the Lord Chief Justice held that General Pinochet was immune from jurisdiction as the acts that he had allegedly committed were official acts performed in the exercise of his functions of head of state. The legal basis of the decision was Sec. 20 of the UK State Immunity Act, which grants to heads of states the same privileges and immunities as those conferred on the heads of diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations, incorporated by reference into the Act and applicable `with necessary modifications' to heads of states.[9] Particularly relevant to the instant case was Article 39(2) of the Vienna Convention which, with the necessary adjustments to the position of heads of states, provides that heads of states shall continue to be immune from the criminal jurisdiction of foreign states, once they are no longer in post, for acts performed in the exercise of their functions as heads of state. Lord Bingham rejected the argument that a distinction could be made, within the category of the official acts of a head of state, between crimes of a different gravity and, consequently, upheld the claim of immunity. In his opinion the

Lord Chief Justice indirectly relied on the decision of the English Court of Appeal (Civil Division) in *Al Adsani v. Government of Kuwait*[10] to state that if a state is entitled to immunity for acts of torture, it should not be surprising that the same immunity is enjoyed by a head of state. Justice Collins, concurring in the Lord Chief Justice's opinion, added that `history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups' and that he could see `no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists'.[11] The quashing of the second warrant, however, was stayed, as the Court granted leave to appeal to the House of Lords, certifying as a point of law of general public importance `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'.[12]

The First Ruling by the House of Lords

The House of Lords on 25th November 1998 reversed the lower court's ruling and held, by a three to two decision, that a former head of state is not entitled to immunity for such acts as torture, hostage taking and crimes against humanity, committed while he was in his post.[13] Lord Nicholls, in whose opinion Lord Hoffman concurred, held that international law, in the light of which domestic law has to be interpreted,[14] `has made it plain that certain types of conduct ... are not acceptable on the part of anyone' and that `the contrary conclusion would make a mockery of international law'.[15] In the view of Lord Nicholls, General Pinochet was not immune under Sec. 20 of the SIA, as the Act confers immunity only in respect of acts performed in the exercise of functions `which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution'. Nor was he entitled to any customary international law doctrine of residual immunity, potentially covering all state officials, for acts of torture and hostage-taking, `outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability'. Finally, both the Torture and Hostage-Taking Convention permit the extraterritorial exercise of criminal jurisdiction by municipal courts. On a similar line of reasoning Lord Steyn maintained that genocide, torture, hostage taking and crimes against humanity, condemned by international law, clearly amount to conduct falling beyond the functions of a head of state.[16] By contrast, the two dissenting Law Lords held that it is not right to distinguish `between acts whose criminality and moral obliquity is more or less great' and that the test is `whether the conduct in question was engaged under colour of or in ostensible exercise of the Head of State's public authority'.[17] Consequently, `where a person is accused of organizing the commission of crimes as the head of the

government, in cooperation with other governments, and carrying out those crimes through the agency of the police and the secret service, the inevitable conclusion is that he was acting in a sovereign capacity'.[18] Lord Lloyd basically agreed with the construction offered by Lord Bingham that the only meaningful distinction for the purpose of head of state immunity is that between private acts and official acts performed in the execution or under colour of sovereign authority. A former head of state would be entitled to immunity for the latter acts under both common law and statutory law, as the acts in question were clearly of a governmental character. Lord Slynn of Hadley admitted the possibility that the immunity *ratione materiae* retained by a former head of state after ceasing service could be affected by the emerging notion of individual crimes of international law. He added, however, that this could be so only to the extent that an international convention clearly defines the crime and gives national courts jurisdiction over it, and that the convention, which must, expressly or impliedly, exclude the immunity of the head of state, is incorporated by legislation in the UK.[19]

On 10 December, the Home Secretary issued an authority to proceed in order to allow the continuation of extradition proceedings. In doing so he said to have had regard to such relevant considerations as the health of General Pinochet, the passage of time since the commission of the alleged acts and the political stability of Chile. While denying authority to proceed on the charge of genocide,[20] the Home Secretary stated that all the other charges alleged in the Spanish request of extradition amounted to extradition crimes and were not of a political character.[21]

The Rehearing of the Case and the New Judgment of the House of Lords

On 17 December 1998 the House of Lords decided to set aside its prior judgment, on the grounds that Lord Hoffman, who cast the deciding vote, by failing to disclose his ties to Amnesty International, which, incidentally, had been admitted as an intervener in the proceedings,[22] was disqualified from sitting.[23] A new hearing before a panel of seven Law Lords was scheduled and, eventually, on 24 March 1999, the House of Lords rendered its decision on the case.[24] By a majority of six to one, the House of Lords in a lengthy and rather convoluted judgment held that General Pinochet was not immune for torture and conspiracy to commit torture as regards acts committed after 8 December 1988, when the UK ratification of the Torture Convention, following the coming into force of section 134 of the Criminal Justice Act 1988 implementing the Convention, took effect. The second judgment of the House of Lords profoundly differs from the previous one for the treatment given to two issues: the qualification of extradition crimes and the role that some of the Law Lords attributed to the Torture Convention for the purpose of denying

immunity to General Pinochet.[25] On the one hand, the intertemporal law question of which critical date is relevant for the double criminality principle was solved by interpreting the relevant provisions of the Extradition Act to the effect of requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct. While Lord Bingham for the Divisional Court and Lord Lloyd in the first ruling of the House of Lords,[26] had held that the critical date was the date of the request of extradition, the large majority of the Law Lords sitting in the second Appellate Committee agreed that the critical date was the date of the actual conduct.[27] Besides being contrary to the wording of the Extradition Act and to settled practice,[28] this interpretation had the effect of remarkably narrowing down the number of offences for which General Pinochet can be extradited.[29] Since torture only became an extraterritorial offence after the entry into force of section 134 of the Criminal Justice Act 1988, alleged acts of torture and conspiracies to commit torture outside the UK before that time did not constitute an offence under UK law.[30] Therefore, they could not be qualified as extradition crimes under the principles of double criminality. Only Lord Millett maintained that UK courts would have jurisdiction at common law over acts of torture from a much earlier date, when international law recognized that such acts could be prosecuted by any state on the basis of universal jurisdiction.[31]

On the issue of immunity, only Lord Goff of Chieveley, entirely endorsing Lord Slynn's opinion in the first ruling, held that General Pinochet enjoyed immunity. In particular, Lord Goff maintained that nothing in the Torture Convention could be construed as an express waiver of state immunity. Nor could such a waiver be reasonably implied.[32] The other Law Lords, albeit on different grounds, found non-immunity in the circumstances of the case. In particular, Lord Browne-Wilkinson, the presiding Law Lord, after stating that the prohibition of torture became `a fully constituted international crime' only by the adoption of the Torture Convention, which set up a `worldwide universal jurisdiction',[33] held that the `notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention' and that torture, as defined in the Convention, `cannot be a state function'.[34] Therefore, starting from the moment in which the UK became party to the Convention, Spain and Chile having already ratified it, all the parties involved had agreed to exercise extraterritorial jurisdiction over acts of torture committed by or with the acquiescence of state officials.[35] On a similar line of reasoning, Lord Hope of Craighead held that Chile had lost its right to object to the extraterritorial jurisdiction of the UK upon its ratification of the Convention which would prevent the parties from invoking immunity *ratione materiae* `in the event of allegations of systematic or widespread torture'.[36] Both Lord Brown-Wilkinson and Hope

followed Lord Slynn's analysis,[37] their views departing from his only as regards the impact of the Torture Convention on the rule of immunity *ratione materiae*. Lord Saville concurred in holding that the provisions of the Torture Convention are inconsistent with immunity, which, consequently, is inapplicable to the conduct in question, at least in the reciprocal relations among the parties.[38] Lord Hutton found that acts of torture, already outlawed by international law at the time of adoption of the Torture Convention, are not amenable within the functions of a head of state and that `there is no waiver issue as the immunity to which Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to acts of torture'.[39] Lord Millett's opinion is at variance with that of his colleagues. According to Lord Millett, universal jurisdiction existed well before the Torture Convention over crimes committed in violation of *jus cogens* and which gravity and scale could be regarded `as an attack on the international legal order'.[40] Relying on *Eichmann* and *Demjianjuk*,[41] he said that any state is permitted under international law to assert its jurisdiction over such crimes and that the commission of such crimes in the course of one's official duties as a responsible officer of the state and in the exercise of his authority as an organ of that state is no bar to the exercise of jurisdiction by a national court. The Torture Convention simply expanded the cover of international crimes to single instances of torture, imposing on states the obligation to exercise their jurisdiction over the crime. According to Lord Millett, recognition of immunity would be `entirely inconsistent with the aims and object of the Convention'.[42] Finally, Lord Phillips of Worth Matravers held that crimes of such gravity as to shock the consciousness of mankind cannot be tolerated by the international community and that state immunity *ratione materiae* cannot coexist with international crimes and the right of states to exercise extraterritorial jurisdiction over them. While doubting that customary international law recognizes universal jurisdiction over crimes of international law, Lord Phillips held that on occasion states agree by way of treaty to exercise extraterritorial jurisdiction, which, once established, should not exclude acts done in an official capacity.[43]

While all the Lords agreed on the need for the Home Secretary to reconsider his decision on allowing extradition proceedings to go ahead, in the light of the new ruling, no one stressed that the UK has the obligation under the Torture Convention either to extradite General Pinochet to Spain or to any other country that has submitted an extradition request or to refer the case to its judicial authorities for prosecution in the UK.[44] On 15 April the Home Secretary issued an authority to proceed, thus allowing extradition proceedings to continue with regard to the remaining charges.[45]

A Tentative Appraisal

Given the impact that the *Pinochet* case may have on the future development of the law of jurisdiction and jurisdictional immunities a tentative appraisal of the way in which the House of Lords interpreted the relevant rules of international law pertaining to the case may be useful. While the decision of the House of Lords turns mainly on the application of UK law, the extensive reliance of the Law Lords on international law arguments for construing municipal law makes such an endeavour a legitimate exercise. Indeed, recourse to international law for interpreting domestic law is the first noticeable feature of the case.[46] The somewhat convoluted reasoning of some of the individual opinions, the frequent lack of clarity in framing the relevant issues as well as occasional incongruities in construing and presenting arguments should not overshadow the willingness of the Law Lords to decide the case consistently with international law standards. Secondly, the principle that individuals may be held accountable for acts which are regarded as criminal at international law was clearly asserted. Whether individual responsibility may be enforced before foreign municipal courts was thought to be an issue to be determined *in casu*, depending on the nature of the crime as well as on relevant international and municipal law provisions concerning enforcement, but the very outcome of the case proves that this may occur. Yet another important finding to be derived from the House of Lords decisions is that contrary to what the High Court had held, a distinction can be aptly drawn at international law between the wrongful acts of state organs and acts which for their gravity can be regarded as crimes of international law. Different consequences would be attached to the latter under international law, particularly as regards the permissibility of the exercise of extraterritorial jurisdiction over them and the inapplicability of immunity *ratione materiae* before international tribunals and, under certain circumstances, before foreign municipal courts. Overall, the frequent reference to such notions as *jus cogens*, obligations *erga omnes* and crimes of international law attests to the fact that the emerging notion of an international public order based on the primacy of certain values and common interests is making its way into the legal culture and common practice of municipal courts.

As regards the issue of immunity more specifically, a large majority of the Law Lords agreed that, while current heads of state are immune *ratione personae* from the jurisdiction of foreign courts, both civil and criminal, a plea of immunity *ratione materiae* in criminal proceedings may be of no avail to former heads of state depending on the nature of the crime. While the majority in the first Appellate Committee held that this is so because acts which amount to international crimes can never be qualified as official acts performed by the head of state in the exercise of his functions, most of the Law Lords sitting in the second Committee, confined their analysis to acts of torture. In the view of many of them, immunity would simply be incompatible with the provisions of the Torture Convention, which clearly indicates the official or governmental character of torture as a constituent

element of the crime. Only Lord Phillips went a step further in saying that no rule of international law requires that immunity be granted to individuals who have committed crimes of international law and that the very notion of immunity *ratione materiae* cannot coexist with the idea that some crimes, in light of their gravity, offend against the very foundation of the international legal system. If one were to follow strictly the reasoning of the majority probably the plea of immunity *ratione materiae* could only be defeated by those crimes of international law which presuppose or require state action. Arguably, this would include crimes against humanity in a wider sense.

On universal jurisdiction under international law, regardless of any treaty-based regime, Lord Brown-Wilkinson maintained that torture on a large scale is a crime against humanity and attains the status of *jus cogens*, which, in turn, would justify the taking of jurisdiction by states over acts of torture wherever committed. Lord Millett went as far as to say that universal jurisdiction exists under customary international law with regard to crimes which have attained the status of *jus cogens* and are so serious and on such a scale as to be regarded as an attack on the international legal order. Lord Millett added that the increasing number of international tribunals notwithstanding, prosecution of international crimes by national courts `will necessarily remain the norm'. This latter remark paves the way for broaching one of the most important and controversial issues underlying the proceedings against General Pinochet.

Are Municipal Courts a Proper Forum for Prosecuting Individual Crimes of International Law?

A preliminary issue to be addressed concerns the long-debated issue of whether municipal courts can be a proper forum for prosecuting crimes of international law. This problem can be framed in the more general debate on the suitability of municipal courts to enforce international law. As is known, some authors have argued that municipal courts can aptly subrogate for the scant number of enforcement mechanisms at international law.[47] Others have rightly stressed that the extent to which municipal courts can apply international law depends, especially in dualist countries, on how international law is incorporated into the state's domestic legal system.[48] Legal culture and individual judges' backgrounds in international law are other factors which are relevant to explaining the more or less active role that municipal courts can play in enforcing international law in different

jurisdictions.[49]

Be that as it may, the case for having municipal courts adjudicate cases involving individual crimes of international law seems compelling. Theoretical and practical considerations mandate this solution. The very notion of crimes of international law postulates that they constitute an attack against the international community as a whole[50] and, therefore, any state is entitled to punish them. On a more practical level, the absence of a permanent international criminal court makes international prosecution merely illusory. Nor can the establishment of international criminal tribunals by way of Security Council resolutions be an effective strategy of enforcement.[51] Consensus within the Security Council may be difficult to reach and the creation of *ad hoc* judicial bodies to deal with particular situations in specific countries entails an element of selectivity in the enforcement of international criminal law which may seriously jeopardize its consolidation and further development. Even with the prospective entry into force of the International Criminal Court, the Statute of which was opened for signature last year,[52] it would be unrealistic to expect that international criminal law can effectively be enforced only by international tribunals. International tribunals may play a strong symbolic role and are more likely to be perceived as an impartial forum, but prosecution by municipal courts will remain crucial.[53] It is of note that Article 17 of the ICC Statute somewhat defers to the jurisdiction of municipal courts, stipulating the inadmissibility of a case when the latter is being investigated or prosecuted by a state with jurisdiction over it or when the accused has already been tried for the conduct which is the subject of the complaint.[54]

Although the record of national prosecution of crimes of international law after the end of World War II is far from being satisfactory, domestic courts have lately manifested an increased activism, especially as regards the prosecution of war crimes and violations of humanitarian law during armed conflict.[55] This development has been favoured by the enactment in several jurisdictions of statutes which expressly allow the exercise of jurisdiction over this type of offence.[56] With specific regard to crimes against humanity, their prosecution by domestic courts has been episodic. Despite occasional and mostly unsuccessful attempts by some countries to investigate, prosecute and punish individuals for crimes committed under past regimes in the same country,[57] most prosecutions have been carried out by foreign courts. Besides the well-known *Eichmann* case,[58] in which the Supreme Court of Israel convicted on charges of war crimes, genocide and crimes against humanity the Head of the Jewish Office of the Gestapo, who was among the principal administrators of the policy of extermination of the Jews in Europe, French courts convicted to life imprisonment for crimes against humanity Klaus *Barbie*,[59]

head of the Gestapo in Lyons and Paul *Touvier*,[60] a French national heading the French Militia in Lyons during the Vichy regime. In another interesting case, *Regina v. Finta*,[61] the Canadian High Court of Justice convicted a Hungarian national for deporting Jews during the war. The latter case is particularly interesting for it establishes that any state may exercise its jurisdiction over an individual found in its territory, irrespective of the place where the alleged offences took place, when such offences can be categorized as crimes against humanity.[62] While not unprecedented, the assertion of universal jurisdiction over crimes against humanity by domestic courts is relatively rare,[63] given the wide doctrinal consensus on its applicability under general international law.[64]

The practice of enforcement, briefly summarized above, highlights the importance of the *Pinochet* case, as one of the few cases not concerning the prosecution of crimes committed during World War II either by Nazis or by Nazi collaborators, as if the international community had deliberately chosen only to reckon with the atrocities committed at that time. In fact, the prosecution of crimes committed during the war has simply paved the way for consolidating the notion of individual accountability for crimes of international law. Current investigations concerning crimes against humanity and other human rights violations in Chile and Argentina by European courts further attest to the increasing activism of municipal courts in enforcing international criminal law.[65]

Mention should be made also of civil remedies as a complementary means of enforcement of international criminal law. In some jurisdictions civil redress may be sought by plaintiffs under particular statutes. In the United States, for instance, the Alien Tort Claims Act (ATC)[66] and the Torture Victim Protection Act (TVPA)[67] provide such a remedy. Under the ATCA district courts have jurisdiction over civil actions brought by aliens for a tort only, committed in violation of the law of nations. On this basis, starting from the landmark case of *Filartiga v. Peña Irala*,[68] federal courts have been able to assert their jurisdiction over tortious conduct abroad in violation of international law, particularly human rights abuses. The TVPA, in turn, provides a cause of action in civil suits in the United States against individuals who, under actual or apparent authority, or colour of law of any foreign nation, subject an individual to torture or extrajudicial killing. The record of enforcement of the two statutes bears witness to the willingness of municipal courts to implement the legislator's intent that human rights abuses be effectively punished.[69]

While it is arguable that customary international law requires states to punish the perpetrators of crimes of international law,[70] many treaties lay down the obligation either to prosecute or extradite individuals who have committed certain offences of

universal concern.[71] It is unfortunate that too often states fail in applying directly the relevant treaty provisions or in enacting implementing legislation whenever this is necessary to enforce them. This is particularly true for international criminal law which often requires the enactment of *ad hoc* criminal rules. It would be desirable indeed that states, regardless of any particular treaty obligation, exercised their jurisdiction over acts which by the *communis opinio* are regarded as crimes of international law. Since the end of World War II states have made it clear that certain acts are attacks against the fundamental interests and values of the international community as a whole. If their statements are to be taken as more than an exercise in political rhetoric, then they must bring their legislation in conformity with international law and give domestic courts the tools to enforce its rules.[72] The rule of statutory construction, widely applied in both common law and civil law jurisdictions, whereby domestic law should be interpreted as much as possible in conformity with international law has a potential of application which should not be underestimated.[73] As the *Pinochet* case shows, the interpretation of domestic statutes in light of contemporary standards of international law may, at least in principle, remedy domestic legislation ambiguities and correctly implement the principles and rules of international law which have a bearing on the case at hand.

5 The first provisional warrant had been issued, on the basis of the 1989 Extradition Act, by Mr Nicholas Evans, a Metropolitan Stipendiary Magistrate on 16 October 1998. The allegations concerned the murder of Spanish citizens in Chile, which offences were within the jurisdiction of Spain. The second provisional arrest warrant was issued by another Stipendiary Magistrate, Mr Ronald Bartle. This time more offences were alleged, including conspiracy to commit acts of torture, hostage taking and conspiracy to murder.

6 European Convention on Extradition, 1957, incorporated in the UK by the European Convention on Extradition Order 1990 (SI 1507 of 1990) as amended.

7 The High Court of Justice, Queen's Bench Division, Divisional Court, *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum. Re: Augusto Pinochet Duarte*, 28 October, 1998, reproduced in 38 ILM (1999) 68.

8 According to the principle of double criminality, an extradition crime is an act which is criminal in both the requesting and the requested state. Since the murder of a British citizen by a non-British citizen outside the United Kingdom would not constitute an offence in respect of which the UK could claim extraterritorial jurisdiction, the murder of Spanish citizens by non-Spanish citizens in Chile cannot be qualified as an extradition

crime.

9 Part I of the SIA was deemed inapplicable to criminal proceedings under Art. 16(4), which expressly excludes criminal proceedings from the scope of application of Part I. Also the House of Lords agreed on this construction.

10 Decision of 12 March 1996, reported in 107 ILR 536.

11 See para. 80 of the High Court's judgment.

12 *Ibid*, at para. 88.

13 House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment of 25 November 1998, 37 ILM (1998) 1302 [hereinafter *Ex Parte Pinochet (HL 1)*]. For a comment see Fox, `The First Pinochet Case: Immunity of a Former Head of State', 48 *ICLQ* (1999) 207.The House of Lords took into account also the formal request of extradition transmitted by the Spanish Government on 6 November to the UK Government. In the official request further charges were added, including genocide, mass murders, enforced disappearances, acts of torture and terrorism.
The Spanish *Audiencia Nacional* had upheld Spanish jurisdiction over the above offences on the basis of the *Ley Organica del Poder Judicial* of 1985, Art. 23 of which allows Spanish courts to exercise jurisdiction over crimes committed by Spanish or foreign citizens outside Spain when such crimes can qualify, under Spanish law, as genocide, terrorism or any other crime which, according to international treaties or conventions, must be prosecuted in Spain. The ruling of the *Audiencia Nacional* sitting in plenary was rendered on 30 October 1998 and the reasoning of the court was released on November 5 (the judgment can be retrieved from the Internet at the following site: <http://www.elpais.es/p/d/especial/auto/chile.htm> (10 Nov. 1998)). The same conclusion was reached by the *Audiencia Nacional* as regards prosecution in Spain of crimes committed in Argentina at the time of the military *junta* (the judgment can be retrieved from the Internet at the following site: <http://www.elpais.es/p/d/especial/auto/argenti.htm> (10 Nov. 1998). The two decisions as well as Judge Garzon's extradition order were promptly published in Spain: *El caso de España contra las dictaduras Chilena y Argentina* (1998).

14 See *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] Q.B. 529. It is of note that also Lord Slynn of Hadley referred to *Trendtex* to state that the principle of immunity should be evaluated in the light of the developments of international law relating to international crimes (*Ex Parte Pinochet*, *supra* note 12, at 1311).

15 *Ibid*, at 1333. Lord Nicholls limited his analysis to torture and hostage-taking.The relevant international conventions have been incorporated into the UK legal system respectively by the Criminal Justice Act 1988 and the Taking of Hostages Act 1982.

16 *Ibid*, at 1338.

17 *Ibid*, at 1309 (Lord Slynn). The latter quote is from Watts, `The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *RdC* (1994), at 56.

18 *Ibid*, at 1323 (Lord Lloyd). Part of the allegations against General Pinochet concerned his coordinating, in cooperation with other governments, the so-called `Operation Condor', aimed at the systematic repression of political opponents.

19 *Ibid*, at 1313-1314 (Lord Slynn). Lord Slynn found nothing in international conventions and UK implementing legislation which could take away immunity. Art. 4 of the Genocide Convention which clearly does so as regards `constitutionally responsible leaders' was not incorporated into UK law, whereas neither the Torture Convention nor the Hostage-Taking Convention contain any express exclusion of immunity for heads of states.

20 Interestingly enough, the Spanish National Audience in upholding the jurisdiction of Spanish courts over the alleged acts of genocide had interpreted broadly the definition of the expression `genocide' in the Genocide Convention. After stating, generally, that `*[s]in distingos, es un crimen contra la humanidad la ejecución de acciones destinada a exterminar a un grupo humano, sean cuales sean las caracteristícas diferenciadoras del grupo*', the Court interpreted the Convention systematically within the broader context of the logic of the international legal system and held that the genocide `*no puede excluir, sin razón en la lógica del sistema, a determinados grupos diferenciados nacionales, discriminándoles respecto de otros*'. Therefore, also acts committed against `*aquellos ciudadanos que no respondían al tipo prefijado por los promotores de la represión como proprio del orden nuevo a instaurar en el pays*' could be qualified as genocide (see *El caso de España*, *supra* note 12, at 313-316).

21 The Home Secretary acted pursuant to section 7(4) of the Extradition Act 1989.

22 Lord Hoffman chaired the charitable arm of Amnesty International in the UK (Amnesty (Charity) International Ltd.): see *The Times*, 8 December 1998.

23 *The Times*, 18 December 1998. The formal setting aside of the judgment occurred on 15 January 1999 (2 W.L.R. 272).

24 *Ex Parte Pinochet (HL 2), supra* note 1.

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 23 ILM (1984) 1027, as modified 24 ILM (1985) 535.

26 *Ex Parte Pinochet (High Court),* Lord Bingham, at para. 44; *Ex Parte Pinochet (HL 1),* Lord Lloyd, at 1318. As Lord Browne-Wilkinson stated, probably at the first hearing it was conceded that all the charges against General Pinochet were extradition crimes.

27 Lord Browne-Wilkinson reached this conclusion via a systematic interpretation of the Extradition Act 1989, also in the light of its predecessor, the Extradition Act 1870. No other Law Lords objected to this construction.

28 On the double criminality principle see G. Gilbert, *Aspects of Extradition Law* (1991) at 47 *et seq*. See also M. C. Bassiouni, *International Extradition. United States Law and Practice* (1996), stating that for the purpose of double criminality US and Swiss law do not require that the relevant conduct be criminal in both the requesting and the requested state at the time the alleged crime was committed (at 391-392). On UK extradition law see A. Jones, *Jones on Extradition* (1995).

29 A schedule of the charges against General Pinochet had been prepared by Alun Jones of the Crown Prosecution Service. The charges are analysed and discussed in detail in Lord Hope's opinion (*Ex Parte Pinochet (HL 2)* at ??). Only charges of torture and conspiracy to commit torture after 29 September 1988 (the date in which Section 134 of the Criminal Justice Act came into force) were thought to be extradition crimes (charge 2 and 4 of the above schedule) as well as a single act of torture alleged in charge 30. Also the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4 were deemed to be extradition crimes. The majority, however, held Pinochet immune for such acts. As to the charges related to hostage-taking (charge 3), Lord Hope found them not to be within the scope of the Taking of Hostages Act 1982, as the relevant statutory offence consists of taking and detaining a person to compel somebody else to do or to abstain from doing something, whereas the charges alleged that the person detained was to be forced to do something under threat to injure other parties (which is exactly the opposite of the statutory offence). It might be worth remembering that the charges of genocide were not the object of discussion as the Home Secretary had refused to issue an authority to proceed as regards those charges.

30 No one argued that section 134 could operate retrospectively so as to make torture committed outside the UK before the coming into force of the Criminal Justice Act 1988 a crime under UK law.

31 Lord Millett held that the jurisdiction of English courts, although mainly statutory, is supplemented by the common law. Therefore, `English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law', including `the systematic use of torture on a large scale and as an instrument of state policy' which had already attained the status of an international crime of universal jurisdiction. Eventually, Lord Millett yielded to the view of the majority and proceeded on the basis that Pinochet could not be extradited for acts of torture committed prior to the coming into force of section 134 of the Criminal Justice Act.(*Ex Parte Pinochet (HL 2)* at).

32 Besides finding no trace in the *travaux préparatoires* of discussions concerning the waiver of state immunity, Lord Goff's stance against immunity heavily relied on policy considerations. The fear of malicious allegations against heads of state, particularly of powerful countries in which they often perform an executive role, should cause one to be cautious in ruling out immunity. By way of example, Lord Goff cites the possibility that a Minister of the Crown or other lower public official may be sued on allegations of acts of torture in Northern Ireland in countries supportive of the IRA. Furthermore, the scope of the rule of state immunity would be limited to what he considers exceptional cases, such as when the offender is found in a third state or in a state where one of its nationals was a victim, the more frequent occurrence being that the offence is committed in the national state of the offender, in which case the latter would have no immunity.

33 Lord Browne-Wilkinson's reasoning is not deprived of ambiguities. After recognizing that torture on a large scale is a crime against humanity which has attained the status of *jus cogens* (relying on *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber of the ICTY, Judgment of 10 December 1998, para. 153) and which justifies states in taking jurisdiction on the basis of the universality principle, he said that he doubted that before the entry into force of the Torture Convention `the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organization of state torture could not rank for immunity purposes as performance of an official function'. This reasoning is inherently flawed. If one characterizes - as Lord Browne-Wilkinson does - the prohibition of torture on a large scale as a *jus cogens* norm, the inevitable conclusion is that no other treaty or customary law rule, including the rules on jurisdictional immunities, can derogate from it (see *Furundzija, supra* this note). Another aspect in Lord Browne-Wilkinson's opinion which remains rather unclear is what he means by saying that the crime of torture did not become `a fully constituted international crime' until the Torture Convention set up a system of `worldwide universal jurisdiction' (via the joint operation of Articles 5, 6 and 7). The tautology inherent in the argument is apparent: on the one hand a crime against humanity would entail universal jurisdiction, on the other only when universal jurisdiction can be established over it would an offence become an international crime. A much more coherent argument would have been that torture on a large scale as a crime against humanity entails universal jurisdiction, whereas single acts of torture have become a crime and are subject to universal jurisdiction only via the Torture Convention (see the reasoning of Lord Millett). No such distinction, however, appears in Lord Browne-Wilkinson's opinion.

34 Among the reasons for holding that acts of torture cannot be qualified as a function of a head of state, Lord Browne-Wilkinson mentioned the following: i) international law cannot regard as official conduct something which international law itself prohibits and criminalizes; ii) a constituent element of the international crime of torture is that it must be committed `by or with the acquiescence of a public official or other person acting in an official capacity'. It would be unacceptable if the head of state escaped liability on grounds of immunity while his inferiors who carried out his orders were to be held liable; iii) immunity *ratione materiae* applies to all state officials who have been involved in carrying out the functions of the state, to hold the head of state immune from suit would also make other state officials immune, so that under the Torture Convention torture could only be punished by the national state of the official.

35 See Art. 1 of the Torture Convention. The Convention entered into force on 26 June 1987. Spain ratified on 21 October 1987, Chile on 30 September 1988 and the UK on 8 December 1988.

36 Immunity *ratione materiae* would shield General Pinochet as regards the other charges. Lord Goff qualifies as an international crime divesting a former head of state of his immunity only systematic or widespread torture. Only such an offence would attain the status of *jus cogens*, compelling states to refrain from such conduct under any circumstances and imposing an obligation *erga omnes* to punish this conduct. Although state torture was already at the time of the early allegations against General Pinochet an international crime under customary international law it was not until the Torture Convention, which enabled states to assume jurisdiction over such offences, that `it was no longer open to any state which was a signatory to the convention to invoke the immunity *ratione materiae* in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity'. Lord Goff's analysis is not entirely convincing. If one assumes, as he does, that the prohibition of systematic torture, which most of the time requires state action, is a *jus cogens* rule, violations of which every state is under an obligation to punish, it is difficult to see how such an obligation could be discharged unless domestic courts are given the possibility of investigating, prosecuting and punishing the individuals who have committed such heinous acts. Furthermore, it is hard to see how the distinction between systematic torture and single instances of torture for the purpose of state immunity can be drawn on the basis of the Torture Convention.

37 See supra, note 18 and accompanying text.

38 Since the Convention prohibits so-called `official torture', to Lord Saville, `a former head of state who it is alleged resorted to torture for state purposes falls ... fairly and squarely within those terms'. States parties to the Convention have clearly and unambiguously accepted, in the view of Lord Saville, that official torture can be punished `in a way which would otherwise amount to an interference in their sovereignty'. For the

same reason, Lord Saville held that also a plea based on act of state would fail in the circumstances of the case.

39 According to Lord Hutton, although the alleged acts were carried out by General Pinochet `under colour of his position as head of state... they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.' Lord Huttton, while accepting the limitation inherent in the qualification of extradition crimes under UK law, which prevents consideration of allegations of torture prior to the coming into force of section 134 of the Criminal Justice Act, said in dictum that `acts of torture were clearly crimes against international law and that the prohibition of torture had acquired the status of *jus cogens* by that date'. He later added that not only torture committed or instigated on a large scale but also a single act of torture qualifies as a crime of international law.

40 *Ex Parte Pinochet (HL 2)*, at ??. Lord Millett correctly notes that the very official or governmental character of the offences characterizes crimes against humanity (at ??) and that `large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international legal order' by the time General Pinochet seized power in 1973.

41 *Attorney General of the Government of Israel v. Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961), *aff'd* 36 ILR 277 (Supreme Court of Israel, 1962); Demjanjiuk v. Petrovsky, 603 F. Supp. 1468, *aff'd* 776 F. 2d 571 (6th Cir. 1985).

42 The reasoning of Lord Millett is clear and straightforward. Since the offence can only be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, `[t]he official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.'

43 Lord Phillips of Matravers found that no rule of international law requiring states to grant immunity *ratione materiae* for crimes of international law can be traced in state practice. Lord Phillips was the only one to object to the construction of section 20 of the SIA being applicable to acts of the head of state wherever committed. He held that the provision had to be interpreted simply to the effect of equating the position of a visiting head of state with that of the head of a diplomatic mission in the UK. In fact, other Law Lords had considered the issue but eventually found in the light of parliamentary history that the original intent to limit section 20 to heads of state `in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom' had been superseded by an amendment of the Government. Lord Phillips maintained that the relevant statutory provision should be interpreted against the background of international law and consequently be limited to visiting heads of state.

44 The obligation is imposed by the joint operation of Art. 7 and Art. 5. By the end of 1998 several states, including Switzerland, France and Begium, had submitted requests of extradition to the UK .

45 See *The Times*, 16 April 1999.

46 See *Alcom Ltd. v. Republic of Colombia* [1984] A.C. 580, 597 per Lord Diplock. See also the reliance of some Law Lords on *Trendtex Trading Co. v. Central Bank of Nigeria* [1977] Q.B. 529 for the relevance of international customary law.

47 See, generally, B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993); R. A. Falk, *The Role of Domestic Courts in the International Legal Order* (1964).

48 See A. Cassese, `Modern Constitutions and International Law', 192 *RdC* (1985-III) 331.

49 R. Higgins, *Problems & Process. International Law and How We Use It* (1994), at 206 *et seq*.

50 See *Prosecutor v. Erdemovic*, Sentencing Judgment, Case No. IT-96-22-T, Trial Chamber I, 29 Nov. 1996 (108 ILR 180), defining crimes against humanity as `...inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must per force demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.' (at ??)

51 See SC Resolutions 808 and 827 (1993) and SC Resolution 955 respectively establishing, under Chapter VII of the UN Charter, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The statutes of the two tribunals are reproduced, respectively, in 32 ILM (1993) 1192 and 33 ILM (1994) 1602.

52 Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9 of 17 July 1998, reprinted in 37 ILM (1998) 999. For a comment see Arsanjani, `The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 22 .

53 See Meron, `International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 555.

54 The Court may determine that a state is unable or unwilling genuinely to carry out an investigation or prosecution. Paras 2 and 3 of Art. 17 list the circumstances which the Court will take into account in determining the unwillingness or inability of national courts to prosecute. These factors include unjustified delays, instances in which the proceedings are not conducted independently or impartially, or when, due to the substantial collapse or unavailability of the interested state's judicial system, the state is unable to carry out the proceedings.

55 In 1997 the Supreme Court of Bavaria condemned one Mr. Dzajic, a former Yugoslav national, for abetting murder in 14 cases and for attempting murder in another case during the conflict in former Yugoslavia (*Public Prosecutor v. Dzajic*, No. 20/96, Supreme Court of Bavaria,3rd Strafsenat, May 23, 1997, excerpted in 1998 *Neue Juristische Wochenschrift* 392, comment by Safferling in 92 *AJIL* (1998) 528). See also the recent case in which a Swiss military tribunal tried, on the basis of the universality principle of jurisdiction, and eventually acquitted a former Yugoslav national, born in Bosnia-Herzegovina, for having beaten and injured civilian prisoners at the prisoner-of-war camp of Omarska and Keraterm in Bosnia (*In re G.*, Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997, comment by Ziegler in 92 *AJIL* (1998) 78). A few years earlier in a decision of 25 November 1994, the Danish High Court had convicted one Mr Saric for having committed violent acts against prisoners of war in the Croat camp of Dretelj in Bosnia, in violation of the Geneva Conventions (see Maison, `Les premiers cas d'application des dispositions pénales des Conventions de Gèneve par les juridictions internes', 6 *EJIL* (1995) 260).

56 Some statutes provide for universal jurisdiction over war crimes (See Articles 109-114 of the Swiss Military Penal Code); some are limited to crimes committed during World War II (War Crimes Act, 1991, ch. 13, para. 1(1) (UK); War Crimes Amendment Act, 1989 Austl. Acts No. 3, para. 9(1)(Australia); Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, para.1(a), as quoted in *Attorney-General of the Government of Israel v. Eichmann, supra* note 40; some others are more general in character and cover also crimes against humanity (see Articles 211-1 and 212-1 (amending the French Penal Code), in the annex to `Lois n. 92-684 du 22 Juillet 1992 portant réforme des dispositions du Code pénal relatives à la répression des crimes et des délits contre le personnes', J.O., 23 Juillet, 1992, at. 9875 (France) and Sec. 6(1.91),(1.94),(1.96) of the Canadian Criminal Code permitting the prosecution of foreign persons for crimes committed abroad against foreigners, provided that at the time of the crime Canada could exercise its jurisdiction over that person, based on his presence in Canada, and later that person is found in Canada.

57 See Ratner and Abrams, supra note 2, at 146 *et seq*. See also the current debate on the prosecution by Cambodia of the leaders of the Khmer Rouges who surrendered at the

end of 1998 for crimes against humanity, to which Prime Minister Hun Sen seems to have eventually consented (see *Keesing's Record of World Events*, vol. 45/1 (1999), at 42733. Under Art. VI of the Genocide Convention, to which Cambodia is a party, there is an obligation on the part of the state in which territory the acts of genocide took place to try the responsible persons. It should be noted that the crime of genocide is widely believed to attract universal jurisdiction.

58 *Attorney-General of the Government of Israel v. Eichmann*, *supra* note 40

59 *Féderation National des Déportées et Internés Résistants et Patriots and Others v. Barbie*, 78 ILR 124 (French *Cour de Cassation* 1985); 100 ILR 330 (French *Cour de Cassation* 1988).

60 100 ILR 338 (French *Cour de Cassation* 1992). Touvier was convicted to life imprisonment for giving instructions for and thereby becoming an accomplice in the shooting of seven Jews at Rillieux on 29 June 1944, as a reprisal for the assassination of the Vichy Government Minister for Propaganda.

61 *Regina v. Finta*, Canada, High Court of Justice, 10 July 1989, 93 ILR 424.

62 *Ibid*, at 426-427.

63 See *Eichmann*, supra note 40; *In the Matter of Extradition of John Demjanjuk*, 776 F. 2d 571 (6th Cir. 1985) at 582-583, cert. denied, 457 U.S. 1016 (1986). See also the quote from the decision of the *Cour d'Appel*, reported by the *Cour de Cassation Chambre Criminelle*, in its judment of 6 October 1983 in *Féderation National des Déportées et Internés Résistants et Patriots and Others v. Barbie* (78 ILR 128): by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.'.

64 See, among others, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 113; Meron, *supra* note 52, at 554 and 569; Randall, `Universal Jurisdiction Under International Law', 66 *Texas L. Rev.* (1988) 785, at 814; *Restatement*, *infra* note 72 § 404.

65 See *supra*, note 12 .

66 28 U.S.C. (1994) § 1350.

67 28 U.S.C. (1994) § 1350 note.

68 630 F. 2d 876 (2nd Cir. 1980) and 577 F. Supp. 860 (EDNY, 1984).

69 *Cabiri v. Assasia Gyimah*, 921 F. Supp. 1189 (SDNY 1996)(arbitrary detention and acts of torture); *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir. 1995)(genocide, war crimes, torture, summary executions); *Xuncax v. Gramajo*, 886 F. Supp. 162 (DMA 1995)(torture, arbitrary detention, summary executions and enforced disappearance); *In re: Estate of Ferdinand Marcos Human Rights Litigation*, 25 F. 3d 1467 (9th Cir. 1994)(torture, summary executions, disappearances); *Trajano v. Marcos*, 978 F. 2d 493 (9th Cir. 1992) (torture); *Paul v. Avril*, 812 F. Supp. 207 (SD Florida, 1992)(torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention); *Forti v. Suarez Mason* 672 F. Supp. 1531 N.D. Cal. 1987)(torture, extrajudicial killings, disappearances and prolonged arbitrary detention).

70 See Condorelli, `Le Tribunal Penal International pour l'Ex-Yougoslavie et sa jurisprudence', in Bancaja Euromediterranean, *Courses of International Law*, vol. I, (1997) 241, at 270. See also Paust, `Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies', 33 *Tex, Int'l L. J.* (1998) 631, at 640-641.

71 See, *inter alia*, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (2 ILM (1963) 1042); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking)(10 ILM (1971) 133); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage)(10 ILM (1971) 1151); the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (16 ILM (1977) 41; the 1976 European Convention on the Suppression of Terrorism (15 ILM (1976) 1272); the 1998 International Convention on the Suppression of Terrorist Bombings, 37 ILM (1998) 249. As regards specifically terrorism, whose status as an international crime remains controversial, a thorough review of the complex network of international treaties and other instances of state practice has been made recently by Kolb, `Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law', 50 *Revue Hellenique de Droit International* (1997) 42-88. It is of note that terrorism does not appear in the list of crimes over which the International Criminal Court (see *supra*, note 51 and accompanying text) will have jurisdiction.

72 Attention to this problem has been drawn also in the press commenting on the proceedings against Pinochet: see *The Economist*, 28 Nov. - 4 Dec. 1998, at 26.

73 On the rule, generally, see Conforti, `Cours géneral de droit international public', 212 *RdC* (1988-V) 56-57. On the application of the rule in common law countries see F. A. Mann, *Foreign Affairs in English Courts* (1986), at 130; *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, § 114. In the United States this rule of statutory

construction dates back to last century: see *The Charming Betsy*, 6 U.S. (2 Cranch) (1804) 132, 143. On the use of international human rights law to interpret domestic law, see Possner, `Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis', 41 *Hastings L. J.* (1990) 824 and with specific regard to the United Kingdom, Higgins, `The Role of Domestic Courts in the Enforcement of International Human Rights: the United Kingdom', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights Before Domestic Courts* (1997) 37.