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SCSL – 2003 – 01 – T
(1873 – 2458)

SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson QC, President
Judge Emmanuel O. Ayoola
Judge George G. King
Judge Renate Winter

Registrar: Mr. Robin Vincent

Date: 29th day of October 2003

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

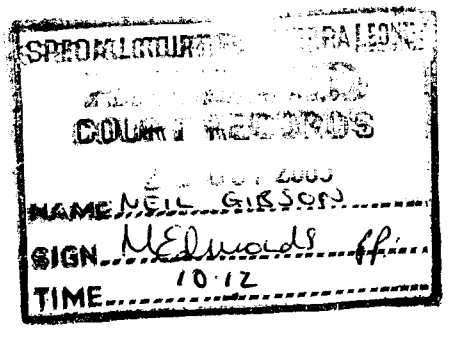
CASE NO. SCSL-2003-01-PT

AUTHORITIES CITED IN THE SUBMISSIONS OF THE *AMICUS CURIAE* PHILIPPE SANDS QC ON HEAD OF STATE IMMUNITY

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THE SPECIAL COURT FOR SIERRA LEONE
THE APPEAL CHAMBER

THE PROSECUTOR
v
CHARLES GHANKAY TAYLOR

CASE SCSL-2003-01-I

INDEX OF AUTHORITIES CITED IN THE SUBMISSIONS OF THE AMICUS CURIAE ON HEAD OF STATE IMMUNITY

1. Paolo Gaeta, 'Official Capacity and Immunities', in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002), pp 975-7, 989, 1000
2. Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, Volume II, http://www.un.org/law/ilc/texts/nurnfra.htm
3. Draft Code of Crimes Against the Peace and Security of Mankind, http://www.un.org/law/ilc/texts/dcodefra.htm
4. Commentary to the 1996 draft Articles, Article 7, http://www.un.org/law/ilc/texts/dcodefra.htm
5. 1994-III 247 *Recueil des Cours*, p. 82 *et seq.*
6. ICTY, *Prosecutor v Blaskic (Subpoena)*, 29 October 1997, 110 *ILR* 687, at 710.
7. Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the *Rome Statute*', 2001, Crim Law Forum 12, 429.
8. Arrest Warrant Of 11 April 2000, (DRC *v.* Belgium), 2002 ICJ Reports, http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm
9. *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61.
10. *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
11. *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.
12. Brigitte Stern, "Immunities for Head of State: Where Do We Stand?", in M. Lattimer and P.Sands (eds.), *Justice for Crimes Against Humanity* (Hart Publishing, forthcoming, November 2003)
13. Joe Verhoeven, 35 Rev. Belge de Droit International (2002) 531.
14. Campbell McLachlan, '*Pinochet* Revisited', 51 ICLQ 959 (2002)
15. Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case', 13 EJIL 853 (2002), http://ejil.org/journal/curdevs/sr31.html.
16. Jean Salmon, "Libres Propos sur l'Arret de la CIJ du 14 Fevrier 2002", 35 Revue Belge de Droit International 512 at 515
17. Dapo Akande, "The Application of International Law Immunities in Prosecutions for International Crimes", unpublished paper (1 July 2003), (accepted for publication by the Intl & Comp. Law Quarterly
18. *Institut de Droit International*, Resolution of 26 August 2001, 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' at www.idi-iil.org.
19. GA Resolution 57/228 A, 187 December 2002, and the Law, http://www.derechos.org/human-rights/seasia/doc/krlaw.html.
20. UNTAET, Resolution No. 2000/15, 6 June 2000.
21. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, paras 110, 113.
22. P. Sands & P. Klein, *Bowett's Law of International Institutions*, 5th edition 2001, p 16, para. 1-028.

23. ICJ Press Release 2003/26, 5 August 2003
24. *Prosecutor v Milosevic* ICTY-99-37 (Kosovo); ICTY 01-51 (Bosnia); ICTY 02-50 (Croatia): *Decision on Preliminary Motions*, Trial Chamber, 8 November 2001.
25. *Lotus S.S, The Case of*, Judgment No 9 (7 Sept. 1927), PCIJ, Series A, No 10.
26. http://www.interpol.int/Public/ICPO/FactSheets/FS200105.asp
27. 'Declaration of Principles of International Law concerning Friendly Relations and Co-operation between States' GA Resolution 2625 (XXV), 1970.
28. Andrew Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in Lattimer and Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing, forthcoming, November 2003)
29. Maurice Kamto, "Une troublante 'immunité totale'. 35 Rev. Belge de Droit International 518 (2002).

Chapter 24.3

Official Capacity and Immunities

Paola Gaeta

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I. Introduction

It is common knowledge that under *international law*, State officials are entitled to immunity from *foreign jurisdiction*. There are two categories of immunities. The first embraces the so-called immunities *ratione materiae*, also referred to as functional immunities. They cover activities performed by *every* State official in the exercise of his functions, regardless of where they are discharged. They do not come to an end when the relevant State organ relinquishes his official position.[1] In addition, these immunities are opposable to *any* foreign State, i.e. have an *erga*

[1] With regard to diplomatic agents, the customary international rule on functional immunity has been codified in Art. 39(2) of the 1961 Vienna Convention on Diplomatic Relations. With regard to consular officers, see Art. 43(1) of the 1963 Vienna Convention on Consular Relations.

omnes effect.[2] It is generally contended that the rationale behind this rule is that those activities are not performed by the State official in his private capacity but on behalf of the State; hence they are attributable to the State to which he belongs so that—as a matter of principle—the individual cannot be held accountable for them.[3]

The other category of immunities, which are only granted to some specific classes of individuals performing State functions abroad, is that of immunities *ratione personae*, also referred to as personal immunities. They pertain to the particular status of the holder (e.g. Head of a diplomatic mission) and are meant to enable him to carry out his official duties within the territory of a foreign State (*ne impediatur legatio*). These immunities cover *all* acts performed by the State official, whether or not performed *during* or *prior to* assumption of his official function, *within* or *outside* the territory of the relevant foreign State.[4] They embrace

[2] With regard to immunities *ratione materiae* of diplomatic agents, the German Constitutional Court has recently taken a different stand. In a Judgment delivered on 10 June 1997, it held that the former Ambassador of Syria to the German Democratic Republic did not enjoy immunity before the courts of the Federal Republic of Germany for the acts performed in his official capacity while he was in office. According to the German Constitutional Court, Art. 39(2) of the 1961 Vienna Convention on Diplomatic Relations (providing that immunity from jurisdiction shall continue to subsist when the functions of the diplomatic agent have come to an end with respect to the acts performed by such a person in the exercise of his functions) only applies to the receiving State, and is not binding on States other than the receiving State. (See German Federal Constitutional Court, Judgment of 10 June 1997, *S. v. Berlin Court of Appeal and District Court of Berlin-Tiergarten*, repr. in English in 115 ILR 596 ff., esp. 610–614. For a critical comment, see B. Fassbender, 'International Decisions', 92 *AJIL* (1998) 74–76.)

[3] See the ICTY Appeals Chamber decision of 18 July 1997, where the Appeals Chamber stated: 'State officials acting in their official capacity . . . are mere instruments of a State and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy the so-called "functional immunity" ' (Ap.Ch., Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, *Blaškić*, IT-95-14-AR108*bis*, at para. 38). The Appeals Chamber rightly pointed out that the rule on functional immunities of State officials and organs acting on behalf of their States is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries. In this regard, reference has been made to cases such as *Governor Collot* and *McLeod* (ibid., note 50). For recent cases pertaining to functional immunity, the Appeals Chamber has referred to cases such as *Eichmann* and *Rainbow Warrior* (ibid., note 52).

Among the scholars who have propounded the view that State officials are immune from foreign criminal jurisdiction for activities conducted in their official capacity because those activities are not attributable to them, see G. Morelli, *Nozioni di diritto internazionale* (1967) 214–217; H. F. Van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ* (1964) 1205 ff. Other scholars have suggested different constructions of the customary rule on functional immunities: on these different views, see P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996) 6–37.

[4] With regard to diplomats, the customary rules on personal immunities (also referred to as diplomatic immunities) are codified in the 1961 Vienna Convention on Diplomatic Relations (see, in particular, Art. 29, on the inviolability of the person of a diplomatic agent, and Art. 31, on his immunity from criminal, civil, and administrative jurisdiction of the receiving State). According to Art. 39(1), diplomatic agents enjoy such immunities from the moment they enter the territory of the receiving

inviolability from arrest and exemption from criminal, civil, and administrative jurisdiction in the legal system of the relevant foreign State.[5] Unlike functional immunities, immunities *ratione personae*, being tied up with and contingent upon the accomplishment of official functions abroad, may only be invoked vis-à-vis the State where the individual is discharging his official function, but may be withdrawn, upon request, by the State to which the individual organ belongs.[6] In addition, these immunities are forfeited when the person enjoying them terminates such functions abroad, with the exception of immunities relating to *official acts* (i.e. immunities *ratione materiae*) that continue even after the State official relinquishes his post.[7]

In addition, State officials may enjoy various immunities under their own *national law*. In particular, Heads of State and of Government, members of Cabinet and Parliament often enjoy immunity from the jurisdiction of their own national courts. Again, these can be immunities *ratione materiae*, i.e. relating to activities

State on proceeding to take up their post or, if already in its territory, from the moment when their appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed.

With regard to personal immunities of Heads of States, Prime Ministers, and Foreign Ministers, the scope and purport of the relevant customary rules are somewhat uncertain. It is widely accepted that incumbent Heads of State are inviolable and that they enjoy immunity from the criminal, civil, and administrative jurisdiction of other States, for all acts performed in their official capacity and having a sovereign character. It is, however, unclear whether they also enjoy inviolability and immunity from jurisdiction for their official but commercial acts, as well as for acts of a private nature. In addition, if the contention is made that a Head of State is entitled to inviolability and immunity from jurisdiction even with regard to acts of non-sovereign or private nature, it is uncertain whether he enjoys such inviolability and immunity when he is abroad on a private visit. (See A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Rec. des Cours* (1994) 9 ff., particularly at 51–54 and 71–75.) The same uncertainty exists with regard to Heads of Governments and Ministers of Foreign Affairs (ibid., 102–110).

Recently, the issue of whether incumbent Ministers of Foreign Affairs enjoy personal immunities in criminal matters was raised before the ICJ. In its Judgment of 14 February 2002, the Court contended that, because of the nature of his functions, a Minister of Foreign Affairs when abroad enjoys *full* immunity from criminal jurisdiction and inviolability, namely, regardless of the private or official nature of the acts, the time of their performance (i.e. prior to, or during the assumption of office) and the private or official nature of his visit abroad (Judgment of 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, available at the ICJ homepage, <http://www.icj-cij.org>, paras. 53–55). The Court's ruling that Ministers of Foreign Affairs enjoy such broad immunities, has been vigorously questioned by Judge *ad hoc* C. Van den Wyngaert in her dissenting opinion (see paras. 11–23).

[5] With regard to civil and administrative jurisdiction, Art. 31(1) of the 1961 Vienna Convention on Diplomatic Relations sets forth a few exceptions, since it provides that a diplomatic agent is not immune in the case of (a) a real action relating to private immovable property situated in the territory of the receiving State; (b) an action relating to succession; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State. In addition, Art. 38 of the Convention establishes that diplomatic agents who are nationals or permanently resident in the receiving State 'shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of [their] functions'.

[6] As for diplomatic agents, see Art. 32(1) of the 1961 Vienna Convention on Diplomatic Relations.

[7] See Art. 39(2) of the 1961 Vienna Convention on Diplomatic Relations.

carried out in the exercise of official functions, which continue after relinquishing office.[8] Or they may be immunities *ratione personae* which make the holder only exempt from the jurisdiction of national courts while holding his official position. In most countries, personal immunities may be waived under special procedures.[9]

Article 27 of the Rome Statute deals with all these different classes of immunity. Article 27(1) provides that the official capacity of an individual shall be of no avail for the purpose of establishing criminal responsibility, nor may it be considered *per se* a ground for mitigation of penalty. It establishes that the 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'.

This provision clearly refers to immunities *ratione materiae*, regardless of whether they are provided for in international or in national law. It excludes the availability both of the international law doctrine of functional immunity and of national legislation sheltering State officials with immunity for official acts in the case of crimes within the jurisdiction of the ICC.

Article 27(2) refers to the other category of immunities mentioned above, i.e. immunities *ratione personae*. It provides that 'immunities or other 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'.

This provision must be read in conjunction with Article 98(1), providing that 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the *State* or *diplomatic immunity* of a person or property of a *third State*, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.'[10]

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[8] See, for instance, Arts. 57(1) and 96(1) of the Austrian Constitution, providing an absolute immunity for members of Parliament with regard to votes and opinions given in Parliament. In the same vein, see Art. 26(1) of the French Constitution; Art. 68(1) of the Italian Constitution; Art. 57(1) of the Constitution of Liechtenstein; Art. 157(1) of the Portuguese Constitution; Art. 71(1) of the Spanish Constitution; Art. 162(1) of the Swiss Constitution. Immunities *ratione materiae* are also granted to other senior State officials, such as Heads of State, Heads of Government, and ministers. See, for instance, Art. 68 of the French Constitution; Art. 49(1) of the Greek Constitution; Art. 90 of the Italian Constitution; Art. 7(2) of the Constitution of Liechtenstein; Art. 56(3) of the Spanish Constitution.

[9] See, for instance, Art. 57(2) of the Austrian Constitution; Art. 26(1) of the French Constitution; Art. 68(2) of the Italian Constitution; Art. 56(1) of the Constitution of Liechtenstein; Art. 157(3) and 196(2) of the Portuguese Constitution.

[10] Emphasis added.

In the following paragraphs, I will discuss four questions: (i) whether and to what extent Article 27 departs from customary international law; (ii) in particular, to what extent Article 27(2), insofar as it enjoins disregarding personal immunities under *international law*, is consistent with customary and treaty rules granting these immunities; (iii) how it can be coordinated and reconciled with Article 98(1); and (iv) the impact of Article 27 and Article 98(1) on national legislation, often of constitutional rank, bestowing immunities on Heads of States, Heads of Government, and other State officials.

II. Customary International Law

A. Functional Immunities and International Crimes

1. Pre-Nuremberg Phase

Traditionally, international customary rules only authorized the removal of functional immunities in time of war for war crimes perpetrated by low-level members of the armed forces.[11] By contrast, it would seem that political leaders as well as military commanders enjoyed functional immunities. Indeed, no case can be found where any such leader or commander was brought to trial for war crimes.

In 1919, an attempt was made to lay down and implement the doctrine of criminal responsibility of senior State officials for both war crimes and the new category of 'crimes against the laws of humanity'. The Commission on Responsibilities relating to the war (created by the Preliminary Peace Conference of Paris) recommended that 'all persons belonging to enemy countries, *however high their position may have been*, without distinction of rank, *including chiefs of States*, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'.[12]

This proposal was strongly opposed by the American representatives, who took issue both with the notion that Chiefs of States should be liable to criminal prosecution and with the concept of crimes against humanity.[13]

[11] It has been argued that the power of a belligerent State to punish war criminals was initially limited to the time of the armed conflict and, in any case, could only be exercised within occupied territory. It was envisaged that armistice or peace treaties could contain a clause whereby the victorious belligerent imposed upon the defeated States the obligation to surrender alleged war criminals for trial (see UN War Crimes Commission, *History of the UN War Crimes Commission and the Development of the Laws of War* (1948), at 29–30).

[12] The Report of the Commission can be read in 14 *AJIL* (1920) 95 ff.

[13] According to the American representatives 'the Head of the State, whether he be called emperor, king, or chief executive . . . is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign

The upshot was the adoption in the 1919 Treaty of Versailles of Article 227 on the responsibility of the former German Emperor for 'a supreme offence against international morality and the sanctity of treaties'[14] and Articles 228–229 providing for the trial by the Allied and Associated Powers of 'all persons accused of having committed acts in violations of law and customs of war'.[15] Since no reference was made to the rank of the accused, the inference is warranted that Articles 228–229 also provided for the criminal responsibility of senior military commanders, thus ruling out the applicability to them of customary rules on functional immunities.

It is well known that the former German Emperor was never brought to trial on account of the refusal of The Netherlands to extradite him (on grounds of national law: Dutch legislation allowed extradition only on the basis of a treaty, and The Netherlands was not party to the Versailles Treaty; in addition, the offences provided for in Article 227 did not constitute crimes under Dutch law[16]). In addition, the high-ranking German military officers indicted under Articles 228–229 were never tried either by the Allies or by Germany.[17] These developments support the view that in the period under consideration no customary rule had yet evolved to the effect of removing the functional immunities for war crimes that senior State officials enjoyed under customary international law.

countries a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty' (see UN War Crimes Commission, *supra* note 11, at 39–40).

With regard to the position of the American representatives on the concept of crimes against humanity, see ibid., at 36.

[14] Art. 227 provided for the establishment of a special tribunal for the trial of Wilhelm II of Hohenzollern. This Tribunal was to be guided 'by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality'. It must be underlined that Wilhelm II was charged with offences against *moral* rather than *legal* provisions.

[15] It should be noted that these articles only deal with violations of law and customs of war; the American view prevailed and no reference was made to the 'laws of humanity'.

[16] See Ch. 41 below. See also E. Decaux, 'Le Statut du Chef d'État déchu', 26 *AFDI* (1980) 109–114.

[17] Under Art. 229, persons charged with war crimes against the nationals of one of the Allied and Associated Powers should have been brought before the military tribunals of the relevant Power, while persons accused of war crimes against nationals of more than one of these Powers should have been brought before military tribunals composed of members of the military tribunals of the Powers concerned. However, Germany refused to surrender the 896 persons requested by the Allies (among those persons there were many senior military and naval officers). As a compromise solution, it was decided that instead of handing the accused persons over to the Allies, the German government would have brought to trial those persons before the Supreme Court of Leipzig. Only 45 persons, against whom the most serious charges had been brought, were tried by the Leipzig Court (see UN War Crimes Commission, *supra* note 11, at 46–52).

2. A Watershed: Nuremberg and Tokyo

One can see a turning point in the London Agreement of 8 August 1945 establishing the International Military Tribunal. Article 7 provided as follows: 'The official position of the defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

This provision clearly made the international law doctrine of functional immunities unavailable to senior officials accused of one of the categories of crimes envisaged in Article 6 of the London Agreement, namely war crimes, crimes against humanity, and crimes against peace. The same provision, slightly changed, can also be found in Article 6 of the Charter of the International Tribunal for the Far East.[18] In their Judgments both Tribunals applied the provisions under discussion, without however asking themselves whether they were in keeping with customary international law.[19]

Subsequent developments included numerous restatements of the rule, both at the international and national level. Mention can be made of Article II(4)(a) of the 1945 Control Council Law No. 10,[20] of Article IV of the 1948 Genocide Convention,[21] of Principle III of the Nuremberg Principles adopted in 1950 by the GA,[22] Article III of the 1973 Apartheid Convention,[23] and, more recently,

[18] 'Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

Art. 6 did not refer specifically to the position of the Head of State, probably because of the political decision not to try the Japanese Emperor Hirohito (O. Triffterer, 'Article 27', in O. Triffterer (ed.), *Commentary on the Rome Statute* (1999) 501, at 503).

[19] The Nuremberg Tribunal stated: 'The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: "The official position of the Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment". On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.'

[20] 'The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.'

[21] 'Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.'

[22] 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

[23] 'International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing

Articles 7(2) and 6(2) of the Statutes of ICTY[24] and ICTR[25] Tribunals. Case law includes both cases based on Control Council Law No. 10, international cases before the ICTY and the ICTR,[26] as well as such national cases as *Eichmann*,[27] and more recently *Pinochet*.[28] Therefore, the contention can be made that a customary rule has evolved in the international community to the effect that all State officials, including those at the highest level, are not entitled to functional immunities in criminal proceedings—either of a national or international nature—if charged with such offences as war crimes and crimes against humanity (whether or not these latter crimes are committed in time of war).[29]

It is apparent that this customary rule constitutes an exception to the general rule granting functional immunity to State organs for acts they perform in their

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in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in Article II of the present Convention; (b) Directly abet, encourage or co-operate in the commission of the crime of *apartheid*.'

[24] 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[25] 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[26] It is worth noting that in *Furundžija*, the ICTY Trial Chamber II stated that Art. 7(2) and Art. 6(2) of, respectively, the ICTY and the ICTR Statutes 'are indisputably declaratory of customary international law' (*Prosecutor v. Anton Furundžija*, IT-95-17/1, Judgment of 10 Dec. 1998, at para. 140).

[27] The plea of having acted on behalf of the German State, raised by the defendants, was rejected by both the District Court of Jerusalem and the Supreme Court of Israel (see the 1961 Decision of District Court of Jerusalem, in 36 ILR (1968), 44–48; and the 1962 Decision of the Israeli Supreme Court, ibid., 308–311).

[28] See the House of Lords Decision of 24 March 1999, reprinted in 38 *ILM* (1999) 581 ff. For comments, see A. Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case', 10 *EJIL* (1999) 237; M. Cosnard, 'Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', 103 *RGDIP* (1999) 308; C. Dominicé, 'Quelques observations sur l'immunité de juridiction pénale de l'ancien Chef d'État', 103 *RGDIP* (1999) 296; H. Fox, 'The Pinochet Case No. 3', 48 *ICLQ* (1999) 687.

[29] One commentator has tried to demonstrate that, even if one considers that the above instances of international practice do not persuasively demonstrate the existence of a customary rule on the matter, the denial of functional immunities in cases of international crimes can be affirmed on the basis of logic. As this author has maintained, 'International Law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole. Nor can the principle of sovereignty, of which immunity is clearly a derivative, be persuasively set forth to defeat a claim based on an egregious violation of human rights' (Bianchi, *supra* note 28, at 261).

In a recent case brought before the French *Cour de Cassation*, concerning the alleged complicity in a terrorist action of M. Ghaddafi, leader of the Socialist People's Libyan Jamahirija, the *Avocat Général* seemed to deny the customary nature of the principle of irrelevance of immunity *ratione materiae* for charges of international crimes, or alternatively its applicability to Heads of State in office. For a critical comment of the stand taken by the *Avocat Général*, as well as of the decision of the *Cour de Cassation* delivered on 13 March 2001, see S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', in 12 *EJIL* (2001) 595.

official capacity. Clearly, the relationship between the two rules is one of *lex specialis* to *lex generalis*. Less clear is the rationale behind the special rule. Arguably, the offences under consideration amount to attacks on values that the international community has come to consider as being of paramount importance. Consequently, it appears to be unjustifiable to permit the prosecution and trial of minor offenders while leaving the leaders unpunishable, the more so because normally such crimes are perpetrated at the instigation, or with the connivance or at least the toleration, of senior State officials. Since under normal circumstances, national authorities do not bring to trial their own senior officials for the alleged commission of the crimes under discussion, those crimes would go unpunished, should the customary rule on functional immunities continue to protect high-ranking State officials against prosecution and trial before foreign courts or international criminal tribunals.

B. The Question of whether under Customary International Law Personal Immunities may be Relied upon in Case of Charges of International Crimes

More complex is the issue of whether customary or treaty rules on *personal* immunities can be derogated from in the case of international crimes: can a State official accused of war crimes, crimes against humanity, or genocide rely upon personal immunities, hence challenge the execution of an arrest warrant and the exercise of criminal jurisdiction by a court of the foreign State where he has been entitled to perform, and is performing, official functions?

International practice is scant. Moreover, it is not always germane to the particular crimes dealt with in this chapter (i.e. genocide, crimes against humanity, and war crimes). In *Pinochet*, some judges of the House of Lords stated that if Pinochet had currently been Head of State, he would have enjoyed personal immunities and therefore exemption from arrest and criminal jurisdiction in Great Britain.[30] This, however, was only *obiter*; in addition it mainly referred to charges of torture as an international crime prohibited by the 1984 Convention. Similarly, on 9 March 2000, the Under-Secretary of State, Mr Thomas Pickering, let an alleged

[30] This issue was incidentally dealt with by specific reference to section 20 of the UK State Immunity Act 1978 (see in particular the opinion of Lord Phillips of Worth Matravers, Judgment of the House of Lords of 24 March 1999, supra note 28, at 653: 'If Senator Pinochet were still the head of State of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. A head of State on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial process, whether civil or criminal, of the courts of the State he is visiting. But Senator Pinochet is no longer head of State of Chile. While as a matter of courtesy a State may accord a visitor of Senator Pinochet's distinction certain privileges, it is under no legal obligation to do so. He accepts, and Chile accepts, that this country no longer owes him any duty under international law by reason of his status *ratione personae*.' See also the opinions of Lord Hutton, ibid., at 637, and Lord Millet, ibid., at 644. In this respect, see Bianchi, *supra* note 28, at 237–277, nn. 42 and 77, and Cosnard, *supra* note 28, at 320–323.

Peruvian torturer, Mr Tomas Ricardo Anderson Kohatsu, leave US territory because he held that Kohatsu was entitled to diplomatic immunities and could not be arrested and prosecuted for acts of torture (covered by the 1984 Convention) he had allegedly committed in Peru in 1997.[31]

The only relevant case, related to charges of war crimes, concerns the international arrest warrant issued on 11 April 2000 by a Belgian *juge d'instruction* against the then acting Minister for Foreign Affairs of the Democratic Republic of Congo, Mr Yerodia Abdoulaye Ndomasi. The arrest warrant sought the detention of Mr Ndomasi and his subsequent extradition to Belgium. Reacting to the issuance of that international arrest warrant, the Democratic Republic of Congo brought a case before the ICJ, claiming, *inter alia*, that the Belgian arrest warrant and Article 5(3) of the 1993 Belgian law on repression of serious violations of international humanitarian law,[32] pursuant to which that warrant had been issued, contravened international law, since they entailed a derogation from the diplomatic immunities of the Minister of Foreign Affairs of a sovereign State. Accordingly, the Democratic Republic of Congo asked the Court to declare that Belgium must annul the arrest warrant.

In the Judgment delivered on 14 February 2002, the Court upheld the claims of the Democratic Republic of Congo: by thirteen votes to three, it found that the issuance of the arrest warrant, and its international circulation, constituted a violation of the international rules on immunity from criminal jurisdiction and inviolability of incumbent Ministers of Foreign Affairs. In addition, by ten votes to six, the Court held that Belgium had, by means of its own choosing, to cancel

[31] Tomas Ricardo Anderson Kohatsu is a member of Peru's Army Intelligence Service. He was sent by Peru to testify before the Inter-American Commission of Human Rights, in Washington, DC. He was granted a G-2 visa, which applies to accredited members of the staff of the Peruvian mission to the OSA. A member of the Center for Constitutional Rights, Mr Michael Ratner, has strongly criticized the decision of Mr Pickering. He pointed out as follows: 'The granting of [the G-2] visa despite Anderson's human rights record is not the same or even equivalent of giving Anderson diplomatic immunity . . . [The G-2 visa] only permits him to enter the U.S. despite his alleged crimes. It does not protect him from arrest or prosecution. Nor do the agreements with the OAS protect Anderson. By their terms they give immunity only to accredited staff and advisors. Anderson was neither. He was merely a witness to a proceeding.' In addition, Mr Ratner argued: 'Even if there was some question as to whether or not Anderson was entitled to immunity, the proper way to proceed was to have him arrested and let the courts make the determination . . . Here, despite serious doubts as to Anderson's claimed immunity, the decision to allow him to return to Peru was made by the State Department and not the courts' (*Statement of Michael Ratner of the Center for Constitutional Rights*, available at: <http://www.humanrightsnow.org/peruande1.htm>). See also 'Contemporary Practice of the United States Relating to International Law: Immunity Provided Peruvian Charged with Torture', in 94 *AJIL* (2000) 535.

[32] According to para. 3 of Art. 5: 'L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi.' This paragraph was inserted in the 1993 Law by the Law of 10 February 1999.

the arrest warrant and so to inform the authorities to whom that warrant was circulated.[33]

The few relevant cases discussed so far are clearly indicative of a trend to recognize personal immunities even in the case of international crimes.

The International Law Commission has taken the opposite view. It has authoritatively stated that 'the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence'.[34] The Commission has based this proposition on logical grounds. It has asserted that 'it would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility'.[35]

Arguably the issue is more complicated than it may appear at first blush. It appears that given the paucity of international practice on the matter, a balanced solution can only be reached by weighing up and trying to reconcile *two sets of conflicting values*: those protected by the international rules on personal immunities, on the one hand, and the requirements following from the international prohibition of

[33] See the operative part (*dispositif*) of the Judgment delivered by the Court on 14 February 2002, *supra* note 4. According to the Court, it is not possible to deduce from State practice 'that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity' (see para. 58 of the Judgment). However, in the opinion of the Court, 'the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility' (para. 60 of the Judgment. Emphasis in the original). In addition, in para. 61 of the Judgment, the Court makes it clear that personal immunities enjoyed under international law by *incumbent* or *former* Ministers for Foreign Affairs do not represent a bar to criminal prosecution in four circumstances: (i) before the national courts of their own countries; (ii) when the State which they represent or have represented decides to waive that immunity; (iii) when they have ceased to discharge their official functions; and that stage, according to the Court, 'a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed *during that period of office* in a *private capacity*' (emphasis added); (iv) before certain international courts, where they have jurisdiction. For a critical comment of the Court's holding concerning the third circumstance/hypothesis, see A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on *The Congo* v. *Belgium* Case', in 13 *EJIL* (2002) (forthcoming).

[34] Comment on Art. 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, in *YILC* (1996), Vol. II, Part 2, at 27. Art. 7 of the ILC Draft Code provides that: 'The official position of an individual who commits a crime against the peace and security of mankind, even if acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment'.

[35] Ibid.

'the most serious crimes of concern to the international community as a whole', on the other.

International rules on personal immunities are designed to safeguard State sovereignty by shielding State officials performing State functions abroad from, *inter alia*, arrest and criminal jurisdiction of local courts, so that no obstacle or impediment is set to the exercise of their official functions. The need to protect States from any undue interference in the official activity of their organs acting abroad is crucial for the smooth conduct of international dealings. It therefore appears that the safeguard of personal immunities should be given pride of place, even in the case of alleged commission of international crimes. This is the more so because—personal immunities being *limited in space and time*—the author of an alleged international crime may be arrested and prosecuted in a State other than the receiving State, or even in the receiving State as soon as, following the cessation of his official activities, his personal immunities terminate.

Generally speaking, it would seem difficult to assert that international rules on personal immunities can be disregarded, with the consequence that the receiving State (say, France) would be authorized to arrest or bring to trial a foreign diplomat (say, the British ambassador) or any other representative of a foreign State (say, the Italian Head of State). One would need to prove that customary international law makes it incumbent upon States to search for and prosecute persons charged with war crimes, crimes against humanity, or genocide; in addition, one should prove that this international obligation is of a *jus cogens* nature. Were the existence and nature of such obligation proved, the need to comply with a peremptory rule of international law (i.e. to arrest and bring to trial persons accused of international crimes) would make lawful the refusal, by the authorities of the receiving State, to grant to the foreign State official the personal immunities provided for in international law. However, one may well doubt that customary international law has evolved to such an extent as to impose upon States the obligation to arrest and prosecute the alleged perpetrators of international crimes. In addition, even assuming that this obligation had crystallized in the international community, one could well doubt that it had acquired the status and rank of *jus cogens*.[36]

Should these remarks apply across the board, so to speak, or are there cases where *exceptionally* personal immunities may be set aside for charges of international crimes? To answer this question, one ought to consider that international rules on personal immunities are not absolute in nature. Indeed, a well-established derogation from these rules is envisaged whenever the official of a foreign State has the nationality of the territorial State, as may well be the case for diplomats (think, for instance, of a Canadian national acting as a US diplomat in Canada).[37] The ratio-

[36] See Ch. 41 below.
[37] See Art. 38 of the 1961 Vienna Convention on Diplomatic Relations.

nale behind the denial of personal immunities to officials of a foreign State who happen to have the nationality of the State where they are performing their official functions is the need to avoid *risking a denial of justice* or—in case of criminal charges—*impunity*. For the State of which the individual is an organ may not have criminal jurisdiction over the crimes allegedly committed by him on the territory of the host State (i.e. the country where he is performing official functions on behalf of his own State), for instance, because the sending State adopts the territoriality or the nationality principles, or both. One may think for example, of a diplomat, having Italian nationality, who is accredited by Argentina to Italy. If, during his mandate, he commits a criminal offence in Italy against Italians, Argentina may not be in a position to prosecute and punish him. Under these conditions, to grant personal immunities to that individual in the State where he is discharging his functions would entail risking that he will never be brought to trial.[38]

One could rely upon the rationale behind this *traditional* exception to the personal immunities rules in order to establish whether there are possible exceptions to these rules in the case of international crimes. Arguably, the general contention is warranted that personal immunities cease to operate whenever the courts of the State to which the individual organ belongs *lack jurisdiction* over the crimes allegedly committed by that organ. This proposition applies *a fortiori* when the alleged crimes have been committed on the territory of the receiving or host State, since this State has a particular interest in the prosecution and punishment of the crimes in question. Clearly, in the situation just referred to the need to avoid the risk of impunity is even stronger than in the case of State officials having the nationality of the receiving State.

In addition, personal immunities should not be granted when, although the State to which the organ belongs *does have* jurisdiction over the crimes allegedly committed by that organ, nevertheless the receiving State has compelling reasons to believe either that the sending State will not prosecute the crimes (for example, because the relevant State authorities have been implicated, either actively or passively, in the commission of the crimes), or that arrest and prosecution by the competent authorities of the sending State will be barred by special national rules pertaining to the particular status of the individual in question (this is for instance the case where the State official is entitled to personal immunities under his national law).

However, these exceptions should not apply whenever the foreign State official is the Head of State. This conclusion is not based on the notion that for Heads of State the *ne impediatur legatio* requirement prevails over the demands of justice.

[38] This construction has been propounded, among others, by G. Sperduti, *Lezioni di diritto internazionale* (1958) 128 *et seq.*

The rationale behind the above proposition is that to bring to trial a Head of State might jeopardize the structure and functioning of the foreign State, since he discharges important and sensitive constitutional functions. Therefore, with regard to Heads of State, the two counter-weighing values at stake are no longer the need to enable foreign dignitaries to freely fulfil official functions abroad, on the one hand, and the necessity to ensure justice by prosecuting and trying alleged international criminals, on the other. Rather, we are faced here with the need to strike a balance between the demands of justice, on the one hand, and the need to avoid any conduct which might lead to the disruption of the highest institutions of a foreign State, on the other. In addition, the possibility for a Head of State to be arrested and prosecuted abroad might lend itself to serious abuse, and this of course could put international peaceful relations in considerable jeopardy.

These considerations warrant the conclusion that in the case under discussion personal immunities should prevail.[39] Faced with allegations that a foreign Head has perpetrated international crimes, the authorities of the receiving State should either deny entry into the territory or, if the charges have been made after entry, request the foreign dignitary to immediately leave the country.[40]

In sum, a sensible and rational solution to the problem of whether personal immunities should be denied in the case of international crimes may be reached by striking a balance between the two conflicting values at stake: the safeguard of the exercise of sovereign powers abroad, and the dispensation of justice in the case of heinous violations of human dignity. As a rule, one should give priority to the first value as long as there is no risk of impunity. After all, what matters is that international crimes be punished. Hence, as long as the sending State is willing and prepared to exercise its criminal jurisdiction over the alleged crime perpetrated by its official, the demands of justice may be regarded as met and the invocation by the sending State of the personal immunities belonging to its official should not be objected to. However, the rules on personal immunities should give way to the international prohibition of international crimes when, as a result of a multitude of factual or legal factors, it appears to be legally impossible or most unlikely for the alleged perpetrator to ever be brought to justice. Consequently, in this case national courts of the receiving State would be empowered to disregard

[39] A similar conclusion has been reached by one commentator (see Cosnard, *supra* note 28, at 320–323). This author stresses that 'toute immunité est accordé à un État, et non à un chef d'État; elle ne peut donc être invoquée que si l'État est, directement ou indirectement mis en cause. Une procédure criminelle contre un chef d'État en exercice interfère avec le bon fonctionnement de l'État qu'il dirige, celui-ci est donc fondé à réclamer son immunité' (at 322). It should be noted that, according to this author, no customary rule exists to the effect of conferring upon current Head of States immunity from foreign criminal jurisdiction.

[40] The question could be raised whether the proposition set forth above also applies to Heads of Government and Ministers of Foreign Affairs, on the assumption that, under customary international law, they are entitled to personal immunities (see *supra* note 4).

personal immunities and bring to justice the alleged authors of international crimes. Nevertheless, an exception should be made for the incumbent Head of State (and possibly, the incumbent Head of Government and Minister of Foreign Affairs),[41] whose possible arrest and prosecution abroad might seriously jeopardize the very stability of their own country.

C. Possible Derogations: The Unavailability of Personal Immunities under the Statutes of the ICTY and ICTR

The foregoing considerations—it is submitted—are based on a balanced construction of principles and rules of customary international law. Plainly, treaties or other international norm-setting instruments may derogate from this general regulation.

A case in point is represented by the Statutes of the ICTY and ICTR. Within a vertical framework, that is the relationships between Member States of the United Nations, on the one side, and International Tribunals, on the other, the Statutes of the two *ad hoc* Tribunals provide for a derogation from the legal regulation of personal immunities contained in customary international law. Admittedly, these Statutes do not envisage any such derogation *explicitly*. However, they lay down the obligation of all UN Member States to cooperate with the International Tribunals, in particular by executing arrest warrants. This obligation, being based on a Security Council binding decision made under Chapter VII of the UN Charter, by virtue of Article 103 of the UN Charter takes precedence over customary and treaty obligations concerning personal immunities. Consequently, whenever a Member State to which the International Tribunal issues an arrest warrant enjoining the detention of the Head of State of another UN member who happens to be on its territory executes the arrest warrant, by so doing it does not breach any customary or treaty obligations vis-à-vis the foreign State concerned. For instance, if President Milošević (when he was still Head of State) entered the territory of another country, either on an official mission or in a private capacity, the authorities of such country were under the obligation to execute the international arrest warrant issued by the ICTY; consequently, they could not be held responsible for any violation of the personal immunities accruing under customary international law to Milošević as Head of State.[42]

[41] See the previous note.

[42] The above proposition is based on the assumption that the Federal Republic of Yugoslavia was a member of the UN even before November 2001, when it formally applied for, and obtained, membership in the UN.

III. The Rome Statute

A. Article 27 of the Rome Statute

As pointed out above, Article 27 envisages both the immunities based on international law and those laid down in national law. The impact of Article 27 on national law immunities will be discussed below.[43] Here an attempt will be made to determine to what extent Article 27 departs from customary international rules bearing on the question of whether international crimes entail the relinquishment of such immunities.

B. Functional Immunities

Article 27(1) does not depart from customary international law as far as functional immunities laid down in international rules are concerned. It restates the customary rule whereby for the purpose of establishing criminal responsibility the plea of acting in an official capacity is of no avail.[44]

As has been correctly stated, this provision constitutes 'one of the clearest manifestations in the Statute of the determination in paragraph 5 of the Preamble to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" '.[45] Article 27(1) enshrines the principle whereby even those who abuse their official position and the powers flowing from it cannot avail themselves of that position to obtain impunity from crimes committed while exercising public functions.

Interestingly, in illustrating the official functions that cannot be relied upon to exclude prosecution and punishment for the crimes laid down in Article 5, Article 27(1) provides a list that is not exhaustive but simply illustrative. It first of all explicitly mentions Heads of State or Government, thus establishing the principle that even those individuals who hold the highest State positions may be prosecuted and tried. Secondly, the list in Article 27(1) includes both the members of Government and those of Parliament, as well as any other 'elected representative or . . . government official'. As is apparent, Article 27(1) provides a fairly detailed list, and this is rather unusual in international rules concerning international crimes.[46] It is warranted to consider that the accurate and detailed nature of this list is not primarily motivated by the need to reject the international doctrine of functional immunities with regard to international crimes. If it were so, it would

[43] See *infra*, III.D.
[44] On the drafting process of this rule, see Triffterer, *supra* note 18, at 505–508.
[45] Ibid., at 509.
[46] See Art. 7 of the 1945 London Agreement and the other rules on irrelevance of official capacity quoted above, notes 16, 18, 19, 21, 22, and 23.

have been sufficient to lay down by way of illustration the possibility *also* for Heads of State or Government and members of Parliament to be prosecuted and punished. In fact the *raison d'être* of the long list in Article 27(1) can be found in the existence, in national law, of 'functional' immunities covering certain State officials, in particular Heads of State, members of Government, and members of Parliament (think, for example, of the so-called principle of unaccountability, laid down in many Constitutions, and covering these State officials for acts performed in the exercise of their functions). Within the framework of, and with reference to, complementarity, Article 27(1) makes it clear that—whenever a State exercises its jurisdiction over one of the crimes under Article 5, the possible application of national legislation on functional immunities runs counter to the Statute. Consequently, the Court is entitled to exercise its jurisdiction.[47]

Finally, it should be stressed that, although Article 27(1) does not expressly mention the issue, the unavailability—in case of charges of international crimes—of the plea of acting in one's official capacity also applies to officials of international intergovernmental organizations.

C. Personal Immunities

1. Irrelevance of Personal Immunities in Criminal Proceedings before the ICC

With regard to personal immunities provided for in international law, Article 27(2) stipulates that these immunities do not bar the Court from exercising its jurisdiction. To this extent, Article 27(2) simply restates a principle which is in many respects obvious. Strictly speaking, under international law individuals are only entitled to enjoy personal immunities vis-à-vis the authorities of the State where they are authorized to discharge official functions (the 'receiving or territorial State'). Clearly, these immunities cannot be relied upon before the ICC; hence they cannot preclude the exercise of the Court's jurisdiction.[48]

It would however be wrong to contend that Article 27(2), since it confines itself to laying down a principle that is self-evident, does not have any bearing on international rules on personal immunities applicable in inter-State relations. The real scope of Article 27(2) can only be appraised if one bears in mind that it makes it possible to clarify the proper scope of the only other provision of the Statute that explicitly covers personal immunities in international law, namely Article 98(1). Both the coordination of these two provisions of the Statute and the contents of these obligations on cooperation with the Court which are incumbent upon contracting States make one important point very clear: the Statute provides a legal

[47] This issue is elaborated upon *infra*, III.D.

[48] The same holds true for personal immunities provided for by national legislation. These immunities only operate with regard to national courts or other national State authorities. Clearly, they cannot bear any relevance in proceedings before the ICC.

regulation of personal immunities, in case of international crimes, that at least partially innovates the regulation contained in customary international law.

2. Personal Immunities and Cooperation with the ICC: The Scope and Purport of Article 98(2) in Relation to Article 27(2)

Article 98(1) is part and parcel of the set of rules governing the question of cooperation with the Court. It bars the Court from proceeding with requests for surrender or assistance whenever the requested State, in order to execute such requests, would be required to breach—vis-à-vis a third State—its international legal undertakings in the area of immunities including personal immunities.[49] The Court may proceed with a request for assistance or cooperation only after obtaining a waiver of the relevant immunities from the third State concerned. If this is the case, the requested State is legally bound to comply with the Court's request.

There clearly arises a problem of coordination of Article 98(1) with Article 27(2).[50] This is apparently not an easy problem. On the one hand, Article 27(2) provides that the Court can exercise its jurisdiction even over those individuals who, under international law, enjoy personal immunities. On the other, Article 98(1) seems to significantly narrow the scope of Article 27(2). Because of Article 98(1), the Court may find a considerable impediment to the exercise of its jurisdiction over individuals who, as they discharge official functions in a foreign State, enjoy in that State personal immunities by virtue of international law. With regard to these individuals, compliance with the Court's requests for arrest or surrender of an official of a foreign State enjoying international immunities is contingent upon a waiver of immunity by the sending State. In the final analysis, as a commentator has recently emphasized, 'a failure to proceed successfully according to Article 98 may *in practice* and contrary to the wording of Article 27, "bar the Court from exercising its jurisdiction over such a person", if the Court cannot secure the attendance of the person in any other way because the Rome Statute does not provide a trial *in absentia*'.[51]

To establish to what extent the regulation laid down in Article 98(1) can narrow down the scope of the principle enshrined in Article 27(2), it is therefore of cru-

[49] It should be noted that in Art. 98(1) the term 'diplomatic' immunities is used, which in many respects is equivalent to that of 'personal' immunities.

[50] As P. Saland has put it: 'It is difficult to determine how [Article 27] relates to article 98, paragraph 1, which deals with cooperation with respect to waiver of immunity. That Article, which was proposed and negotiated only in Rome, was discussed by another working group. It seems that there may be a contradiction between the two articles, at least if "the third State" mentioned in Article 98 is interpreted to mean not only a non-party State but also a party to the Rome Statute.' (P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 189, at 202, note 25).

[51] Triffterer, *supra* note 18, at 513 (emphasis in the original).

cial importance to establish as clearly as possible the purport of Article 98(1). Two possible constructions can be suggested.

Under a first interpretation, Article 98(1) would make it incumbent upon the Court to obtain a waiver of immunity not only when the State entitled to make such a waiver is a *State not party* to the Statute, but also when it is a *contracting State*.[52] To support this construction it could be emphasized that the Statute, whenever in the section concerning cooperation it refers to 'non-contracting States', uses the expression 'States not Parties'. The term 'third State' only appears in Article 98(1). There it is used in contrast to the expression 'requested State'; consequently it refers to a State other than the State that is requested by the Court to cooperate. It could be argued that this wording was not haphazard. Arguably the draftsmen used that expression precisely to indicate *third* States, i.e. States other than the *requested* State, regardless of whether or not such a third State is party to the Statute. On the strength of this interpretation, Article 98(1) would condition to the utmost the operation of Article 27(2) and the principle it lays down whereby international rules on personal immunities cannot hamper the exercise of the Court's criminal jurisdiction. Indeed, a waiver of immunity by the competent State would *always* constitute a *sine qua non* condition to the execution of arrest warrants and requests for transfer concerning individuals enjoying personal immunities under international law.

On close scrutiny this interpretation does not appear to be convincing, for, if accepted, the joint operation of Articles 27(2) and 98(1) would lead to absurd consequences. The Court, as is well known, cannot conduct trials *in absentia* nor can it execute arrest warrants by itself. The effective possibility for the Court to exercise its jurisdiction rests, and is contingent upon, the smooth and thorough functioning of international cooperation. However, Article 27(2) would eventually prove to a large extent meaningless, were one to hold the view that a waiver of immunity by the competent States, *including States Parties to the Statute*, would always be a necessary condition to the obligation of the requested State to execute arrest warrants or requests for transfer. By virtue of Article 98(1), the Court would be in a position to exercise its jurisdiction only after obtaining a waiver of immunity from the competent State. If this is so, why to provide, as Article 27(2) does, that criminal proceedings instituted before the Court cannot be prevented by the fact that the accused enjoys immunities deriving from international law? Clearly, in the case under discussion, the waiver of immunity has already deprived the person against whom the Court has instituted criminal proceedings of the

[52] It is worth noting that one cannot reject this possible interpretation by simply pointing out that in any way contacting Parties are under the general obligation to cooperate with the Court, pursuant to Art. 88 of the Statute. For this obligation is imposed by the Statute to the extent that it is spelt out in specific Statute's provisions. It is therefore crucial to establish the proper meaning of Art. 98(1), which could indeed restrict the general obligation to cooperate.

international immunities he enjoyed in the receiving State. In other words, the principle of Article 27(2) whereby international personal immunities do not bar the Court from exercising its jurisdiction becomes meaningless if there can be no cases where individuals are brought before the Court who effectively enjoy those immunities (in the State that has transferred them to the Court). Under the interpretation of Article 98(1) we are discussing, the only case where Article 27(1) would be relevant is that—rather peripheral—cases of the voluntary appearance before the Court of an individual entitled to, and enjoying, international immunities.

To render effective the principle laid down in Article 27(2) it is necessary to opt for a different interpretation of Article 98(1). Under this interpretation a waiver of immunity is a necessary condition to the execution of arrests or transfers only in those cases where the requested State is internationally obligated, as far as immunities are concerned, toward a *State not party* to the Statute. To put it differently, the expression 'third State' in Article 98(1) must be taken to mean 'third State as regards the Statute', that is as equivalent to 'State not Party' (and not in the sense of a third State with regard to the requested State). Under this interpretation the Court's request for arrest or transfer must be preceded by a waiver of immunity only in limited cases, i.e. when the requested State is legally bound, vis-à-vis a *State not party to the Statute*, to grant immunities to the accused. By contrast, if the requested State is legally bound, as far as immunities are concerned, towards a State Party to the Statute, the waiver of immunity is not necessary: the Court, even without obtaining a waiver, may request the arrest or transfer of individuals who, in the international relations between the sending and receiving States, are entitled to personal immunities. By virtue of Article 98(1) and the obligations on cooperation following from the Statute, the requested State is obliged to comply with such requests even if the sending State does not intend to waive the personal immunities of the accused.[53]

This interpretation is based on the principle of effectiveness (or *principe de l'effet utile*: *ut res magis valeat quam pereat*). As a result of such interpretations Article 27(2)

[53] The UK, in Section 23(1) of the International Criminal Court Act (2001), has taken a stand that is in line with the construction propounded above. That Section provides as follows: 'Any State or diplomatic immunity attaching to a person by reason of a connection with a *State party to the ICC Statute* does not prevent proceedings under this Part [concerning arrest and delivery of persons to the ICC] in relation to that person' (emphasis added). In the Explanatory Notes to the International Criminal Court Act, it is emphasized that Arts. 27 and 98(1), 'mean that a State Party to the ICC Statute, in accepting Article 27, has already agreed that the immunity of its representatives, officials or agents, including its Head of State, will not prevent the trial of such persons before the ICC, *nor their arrest and surrender to the ICC*. But *non-States Parties* have not accepted this provision and so the immunity of their representatives would remain intact unless an express waiver were given by the non-State Party concerned to the ICC' (emphasis added). The text of the International Criminal Court Act (2001) and of the Explanatory Notes is available at the Council of Europe home page, Office of Legal Affairs, <http://www.legal.coe.int/criminal/icc>.

acquires its own *raison d'être*. This interpretation would enable the Court to also exercise its jurisdiction over individuals who enjoy personal immunities deriving from international law in the State that has proceeded to their arrest and transfer.

3. The Legal Regulation of Personal Immunities under the Rome Statute at the Vertical and the Horizontal Level

Based on the foregoing interpretation of Articles 27(2) and 98(1), it may prove appropriate to take a general look at the way the Statute legally regulates personal immunities granted under international law.

Within the framework of *cooperation between the ICC*, on the one side, and *States Parties to the Statute* (or States having accepted *ad hoc* the Court's jurisdiction), on the other, the legal regulation enshrined in the Statute allows a derogation from customary international rules on personal immunities. By virtue of Articles 27(2) and 98(1) and of the obligations on cooperation laid down in the Statute, the States just referred to are legally bound to execute requests for arrest or transfer from the Court *even* when such requests concern individuals enjoying those immunities. In other words, the immunities at issue do not apply in cases where an individual is accused before the Court of one of the crimes provided for in Article 5 of the Statute and it consequently proves necessary to ensure that he is brought before the Court for trial. In substance, unlike the position in general international law, personal immunities under international law do not apply at all before the Court, not even when the accused person is a Head of State or Government. Indeed, nothing in the Statute seems to warrant the proposition that these individuals should be given a treatment different from that due to other State officials. In this connection it should be stressed that, when the highest State officials such as a Head of State or Government are accused of international crimes before the ICC, the reasons set out above militating against their prosecution and trial before national courts cannot be held applicable. In particular, one should exclude the risk of abuse.

It is apparent from the above that, pursuant to Article 98(1), the Statute does not instead derogate from the regulation of personal immunities laid down in customary international law whenever the sending State of the individual enjoying personal immunities is *not a party to the Statute* nor has accepted *ad hoc* the Court's jurisdiction. In this case the Court cannot proceed with requests for arrest or transfer that 'would require the requested State to act inconsistently with its obligations under international law with respect to the . . . diplomatic immunities of a person of a third State'. This of course holds true unless the Court obtains a prior waiver of immunity from the State not party to the Statute.

In short, in the case expressly provided for in Article 98(1), the customary legal regulation of personal immunities remains unaffected. The obligations on

cooperation that contracting States undertake vis-à-vis the Court do not go so far as to entail for them that, in order to execute the Court's requests, they should breach international obligations vis-à-vis States *not parties* to the Statute.

As for the contents of these international obligations (other than those set out in treaties), an attempt has been made above to show that, in general international law, immunities *do not operate* whenever it is certain (or there exist compelling reasons for believing) that the sending State will not prosecute and punish crimes with which its State official abroad is charged (whether this official be a diplomat, a delegate to an international organization, or any other official discharging official functions abroad). Immunity from arrest and criminal jurisdiction instead operates in all other cases. As has been pointed out above, one should include among such cases those where the State official abroad is a Head of State or Government.

Articles 27(2) and 98(1), as well as the obligations on cooperation laid down in the Statute, only deal with cases where criminal proceedings *before the Court* are instituted against a person protected by international immunities. As far as *relations between States* are concerned, the Statute does not have any bearing on the legal regulation of immunities contained in customary international law. It follows that, if the authorities of a State Party to the Statute intend to arrest and bring to trial a person enjoying these immunities, they must in any event comply with the customary and treaty rules governing this matter. It is worth stressing that this proposition also holds true in the case where relations between two States Parties to the Statute come into play: as between these two States the international customary and treaty obligations on immunities cannot but apply. Indeed, the derogation from customary (and treaty) law provided for in the Statute only operates within the framework of *vertical* relations, i.e. when the question at issue is whether it is admissible to arrest and bring before the Court individuals accused of international crimes. By contrast, that derogation does not operate at the *horizontal* level, i.e. at the level of relations between States Parties to the Statute.

D. The Impact of Article 27 on National Legislation Concerning Immunities

As mentioned above, Article 27 also takes into account national rules on immunities of certain State officials. It can be maintained that in paragraph 1 of this provision the reference to such national rules is *implicit*: clearly, in establishing the unavailability of the plea of official capacity whenever responsibility for international crimes is at stake, Article 27(1) also intends to cover the non-applicability of national legislation traditionally granting immunity to State agents for official acts. By contrast, paragraph 2 of Article 27 makes *explicit* reference to possible jurisdictional immunities provided for in national law. In addition to excluding the immunities from jurisdiction laid down in inter-

national law, Article 27(2) rules out the right to rely, in proceedings before the Court, upon any immunity from jurisdiction accruing to the accused by virtue of national law.

Thus, on this score Article 27 appears to have considerable importance. It lays down a principle that, also by virtue of other provisions of the Statute, could make it incumbent upon the States Parties to the Statute to change their *national legislation* on the immunities belonging to some State officials (a legislation, it should be noted, often of constitutional rank),[54] in order to enable: (a) national courts to institute proceedings against those State officials; (b) national authorities to execute an order of arrest and surrender of the ICC. The need to change national legislation follows from both (i) the principle of complementarity and (ii) the specific obligations laid down in Article 88. Let us examine these two grounds in turn.

As for the first ground, it is necessary to make a few general remarks before tackling the specific issue under discussion, namely the impact of complementarity on national legislation on immunities.

Generally speaking, the complementary role of the ICC to national jurisdictions should operate in such a way as to induce States to harmonize their national criminal legislation. Harmonization must be carried out both with regard to the definition of the crimes' envisaged in Article 5 and of their constituent elements, and as far as general principles of international criminal law are concerned. The need for harmonization can be explained as follows. The Statute, while recognizing national courts' priority in the area of prosecution and trial of the crimes under Article 5, nonetheless lays down the principle that the ICC is entitled to substitute

[54] According to the *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court*, adopted in Venice on 16 December 2000 by the European Commission for Democracy through Law of the Council of Europe, '[o]ne of the constitutional problems raised by the ratification of the Rome Statute concerns the immunity that most European countries grant to the head of State or Government, a member of a government or parliament, an elected representative or a government official. Such immunity may contravene Article 27 . . . of the Statute. . . . In other words, where they commit a crime coming within the jurisdiction of the International Criminal Court, political leaders cannot evade their responsibility by pleading immunity before either that court or their country's own courts.' (The Report is available at the home page of the Council of Europe, Office of Legal Affairs,<http://www.legal.coe.int/criminal/icc>.) The Report envisages a number of solutions to this problem of immunity. First of all, 'a State has the possibility of amending its constitution to bring it into line with the Statute'. Secondly, 'States could choose to interpret the relevant constitutional provisions in such a way as to avoid conflict with the Statute'. Thirdly, it can be maintained that 'lifting the immunity of heads of State or Government has become a customary practice in public international law'. The third solution envisaged by the Venice Report is highly questionable. The customary international rule providing for the lifting of immunities of Heads of State or Government and other State officials to which the Venice Report refers, concerns *immunities under international law*, i.e. immunities that can be opposed before national courts of *foreign States*, and not immunities granted to certain State officials by *national law*, i.e. immunities that apply before the national courts of the State to which those officials belong (see *supra*, I).

for national courts whenever a State is unwilling or unable to exercise criminal jurisdiction.[55] Clearly, if the criminal legislation of the relevant State is at odds with the provisions of the Statute on the definition of crimes and their constituent elements or on general principles of criminal law, these circumstances may amount to the conditions required for the Court's stepping in, since the Court might find that the relevant State is 'unable' to genuinely carry out national proceedings.[56] Arguably this can in particular happen when national criminal legislation is more permissive than the relevant provisions of the Statute: for instance, certain acts regarded as criminal in the Statute are legally allowed by the national legislation; or this legislation provides for circumstances excluding wrongfulness or criminal liability, that are instead ruled out in the Statute; or else national law envisages special procedures that bar, or render more difficult, the exercise of criminal jurisdiction. In such cases the Court may satisfy itself that the conditions laid down in Article 17 of the Statute are fulfilled; it may consequently institute international criminal proceedings. To 'safeguard' the primacy of the national repressive systems, particularly with regard to crimes perpetrated on their territory or against their nationals, States Parties to the Statute will naturally tend to make

[55] See Ch. 18.1 above.

[56] The criteria for assessing the State's ability to exercise criminal jurisdiction are set out in Art. 17(3), providing that a State can be deemed unable to genuinely carry out national proceedings when it is not in a position: (i) to obtain the accused; (ii) to obtain the necessary evidence and testimony; (iii) to otherwise carry out its proceedings.

The chapeau of Art. 17(3) makes it clear that these three instances of inability must stem from *a total or substantial collapse* or *unavailability* of the national judicial system.

The drafting history of the provision shows that the negotiators intended to cover situations such as that of Rwanda in 1994, where a collapse of the national judicial system made it objectively impossible to carry out investigations and prosecutions. Hence the Court must assess against a *factual* background the inability of the State endowed with jurisdiction, to obtain the accused, or the necessary evidence and testimony, or in any case to carry out national proceedings. Clear instances of inability would be the absence of qualified personnel to effect genuine investigations or prosecutions, or of judges for the conduct of trial proceedings. (In this regard, see Ch. 18.1, IV.D, above.)

However, in considering the requirement of *unavailability of the national judicial system* one could advance a more liberal construction, so as to also include *legal inabilities* of the national judicial system. This construction is based on the principle of *effet utile* or effective interpretation (*ut res magis valeat quam pereat*): otherwise, one could not explain in what cases a national judicial system, which has not totally or substantially collapsed, is nevertheless 'unavailable'. Furthermore, this liberal construction of Art. 17(3) is in keeping with the object and purpose of the Rome Statute, whose main goal is to avoid impunity by establishing an International Court that will act in the place of national courts when such courts cannot dispense justice. It would be contrary to the very *raison d'être* of the establishment of the International Court to contend that this Court is not allowed to step in whenever, in the national system having jurisdiction, persons allegedly responsible for serious crimes of relevance to the whole international community may escape criminal justice by virtue of national legislation providing for amnesties, or statutes of limitation, or national immunities, or defences ruled out by the ICC Statute.

It is worth noting that, in its decision of 22 January 1999, the French *Conseil Constitutionnel*, when dealing with the question of complementarity, held that the ICC could exercise its jurisdiction whenever amnesty laws or statutes of limitations would bar national courts from adjudicating a case. (The decision is available on the web at <http://www.conseil-constitutionnel.fr> (home page).)

all the legislative changes necessary for adjusting their legal systems to the principles enshrined in the Statute.

Turning to the specific matter we are discussing here, it can thus be said that Article 27(1) of the Statute might have the knock-on effect of compelling contracting States to remove or repeal national legislative provisions on substantive or procedural immunities accruing to individuals discharging certain official functions. These legislative changes will enable *national courts* to exercise their jurisdiction for the prosecution and trial of the crimes covered by Article 5.

Changes in national legislation, while they are *implicitly presupposed and required* by the Statute for the proper functioning of the complementarity system, are *legally imposed* by Article 27(2) read in conjunction with Article 88. Article 88, which is in the section on cooperation, provides that 'States parties shall ensure that there are procedures available under their national law for all forms of co-operation which are specified under this Part'. On the strength of this provision, States Parties are duty bound to ensure that their national legal systems make it possible for the mechanisms and modalities of cooperation envisaged in the Statute to function properly and smoothly. Of course these mechanisms and modalities also include requests for transfer of persons accused before the Court. The obligation laid down in Article 88 among other things requires that contracting States adopt implementing legislation capable of making self-executing, within their own legal systems, the Statute's provisions on cooperation.

On close scrutiny, Article 88 appears to be one of the crucial provisions of the Statute. It aims at preventing the Court from being made *practically* unable to exercise its jurisdiction, once the unwillingness or inability of national courts to exercise their criminal jurisdiction has been ascertained. It would be pointless to maintain that in principle the Court is competent to try a certain individual, if the surrender of this individual to the Court is in fact barred by the need for a State to comply with its own national legislation on immunities, possibly of constitutional rank. This is why Article 88 imposes upon States the *positive obligation* to make sure that their national legal systems are fully in keeping with the obligations on co-operation laid down in the Statute, in all their implications.

Clearly, the existence of national laws conferring immunity from arrest and criminal jurisdiction on certain classes of individuals constitutes a major obstacle to the effective functioning of cooperation of States with the Court. Hence, contracting States are obliged to make those immunities inoperative, so as to be in a position to comply with a request for arrest and surrender to the Court of an individual entitled to those immunities. Failure to change national legislation on

immunities with a view to complying with an ICC order for arrest and surrender, will therefore lead to a conflict with Article 88.[57]

IV. Concluding Remarks

It may now prove useful to gather up the threads of the foregoing discussion and take a general look at the legal regulation made in the Statute of the main question considered so far: whether immunities deriving from international law as well as national legislation may be relied upon when the Court is called upon to prosecute and try individuals entitled to such immunities.

As for customary international rules on functional immunities, undoubtedly Article 27(1) confines itself to codifying—thereby giving, by the same token, legal certainty to—such rules: as is well known, they provide that the fact of acting as a State official does not relieve an individual of his criminal responsibility in case of international crimes. Thus, on this score, Article 27(1) does not innovate in the existing legal regulation.

Article 27 has much greater significance in two other respects.

First, it has a considerable impact on international rules on personal immunities. Article 27(2), together with the obligations on cooperation laid down in Part 9 of the Statute, provides a legal regulation aimed at completely *removing* these immunities whenever international crimes are at stake. Thus, an important *derogation* from customary international law is provided for in the Statute. However, this derogation only operates (i) at the *vertical level* (that is, whenever it is necessary to execute an arrest warrant or a request for surrender emanating from the Court), and (ii) by virtue of Article 98(1), only in the reciprocal relationships between *States Parties to the Statute*. In all other cases, in particular when requests for cooperation involve the question of personal immunities of officials of a State *not party* to the Statute, one has to fall back on the traditional legal regulation contained in international customary rules. Consequently, the Court may not make requests for cooperation entailing, for the requested State, a violation of international rules on personal immunities to the detriment of a State not party to the Statute. This of course applies unless the Court obtains a waiver of immunities from the State not party.

One important point should, however, be stressed: the status of international law is uncertain as regards the question of whether or not customary and treaty rules on personal immunities are applicable in case of international crimes. As international

[57] In light of the foregoing observations, one may easily explain, and consider appropriate and indeed legally necessary, the fact that some States that have ratified the ICC Statute have modified their constitutions in order to avoid, *inter alia*, a conflict between Art. 27 and constitutional rules on immunities.

practice is scant or lacking, it is difficult to assert that, as in the case of functional immunities, also with regard to personal immunities international law provides a derogation concerning international crimes (i.e. those immunities would not shield a person accused of such crimes). In the foregoing paragraphs an effort has been made to propound a solution that may prove balanced and in keeping with the need to reconcile the requirements of justice and the particular needs protected by the traditional rules on personal immunities. The Statute does not enable us to verify whether this solution is appropriate and correct, nor does it provide any clue or shed light on this difficult matter. In other words, the Statute leaves this delicate issue unsettled. However, this is a matter that may give rise to problems in the near future, as soon as requests for cooperation are made involving the question of whether individuals acting as officials of a State not party to the Statute are entitled to personal immunities, and may therefore escape the Court's jurisdiction.

Secondly, Article 27 has a considerable impact on the immunities that national legal systems confer on individuals discharging certain State functions. Article 27 obliges States to modify their national legislation, even when it has constitutional rank, with a view to abolishing those immunities whenever the perpetration of international crimes under Article 5 of the Statute is at stake. This impact is of fundamental importance. It brings to the fore the intent of the draftsmen to ensure that 'the most serious crimes of concern to the international community as a whole must not be unpunished and that their effective prosecution must be ensured by taking measures at national level'. For the first time an international treaty obliges States to comply with and implement the principle that no individual, not even those who occupy the highest position in the State hierarchy, may eschew the criminal jurisdiction of national courts, if accused of one of the crimes provided for in Article 5 of the Statute.

Select Bibliography

CUSTOMARY INTERNATIONAL LAW

Immunities under International Law: H. F. van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ* (1964) 1193; D. E. Ovaska, 'Internal Deed of Foreign Official Actionable in United States Court', 5 *Suffolk Transnational Law Journal* (1981) 297; C. J. Lewis, *State and Diplomatic Immunity* (3rd edn., 1990); F. Orrego Vicuna, 'Diplomatic and Consular Immunities and Consular Rights', 40 *ICLQ* (1991) 34; C. A. Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', 41 *ICLQ* (1992) 848; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', 247 *Rec. des Cours* (1994) 9; P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali*

(1996); H. Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', 51 *ICLQ* (2002) 119.

International Immunities and International Crimes: A. Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian Journal of Public and International Law* (1993) 195; J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997); P. De Sena, 'Immunity of State Organs and Defence of Superior Orders as an Obstacle to the Domestic Enforcement of International Human Rights', in B. Conforti *et al.* (eds.), *Enforcing International Human Rights in Domestic Courts* (1997) 367; A. Bianchi, 'Immunity versus Human Rights: The *Pinochet* case', 10 *EJIL* (1999) 237; M. Cosnard, 'Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', 103 *RGDIP* (1999) 308; P.-M. Dupuy, 'Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercise des secondes', 103 *RGDIP* (1999) 189 ; N. S. Rodley, 'Breaking the Cycle of Impunity for Gross Violations of Human Rights', 69 *Nordic Journal of International Law* (2000) 11; R. Wedgwood, 'International Criminal Law and Augusto Pinochet', 40 *Virginia Journal of International Law* (2000) 829; D. Turns, 'Pinochet's Fallout: Jurisdiction and Immunity for Criminal Violations of International Law', 20 *Legal Studies* (2000) 566; K. Ambos, 'Aufhebung der Immunität von Pinochet als Senator auf Lebenszeit durch das Berufungsgericht von Santiago de Chile vom Obersten Gerichtshof bestätigt', 28 *Europäische Grundrechte-Zeitschrift* (2001) 41; S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', 12 *EJIL* (2001) 595; A. Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on *The Congo* v. *Belgium* Case', in 13 *EJIL* (2002), forthcoming.

ROME STATUTE

International Immunities under the Rome Statute: O. Triffterer, 'Article 27', in O. Triffterer (ed.), *Commentary on the Rome Statute* (1999) 501; K. Prost and A. Sclunck, 'Article 98', in O. Triffterer (ed.), *Commentary on the Rome Statute* (1999) 1131; S. Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute', *Criminal Law Forum* (2001), forthcoming.

The Impact of the Rome Statute on Immunities under National Law: B. Genevois, 'Le Conseil constitutionnel et le droit pénal international: A propos de la décision n° 98-408 DC du 22 janvier 1999', *Revue française de droit administratif* (1999) 285; P. Gaeta, 'L'incidenza dello Statuto di Roma sulle norme cotituzionali italiane in materia di immunità', *Diritto pubblico comparato ed europeo* (2000) 594; C. Kress and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders*, Vol. I (2000).

1904

International Law Commission

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII **1905**

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Abstract: (back)
* Text adopted by the Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II.

International Law Commission

Draft Code of Crimes Against the Peace and Security of Mankind, 1996 *

PART I
GENERAL PROVISIONS

Article 1
Scope and application of the present Code (commentary)

1. The present Code applies to the crimes against the peace and security of mankind set out in Part II.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Article 2
Individual responsibility (commentary)

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

(a) intentionally commits such a crime;

(b) orders the commission of such a crime which in fact occurs or is attempted;

(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(e) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Article 3
Punishment (commentary)

An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Article 4
Responsibility of States (commentary)

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5

Order of a Government or a superior (commentary)

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Article 6

Responsibility of the superior (commentary)

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 7

Official position and responsibility (commentary)

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Article 8

Establishment of jurisdiction (commentary)

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Article 9

Obligation to extradite or prosecute (commentary)

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Article 10

Extradition of alleged offenders (commentary)

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Article 11

Judicial guarantees (commentary)

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Article 12

Non bis in idem (commentary)

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) by an international criminal court, if:

(i) the act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) by a national court of another State, if:

(i) the act which was the subject of the previous judgement took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 13
Non-retroactivity (commentary)

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 14
Defences (commentary)

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 15
Extenuating circumstances (commentary)

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART II
CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16
Crime of aggression (commentary)

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Article 17
Crime of genocide (commentary)

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Article 18
Crimes against humanity (commentary)

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) murder;

(b) extermination;

(c) torture;

(d) enslavement;

(e) persecution on political, racial, religious or ethnic grounds;

(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) arbitrary deportation or forcible transfer of population;

(h) arbitrary imprisonment;

(i) forced disappearance of persons;

(j) rape, enforced prostitution and other forms of sexual abuse;

(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Article 19

Crimes against United Nations and associated personnel (commentary)

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 20

War crimes (commentary)

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) any of the following acts committed in violation of international humanitarian law:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried

out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement of protected persons;

(viii) taking of hostages;

(b) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(c) any of the following acts committed wilfully in violation of international humanitarian law:

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(d) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) any of the following acts committed in violation of the laws or customs of war:

(i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;

(iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) plunder of public or private property;

(f) any of the following acts committed in violation of international humanitarian law applicable in armed

conflict not of an international character:

(i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(ii) collective punishments;

(iii) taking of hostages;

(iv) acts of terrorism;

(v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) pillage;

(vii) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

*** Abstract:** (back)
Text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report (A/48/10), which also contains commentaries on the draft articles, will be published in *Yearbook of the International Law Commission, 1996*, vol. II(2).



International Law Commission

International Law Commission Report, 1996

Chapter II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND[1]

Article 7 - Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Commentary

(1) As indicated in the commentary to article 5, crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

(2) The official position of an individual, including a head of State, was excluded as a defence to a crime under international law or as a mitigating factor in determining the commensurate punishment for such a crime in the Nürnberg Charter which in article 7 states:
The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment. 51/

[1] Find at http://www.un.org/law/ilc/texts/dcodefra.htm

(3) In accordance with this provision, the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity:
It was submitted that ... where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this submission] must be rejected. ... The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. ... [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law. 52/

(4) The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Nürnberg Charter, including the Tokyo Tribunal Charter (article 6), 53/ Control Council Law No. 10 (article 4) and, more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7) and Rwanda (article 6). The absence of such a defence was also recognized by the Commission in the Nürnberg Principles 54/ (Principle III) and the 1954 draft Code 55/ (article 3).

(5) Article 7 reaffirms the principle of individual criminal responsibility under which an official is held accountable for a crime against the peace and security of mankind notwithstanding his official position at the time of its commission. The text of this article is similar to the relevant provisions contained in the Nürnberg Charter and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The phrase "even if he acted as head of State or Government" reaffirms the application of the principle contained in the present article to the individuals who occupy the highest official positions and therefore have the greatest powers of decision.

(6) Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its judgement, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its judgement, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. 56/ It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.

(7) The Commission decided that it would be inappropriate to consider official position as a mitigating factor in the light of the particular responsibility of an individual in such a position for the crimes covered by the Code. The exclusion of official position as a mitigating factor is therefore expressly reaffirmed in the present article. The official position of an individual has also been excluded as a mitigating factor in determining the commensurate punishment for crimes under international law in almost all of the relevant legal instruments, including the Nürnberg Charter, Control Council Law No. 10 and the Statutes of the International Criminal Tribunals. The Tokyo Tribunal Charter was the only legal instrument which indicated the possibility of considering official position as a mitigating factor when justice so required.

NOTES

51. Nazi Conspiracy and Aggression: Opinion and Judgement [hereinafter Nürnberg Judgement] (U.S. Gov. Printing Office 1947), at p. 52.

52. Nürnberg Charter, article 6.

53. ibid

54. Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.

55. United Nations, Treaty Series, vol. 78, p. 277.

56. Ibid., vol. 75, p. 31.

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session de Vancouver - 2001

Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international

(Treizième Commission, Rapporteur : M. Joe Verhoeven)

(Le texte français fait foi. Le texte anglais est une traduction.)

L'Institut de Droit international,

Rappelant le projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains et chefs d'Etats étrangers, qu'il a adopté lors de sa 11ème Session (Hambourg, 1891), ainsi que les Résolutions sur "L'immunité de juridiction et d'exécution forcée des Etats étrangers" et sur "Les aspects récents de l'immunité de juridiction et d'exécution des Etats" qu'il a adoptées respectivement lors de ses 46ème (Aix-en-Provence, 1954) et 65ème (Bâle, 1991) Sessions ;

Désireux de dissiper les incertitudes qui entourent, dans la pratique contemporaine, l'inviolabilité et l'immunité de juridiction ou d'exécution dont le chef d'Etat ou de gouvernement est en droit de se prévaloir devant les autorités d'un autre Etat ;

Affirmant qu'un traitement particulier doit être accordé au chef d'Etat ou de gouvernement, en tant que représentant de cet Etat, non pas dans son intérêt personnel, mais parce qu'il lui est nécessaire pour exercer ses fonctions et assumer ses responsabilités de manière indépendante et efficace, dans l'intérêt bien compris tant de l'Etat concerné que de la communauté internationale dans son ensemble ;

Rappelant que les immunités reconnues à un chef d'Etat ou de gouvernement n'impliquent aucunement qu'il soit en droit de ne pas respecter les règles en vigueur sur le territoire du for ;

Soulignant que ces immunités ne devraient pas lui permettre de s'approprier frauduleusement des avoirs de l'Etat qu'il représente et que tous les Etats doivent se prêter mutuellement assistance en vue de la restitution de ces avoirs à l'Etat auquel ils appartiennent, conformément aux principes rappelés par l'Institut dans la Résolution qu'il a adoptée, lors de sa Session d'Oslo (1977), sur "Les demandes fondées par une autorité étrangère ou par un organisme public étranger sur les dispositions de son droit public" ;

Adopte la Résolution suivante :

1ère partie : Le chef d'Etat en exercice

Article 1

La personne du chef d'Etat est inviolable sur le territoire d'un Etat étranger. Elle ne peut y être soumise à aucune forme d'arrestation ou de détention. Les autorités de celui-ci traitent ce chef d'Etat avec le respect qui lui est dû et prennent toutes mesures raisonnables pour empêcher qu'il soit porté atteinte à sa personne, à sa liberté ou à sa dignité.

Article 2

En matière pénale, le chef d'Etat bénéficie de l'immunité de juridiction devant le tribunal d'un Etat étranger pour toute infraction qu'il aurait pu commettre, quelle qu'en soit la gravité.

Article 3

En matière civile ou administrative, le chef d'Etat ne jouit d'aucune immunité de juridiction devant le tribunal d'un Etat étranger, sauf lorsqu'il est assigné en raison d'actes qu'il a accomplis dans l'exercice de ses fonctions officielles ; dans ce dernier cas, il ne jouit pas de l'immunité si la demande est reconventionnelle. Toutefois, aucun acte lié à l'exercice de la fonction juridictionnelle ne peut être accompli à son endroit lorsqu'il se trouve sur le territoire de cet Etat dans l'exercice de ses fonctions officielles.

Article 4

1. Les avoirs personnels du chef d'Etat qui sont localisés dans le territoire d'un autre Etat ne peuvent y être saisis ni y faire l'objet d'une quelconque mesure d'exécution forcée, sauf pour donner effet à un jugement prononcé contre lui et passé en force de chose jugée. Toutefois, ces avoirs ne peuvent faire l'objet d'aucune saisie ou mesure d'exécution lorsque ce chef d'Etat se trouve sur le territoire du for dans l'exercice de ses fonctions officielles.

2. Lorsque la légalité de l'appropriation d'un bien ou de tout autre avoir détenu par ou pour le compte d'un chef d'Etat prête sérieusement à doutes, les dispositions qui précèdent n'empêchent pas les autorités de l'Etat dans le territoire duquel ces biens ou avoirs sont localisés de prendre à leur égard les mesures provisoires jugées indispensables pour en conserver le contrôle tant que la légalité de leur appropriation n'est pas établie à suffisance de droit.

3. Conformément à leur devoir de coopération, les Etats devraient prendre toute mesure utile pour lutter contre les pratiques illicites, notamment en identifiant l'origine des dépôts et des mouvements de fonds et en fournissant toute information à leur propos.

Article 5

Les membres de la famille ou de la suite d'un chef d'Etat ne bénéficient, sauf à titre de courtoisie, d'aucune immunité devant les autorités d'un autre Etat, ce qui ne préjuge pas des immunités qui peuvent leur être reconnues à un autre titre, notamment celui de membre d'une mission spéciale, lorsqu'ils accompagnent ce chef d'Etat dans un déplacement à l'étranger.

Article 6

Les autorités de l'Etat doivent accorder au chef d'Etat étranger, dès l'instant où sa qualité leur est connue, l'inviolabilité, l'immunité de juridiction et l'immunité d'exécution auxquelles il a droit.

Article 7

1. Le chef d'Etat ne jouit plus de l'inviolabilité, de l'immunité de juridiction ou de l'immunité d'exécution qui lui sont accordées en vertu du droit international lorsque son Etat y a renoncé. Cette renonciation peut être explicite ou implicite, pourvu qu'elle soit certaine.

Il appartient au droit national de l'Etat intéressé de déterminer l'organe compétent pour décider de cette renonciation.

2. La renonciation devrait être décidée lorsque le chef d'Etat est suspecté d'avoir commis des infractions particulièrement graves ou lorsque l'exercice de ses fonctions ne paraît pas compromis par les décisions que les autorités du for seraient appelées à prendre.

Article 8

1. Les Etats peuvent par accord apporter à l'inviolabilité, à l'immunité de juridiction et à l'immunité d'exécution de leurs chefs d'Etat les dérogations qu'ils jugent opportunes.

2. Si la dérogation n'est pas explicite, il convient de présumer qu'il n'est pas dérogé à l'inviolabilité et aux immunités visées au paragraphe précédent ; l'existence et l'étendue de cette dérogation doivent être établies sans ambiguïté par toutes voies de droit.

Article 9

Rien dans la présente Résolution n'interdit à un Etat d'accorder unilatéralement, dans le respect du droit international, des immunités plus étendues au chef d'Etat étranger.

Article 10

Rien dans la présente Résolution ne préjuge du droit ou de l'obligation d'un Etat d'accorder ou de refuser l'accès ou le séjour sur son territoire à un chef d'Etat étranger.

Article 11

1. Les dispositions de la présente Résolution ne font pas obstacle :

a. aux obligations qui découlent de la Charte des Nations Unies ;

b. à celles qui résultent des statuts des tribunaux pénaux internationaux ainsi que de celui, pour les Etats qui y sont parties, de la Cour pénale internationale.

2. Les dispositions de la présente Résolution ne préjugent pas :

a. des règles déterminant la compétence du tribunal devant lequel l'immunité est soulevée ;

b. des règles relatives à la détermination des crimes de droit international ;

c. des obligations de coopération qui pèsent en ces matières sur les Etats.

3. Rien dans la présente Résolution n'implique ni ne laisse entendre qu'un chef d'Etat jouisse d'une immunité devant un tribunal international à compétence universelle ou régionale.

Article 12

La présente Résolution ne préjuge pas de l'effet de la reconnaissance ou de la non-reconnaissance d'un Etat ou d'un gouvernement étranger sur l'application de ses dispositions.

2ème Partie : L'ancien chef d'Etat

Article 13

1. Le chef d'Etat qui n'est plus en fonction ne bénéficie d'aucune inviolabilité sur le territoire d'un Etat étranger.

2. Il n'y bénéficie d'aucune immunité de juridiction tant en matière pénale qu'en matière civile ou administrative, sauf lorsqu'il y est assigné ou poursuivi en raison d'actes qu'il a accomplis durant ses fonctions et qui participaient de leur exercice. Il peut toutefois y être poursuivi et jugé lorsque les actes qui lui sont personnellement reprochés sont constitutifs d'un crime de droit international, lorsqu'ils ont été accomplis principalement pour satisfaire un intérêt personnel ou lorsqu'ils sont constitutifs de l'appropriation frauduleuse des avoirs ou des ressources de l'Etat.

3. Il n'y bénéficie d'aucune immunité d'exécution.

Article 14

L'article 4, paragraphes 2 et 3, et les articles 5 à 12 de la présente Résolution s'appliquent, *mutatis mutandis,* aux anciens chefs d'Etat dans la mesure ou ceux-ci bénéficient de l'immunité d'après l'article 13.

3ème Partie : Le chef de gouvernement

Article 15

1. Le chef de gouvernement d'un Etat étranger bénéficie de l'inviolabilité et de l'immunité de juridiction qui sont reconnues, dans la présente Résolution, au chef d'Etat. Cette disposition ne préjuge pas de l'immunité d'exécution qui pourrait lui être reconnue.

2. Le paragraphe premier ne préjuge pas des immunités qui peuvent être reconnues aux autres membres du gouvernement en raison de leurs fonctions officielles.

Article 16

Les dispositions des articles 13 et 14 sont applicables à l'ancien chef de gouvernement.

*

(26 août 2001)



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10/28/2003 07:08 PM

To: "Lotta Teale (E-mail)" <teale@un.org>
cc:
Subject: Judgement on the Request of the Republic of Croatia for Review of the Decision

doc 6

IN THE APPEALS CHAMBER

Before:	**Judge Antonio Cassese, Presiding**
	Judge Adolphus Karibi-Whyte
	Judge Haopei Li
	Judge Ninian Stephen
	Judge Lal Chand Vohrah
Registrar:	**Mrs. Dorothee de Sampayo Garrido-Nijgh**
Judgement of:	**29 October 1997**

PROSECUTOR

v.

TIHOMIR BLASKIC

JUDGEMENT ON THE REQUEST OF THE REPUBLIC OF CROATIA FOR REVIEW OF THE DECISION OF TRIAL CHAMBER II OF 18 JULY 1997

The Office of the Prosecutor
Ms. Louise Arbour, Prosecutor — **Mr. Mark Harmon**

The Republic of Croatia
Ambassador Ivan Simonovic — **Mr. Ivo Josipovic**
Mr. David B. Rivkin Jr. — **Mr. Lee A. Casey**

Defence Counsel for Tihomir Blaskic
Mr. Russell Hayman — **Mr. Anto Nobilo**

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III **DISPOSITION**

I. INTRODUCTION

A. Background

1. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("International Tribunal") is seized of the question of the validity of a *subpoena duces tecum* issued by Judge Gabrielle Kirk McDonald to the Republic of Croatia ("Croatia") and its Defence Minister, Mr. Gojko Susak, on 15 January 1997. This matter arises by way of a challenge by Croatia to the Decision of Trial Chamber II on 18 July 1997 ("Subpoena Decision")[1] upholding the issuance of the said *subpoena duces tecum* by Judge McDonald, and ordering compliance therewith by Croatia within 30 days. Croatia has challenged the legal power and authority of the International Tribunal to issue this compulsory order to States and high government officials. The legal issues that have been argued before this Chamber address the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* in general and, in particular, to a State; the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* to high government officials of a State and other individuals; the appropriate remedies to be taken if there is non-compliance with such *subpoenae duces tecum* ; and other issues including the question of the national security interests of sovereign States.

B. Procedural History

2. Pursuant to *ex parte* requests by the Office of the Prosecutor ("Prosecution") on 10 January 1997, Judge McDonald issued on 15 January 1997 *subpoenae duces tecum* to Croatia and its Defence Minister, Mr. Susak[2], and also to Bosnia and Herzegovina and the Custodian of the

Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herceg Bosna[3]. The requests for the *subpoenae duces tecum* were submitted for consideration to Judge McDonald, who issued them in her capacity as the Judge confirming the Indictment against Tihomir Blaskic[4].

3. In a letter dated 10 February 1997[5], Croatia declared "its readiness for full cooperation under the terms applicable to all states", but challenged the legal authority of the International Tribunal to issue a *subpoena duces tecum* to a sovereign State and objected to the naming of a high government official in a request for assistance pursuant to Article 29 of the Statute of the International Tribunal ("Statute").

4. On 14 February 1997, a hearing was held at which the addressees of the *subpoenae duces tecum* were requested to appear to answer questions relevant to the production of the subpoenaed documents. A representative of the Government of Bosnia and Herzegovina attended and explained the steps taken thus far in compliance with the *subpoena duces tecum* . Croatia did not attend, and Judge McDonald issued an Order of a Judge to ensure compliance with a *subpoena duces tecum* [6] requesting Croatia and Mr. Susak to produce the documents or, in the event of non-compliance, requiring a representative of the Ministry of Defence personally to appear before her on 19 February 1997 to show cause of their non-compliance.

5. Representatives from both Croatia and Bosnia and Herzegovina attended the hearing on 19 February 1997. On 20 February 1997, Judge McDonald suspended the *subpoena duces tecum* issued to Croatia and to Mr. Susak[7] in order to allow the parties to resolve the matter informally and in consideration of Croatia's challenge to the authority of the International Tribunal to issue such subpoenas. Croatia thereafter provided to the Prosecution certain requested documents and informed the International Tribunal that it was in the process of locating other documents.

Hearings dealing with the *subpoena duces tecum* addressed to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive were held on 24 February 1997, 28 February 1997 and 7 March 1997.

6. On 28 February 1997, counsel for the accused filed a Motion for issuance of a *subpoena duces tecum* to Bosnia and Herzegovina compelling the production of exculpatory documents, for which an Order compelling the production of documents was subsequently made[8].

7. On 7 March 1997, Judge McDonald issued an Order directing all the parties to file, by 1 April 1997, briefs addressing issues relating to the power of a Judge or Trial Chamber of the International Tribunal to issue *subpoenae duces tecum* to States and high government officials, and the appropriate remedies for non-compliance[9]. A hearing was set for 16 April 1997.

8. Considering the importance of the issues, on 14 March 1997, Judge McDonald ordered that the matter be submitted to Trial Chamber II to be heard by the full Chamber, consisting of herself as Presiding Judge, Judge Elizabeth Odio Benito and Judge Saad Saood Jan[10]. She also invited requests for leave to submit *amicus curiae* briefs on the above-mentioned issues pursuant to Rule 74 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

9. The Prosecution submitted, on 20 March 1997, a Request of the Prosecutor in respect of issues to be briefed for the hearing of 16 April 1997 relating to *subpoenae duces tecum* by which it sought to narrow the scope of the issues to be briefed and, also on 21 March 1997, a Request for reinstatement of *subpoena duces tecum* . Both were opposed by Croatia. On 27 March 1997, the Trial Chamber denied the two requests of the Prosecution[11].

10. Bosnia and Herzegovina submitted its Brief on the Issues on 25 March 1997. On 1 April 1997, an Order inviting the defence to file a brief and participate in the hearing to discuss issues regarding *subpoenae duces tecum* was issued[12]. The Prosecution, the Minister of Defence of Bosnia and Herzegovina, and Croatia submitted briefs on 1 April 1997 regarding the *subpoenae duces tecum* . Croatia responded to the Prosecution's Brief on 11 April 1997. Also submitted prior to the 16 April 1997 hearing, with leave, were *amicus curiae* briefs from:

- Bartram S. Brown;
- Luigi Condorelli;
- The Croatian Association of Criminal Science and Practice;
- Marie-José Domestici-Met;
- Donald Donovan for the Lawyers Committee for Human Rights;
- Jochen A. Frowein, Georg Nolte, Karin Oellers-Frahm and Andreas Zimmermann, for the Max-Planck-Institute for Comparative Public Law and International Law;
- Annalisa Ciampi and Giorgio Gaja;
- Peter Malanczuk;
- Juristes sans frontières and Alain Pellet;
- Juan-Antonio Carrillo Salcedo;
- Bruno Simma;
- Thomas Warrick, Rochelle Stern and J. Stefan Lupp; and
- Ruth Wedgwood.

11. In a letter dated 15 April 1997, Mr. Jelinic, on behalf of Croatia, requested, *inter alia,* that Judge McDonald recuse herself from participating in the hearing set for 16 April 1997 as she was "the Judge who issued the order that is here at issue". On 16 April 1997, the Bureau of the International Tribunal, consisting of President Cassese, Vice-President Karibi-Whyte, and the two Presiding Judges of the Trial Chambers, Judge Jorda and Judge McDonald, met to consider this request. After stating her position on the issue, Judge McDonald retired and the Bureau considered the request in her absence. The Bureau concluded that the impartiality of Judge McDonald was in no way affected by her earlier participation in the issuing of the subpoena and that she was therefore not precluded by Rule 15 (A) of the Rules from further participation[13].

12. The hearing before Trial Chamber II was held on 16 and 17 April 1997. The Prosecution, Croatia, Bosnia and Herzegovina, a representative of its Minister of Defence, Mr. Ante Jelavic, and counsel for the accused, as well as several of those who submitted *amicus curiae* briefs[14], presented oral arguments. On 8 May 1997, Croatia submitted, with leave of the Trial Chamber, a final Brief in opposition to *subpoena duces tecum* , to which the Prosecution responded on 28 May 1997 after having been granted an extension of time.

13. Trial Chamber II delivered the Subpoena Decision on 18 July 1997. The issuance of the *subpoena duces tecum* to Croatia and its Defence Minister by Judge McDonald on 15 January

1997 was upheld; the said *subpoena duces tecum* which had been suspended on 20 February 1997 was reinstated, and Croatia was ordered to comply with its terms within 30 days. It was determined that a Judge or Trial Chamber of the International Tribunal has the power and authority to issue orders such as *subpoena duces tecum* to States, high government officials and individuals. It held that while international law provides that it is for the State to determine how it will fulfil its international obligations, this does not mean it can enact national legislation imposing conditions on the fulfilment of such obligations, particularly with respect to State obligations under Chapter VII of the Charter of the United Nations. Security Council resolutions 827 and 1031 demonstrate the intention of the Security Council that States should give effect to and are bound to comply fully with orders of the International Tribunal. Their officials are likewise bound to comply with *subpoenae duces tecum* addressed to them in their official capacity. It was furthermore stressed that, whilst such officials are subject to the orders of the International Tribunal, States are also responsible for compliance and for requiring compliance with orders of the International Tribunal. National security considerations are not subject to absolute privilege and cannot be validly raised as an automatic bar to compliance with orders of the International Tribunal. A claim of national security having been raised, it falls within the competence of the Trial Chamber to determine the validity of this assertion by, for example, holding an *in camera* , *ex parte* hearing whereby it may examine such evidence. The Trial Chamber declined to consider the issue of remedies available for failure to comply with such orders as it was felt to be not ripe for consideration at that stage.

14. On 25 July 1997, pursuant to Rule 108 of the Rules, Croatia filed a Notice of appeal and request for stay of the Trial Chamber's Order of 18 July 1997. The Appeals Chamber was asked to review and set aside the Subpoena Decision, to quash the *subpoena duces tecum* issued by Judge McDonald to Croatia and its Minister of Defence on 15 January 1997 and to stay the Trial Chamber's Order of 18 July 1997, pending resolution of the appeal. The Appeals Chamber was also asked to instruct the Trial Chamber and Prosecution that no further compulsory orders under threat of sanction may be issued to States or their officials.

15. On 29 July 1997, the Appeals Chamber declared admissible Croatia's request for review of the Subpoena Decision under Rule 108 *bis* of the Rules[15]. It stayed the execution of the *subpoena duces tecum* issued by Judge McDonald to Croatia and its Minister of Defence on 15 January 1997 and the Order of Trial Chamber II to Croatia on 25 July 1997 pending resolution of the issues on appeal. The Appeals Chamber also, pursuant to Rule 74 of the Rules, invited interested *amici curiae* to submit briefs by 15 September 1997 addressing the following issues:

1. the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* ;
2. the power of a Judge or Trial Chamber of the International Tribunal to make a request or issue a *subpoena duces tecum* to high government officials of a State;
3. the appropriate remedies to be taken if there is non-compliance with a *subpoena duces tecum* or request issued by a Judge or Trial Chamber; and
4. any other issue concerned in this matter, such as the question of the national security interests of a sovereign State.

16. On 4 August 1997, the Prosecution filed a Motion to set aside the Decision of the Appeals Chamber of 29 July 1997. This was followed on 8 August 1997 by the filing by Croatia of its opposition to that motion. On 12 August 1997, the Appeals Chamber rejected the

Prosecution's motion to set aside its Decision of 29 July 1997, confirmed the suspension of the execution of the *subpoena duces tecum* and the compliance order of Trial Chamber II to Croatia, confirmed the scheduling order and set the hearing of the appeal for 22 September and 23 September 1997[16].

17. The Brief on appeal of the Republic of Croatia in opposition to *subpoena duces tecum* was filed on 18 August 1997, and was followed by the Prosecution's Brief in response on 8 September 1997. Croatia replied to the Prosecution's Brief on 15 September 1997. Pursuant to the invitation of the Appeals Chamber on 29 July 1997, the following submitted *amicus curiae* briefs:

- The People's Republic of China;
- The Government of the Kingdom of the Netherlands;
- The Governments of Canada and New Zealand;
- The Government of Norway;
- Ruth Wedgwood;
- Max Planck Institute for Foreign and International Criminal Law;
- Juristes sans frontières and Alain Pellet;
- Carol Elder Bruce; and
- Herwig Roggemann.

18. On 22 September 1997, the challenge of Croatia to the *subpoena duces tecum* issued by Judge McDonald and the Subpoena Decision was heard by the Appeals Chamber consisting of Judge Cassese (presiding), Judge Karibi-Whyte, Judge Li, Judge Stephen and Judge Vohrah. Oral submissions were made by Croatia, by the Prosecution, and by counsel for the accused and an oral statement was made by Ambassador Simonovic on behalf of Croatia.

19. After due consideration of the written briefs and oral arguments by the parties, and also having considered the submissions by *amici curiae* , the Appeals Chamber issues the following Judgement.

II. DISCUSSION

A. Preliminary Questions

1. The legal meaning of the term "subpoena"

20. The Appeals Chamber deems it appropriate to deal at the outset with two issues that are preliminary to the various questions with which it is seized. The first issue may be regarded by some as pertaining more to nomenclature than to substance, but in reality relates to both: should the term "subpoena" be understood to mean an injunction accompanied by a threat of penalty in case of non-compliance? Or should one rather take the view propounded at the hearings before the Trial Chamber by the Prosecutor, and upheld by the Trial Chamber, that the term subpoena should be understood to mean only a binding order, without "necessarily imply[ing] the assertion of a power to imprison or fine, as it may in a national context"[17]?

21. As just pointed out, the Trial Chamber held that the word "subpoena" must be given the neutral meaning of "binding order". However, it left open the question of whether or not a penalty could be imposed for non-compliance with such an order. The Trial Chamber noted that, under Rule 54 of the Rules, "it would be incorrect to infer that a penalty was envisaged,

just as it would be incorrect to infer that a penalty was excluded from consideration" (emphasis added)[18].

For a proper interpretation of the word "subpoena" used in Rule 54, the Appeals Chamber starts from the premise that (i) in common-law jurisdictions, where the word at issue is a term of art, it usually designates compulsory orders issued by courts, the non-compliance with which may be "sanctioned" as contempt of court, and (ii) in the French text of Rule 54, as correctly emphasised by the Trial Chamber, the equivalent of "subpoena", namely " *assignation* ", "does not necessarily imply any imposition of a penalty"[19]. Based on this premise, two interpretations seem possible. First, as suggested by one of the*amicus curiae* , one could argue that "the legal concepts incorporated in the rules are severed from their origin in one specific legal culture. In other words, the meaning of certain terms in the rules of the ICTY is not pre-determined by the interpretation of these terms in the legal culture from which they originate but must be ascertained independently in the context of the specific framework of the tasks and purposes of the ICTY"[20]. As a consequence, "it seems inconceivable that the use of the term *subpoena* in Rule 54 could include an authorization of Trial Chambers and/or Judges to impose penalties in case of unjustified non-compliance"[21]. A different interpretation has been suggested by another *amicus curiae* . According to this interpretation, in order to reconcile the two texts of Rule 54 and at the same time take account of the fact that States cannot be the subject of penalties or sanctions by an international court, the term "subpoena" in the English text should not be construed as always meaning a compulsory order not capable of being enforced by a penalty; rather, in light of the principle of effectiveness (*ut res magis valeat quam pereat*), that word should be given a narrow interpretation: it should only refer to compulsory orders, implying the possible imposition of a penalty, issued to individuals acting in their private capacity[22].

The Appeals Chamber upholds the latter interpretation. Rule 7 provides that in the event of discrepancy between the English and French texts of the Rules, "the version which is more consonant with the spirit of the Statute and the Rules shall prevail". Pursuant to this principle of construction, the Appeals Chamber has to take into account certain factors. Admittedly, Article 29, paragraph 2, of the Statute only mentions "orders" and "requests", without referring to "subpoenas". However, it would be contrary to the general principle of effectiveness (*principe de l'effet utile*), to make redundant the word "subpoena" in the English text of Rule 54 by giving it the neutral meaning of "binding order". Since, as shall be seen below (paragraphs 24 - 25 and 38), the International Tribunal is not empowered to issue binding orders under threat of penalty to States or to State officials, it is consonant with the spirit of the Statute and the Rules to place a narrow interpretation on the term of art at issue and construe it as referring only and exclusively to binding orders addressed by the International Tribunal, under threat of penalty, to individuals acting in their private capacity. The same holds true for the French term *"assignation"* , which must be taken exclusively to refer to orders directed to such individuals and involving a penalty for non-compliance.

2. Whether the question of legal remedies is "ripe for consideration"

22. The second preliminary issue is whether, in adjudicating the various questions under consideration, the Appeals Chamber should also pronounce upon the legal remedies available in case of non-compliance with binding orders or subpoenas of the International Tribunal. The Trial Chamber held that this issue "is not yet ripe for consideration"[23], although it then hinted in passing at a host of remedies and penalties[24]. The Trial Chamber thus applied the

so-called "ripeness doctrine" upheld by United States courts. Under this doctrine, a court should refrain from determining issues that are only hypothetical or speculative, or at any rate devoid of sufficient immediacy and reality as to warrant adjudication. It is well known that in the United States this doctrine is derived from the "case or controversy" clause of Article III of the United States Constitution and is intended to prevent courts from hearing complaints about agency action that has not yet injured the plaintiff[25]. The Appeals Chamber, with respect, determines that it is inappropriate to resort to this doctrine in these proceedings.

23. This conclusion rests on two grounds. First, whatever the merits of this doctrine, it appears to the Appeals Chamber to be inapposite to transpose it into international criminal proceedings. The Appeals Chamber holds that domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings.

24. Secondly, even if the Appeals Chamber were to accept the importation of that doctrine into international criminal proceedings, its application would not lead to the results suggested by the Trial Chamber. Counsel for Croatia has submitted that, if faced with a similar situation, United States courts would probably hold that there was an actual controversy fit for judicial review, or at least determine that a declaratory judgement could be requested by the party concerned[26]. The Appeals Chamber emphasises that Croatia challenged both the power of the International Tribunal to issue subpoenas to States and its power to adopt sanctions in case of non-compliance. This was the subject-matter of the dispute. Accordingly, in her Order of 14 March 1997, Judge McDonald enumerated four categories of issues to be addressed by *amici curiae;* one such category concerned the measures to be taken in case of failure to execute a *subpoena duces tecum* or a request issued by a Judge or a Trial Chamber of the International Tribunal. This issue was fully ventilated in the briefs of Croatia, the Prosecutor and the various *amici curiae,* and closely debated in the oral submissions before the Trial Chamber. The question was therefore the subject of arguments and disagreements; in particular, Croatia and the Prosecutor held opposing views. Furthermore, it is unpersuasive to contend that, since the Trial Chamber only passed on the classes and characteristics of orders that the International Tribunal is empowered to issue, the question of remedies was still hypothetical or speculative at that stage. Indeed, given that the Trial Chamber held that Croatia was bound to comply with the *subpoena duces tecum* , it was of direct relevance for Croatia to know what remedies or sanctions would be available to the International Tribunal, were the subpoena to be ignored.

B. Whether The International Tribunal Is Empowered To Issue Binding Orders To States

1. Can the International Tribunal issue subpoenas to States?

25. The Appeals Chamber holds the view that the term "subpoena" (in the sense of injunction accompanied by threat of penalty) cannot be applied or addressed to States. This finding rests on two grounds.

First of all, the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an

international judicial body, this is not a power that can be regarded as inherent in its functions [27]. Under current international law States can only be the subject of countermeasures taken by other States or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations.

Secondly, both the Trial Chamber[28] and the Prosecutor[29] have stressed that, with regard to States, the 'penalty' attached to a subpoena would not be penal in nature. Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.

With regard to States, the Appeals Chamber therefore holds that the term "subpoena" is not applicable and that only binding "orders" or "requests" can be addressed to them.

2. Can the International Tribunal issue binding orders to States?

26. Turning then to the power of the International Tribunal to issue binding orders to States, the Appeals Chamber notes that Croatia has challenged the existence of such a power, claiming that, under the Statute, the International Tribunal only possesses jurisdiction over individuals and that it lacks any jurisdiction over States[30]. This view is based on a manifest misconception. Clearly, under Article 1 of the Statute, the International Tribunal has criminal jurisdiction solely over natural "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since [1 January] 1991". The International Tribunal can prosecute and try those persons. This is its primary jurisdiction. However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal. The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal. This obligation is laid down in Article 29[31] and restated in paragraph 4 of Security Council resolution 827 (1993)[32]. Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies). Furthermore, the obligation set out - in the clearest of terms - in Article 29 is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States. The Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all Member States to comply with orders and requests of the International Tribunal. The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes* "[33]. By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29[34] (on the manner in which this legal interest can be exercised, *see* below, paragraph 36)

As for States which are not Members of the United Nations, in accordance with the general principle embodied in Article 35 of the Vienna Convention on the Law of Treaties[35], they may undertake to comply with the obligation laid down in Article 29 by expressly accepting the obligation in writing. This acceptance may be evidenced in various ways. Thus, for instance, in the case of Switzerland, the passing in 1995 of a law implementing the Statute of the International Tribunal clearly implies acceptance of Article 29[36].

27. The obligation under consideration concerns both action that States may take only and exclusively through their organs (this, for instance, happens in case of an order enjoining a State to produce documents in the possession of one of its officials) and also action that States may be requested to take with regard to individuals subject to their jurisdiction (this is the case when the International Tribunal orders that individuals be arrested, or be compelled under threat of a national penalty to surrender evidence, or be brought to The Hague to testify).

28. The Prosecutor has submitted[37] that Article 29 expressly grants the International Tribunal "ancillary jurisdiction over States". However, care must be taken when using the term "jurisdiction" for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the Statute. With regard to States affected by Article 29, the International Tribunal does not, of course, exercise the same judicial functions; it only possesses the power to issue binding orders or requests. To avoid any confusion in terminology that would also result in a conceptual confusion, when considering Article 29 it is probably more accurate simply to speak of the International Tribunal's ancillary (or incidental) mandatory powers *vis-à-vis* States.

29. It should again be emphasised that the plain wording of Article 29 makes it clear that the obligation it creates is incumbent upon all Member States, irrespective of whether or not they are States of the former Yugoslavia. The Appeals Chamber therefore fails to see the merit of the contention made by one of the *amici curiae* , whereby the obligation under discussion would be incumbent solely upon the former belligerents, i.e., States or Entities of ex-Yugoslavia[38]. This view seems to confuse the obligations stemming from the Dayton and Paris Accords of 21 November and 14 December 1995, which apply only to the States or Entities of the former Yugoslavia, with the obligation enshrined in Article 29, which has a much broader scope. It is evident that States other than those involved in the armed conflict may have in their possession evidence relevant to crimes committed in the former Yugoslavia, or they may have instituted proceedings against persons accused of crimes in the former Yugoslavia. Similarly, suspects, indictees or witnesses may live on their territory or evidentiary material may be located there. The cooperation of these States with the International Tribunal is therefore no less imperative than that of the States or Entities of the former Yugoslavia.

Nor does the Appeals Chamber see any merit in another possible contention: that since the International Tribunal is essentially intended to exercise functions that the national courts of the successor States or Entities of the former Yugoslavia have failed or are failing to discharge, it is essentially with regard to those States and Entities that the International

Tribunal may exercise its primacy; hence, it is with respect only to them that the International Tribunal may demand the observance of Article 29, and consequently, issue compelling orders. The International Tribunal is not intended to replace the courts of any State; under Article 9 of the Statute it has concurrent jurisdiction with national courts. National courts of the States of the former Yugoslavia, like the courts of any State, are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law[39]. It is with regard to national courts generally that the International Tribunal may exercise its primacy under Article 9, paragraph 2, or, if those courts fail to fulfil that customary obligation, may intervene and adjudicate. The fact that the crimes falling within its primary jurisdiction were committed in the former Yugoslavia does not in any way confine the identity of the States subject to Article 29; all States must cooperate with the International Tribunal.

30. While it does not accept the foregoing argument, the Appeals Chamber does see some merit in the distinction drawn by the Prosecutor in her Brief[40] between "States located on the territory of the former Yugoslavia" and "third States which were not directly involved in the conflict and whose role, then as now, is that of concerned bystanders". Unlike the aforementioned *amicus curiae,* the Prosecutor does not draw any legal consequence from this distinction. According to her, the distinction may only have practical value in that "[t]he mandatory compliance powers expressly conferred by Article 29(2) of the Statute will rarely, if ever, need to be invoked with respect to such third States"[41]. Whether these mandatory powers will need to be invoked with regard to third States is, of course, a matter of speculation. The Appeals Chamber accepts however the practical difference between the two categories of States: those of the former Yugoslavia are more likely to be required to cooperate in the ways envisaged in Article 29. As the former belligerent parties, they are more likely to hold important evidence needed by the International Tribunal.

31. Having clarified the scope and purport of Article 29, the Appeals Chamber feels it necessary to add that it also shares the Prosecutor's contention that a distinction should be made between two modes of interaction with the International Tribunal: the cooperative and the mandatory compliance[42]. The Appeals Chamber endorses the Prosecution's contention that:

> [A]s a matter of policy and in order to foster good relations with States, . . . cooperative processes should wherever possible be used, . . . they should be used first, and . . . resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary.[43]

In the final analysis, the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States. It is therefore to be regarded as sound policy for the Prosecutor, as well as defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29.

3. The possible content of binding orders

32. The Appeals Chamber shall now consider whether binding orders for the production of documents addressed to States can be broad in scope or whether they must instead be specific.

Croatia has submitted that the Trial Chamber ordered the production of "unspecified documents, identified only by category, and of no proven relevance", thereby substantially adopting "the highly controversial U.S.-style discovery process"[44]. In the Subpoena Decision the Trial Chamber averred that it is for the appropriate Judge or Trial Chamber "to make a preliminary assessment of whether the requested items appear relevant and admissible and are identified with sufficient specificity"[45]. The Appeals Chamber upholds this view. Any request for an order for production of documents issued under Article 29, paragraph 2, of the Statute, whether before or after the commencement of a trial, must:

> (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number. The Appeals Chamber agrees with the submission of counsel for the accused[46] that, where the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefor, and should still be required to identify the specific documents in question in some appropriate manner. The Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89 (B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars;
>
> (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests;
>
> (iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and
>
> (iv) give the requested State sufficient time for compliance; this of course would not authorise any unwarranted delays by that State. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State.

4. Legal remedies available in case of non-compliance by a State

33. What legal remedies are available to the International Tribunal in case of non-compliance by a State with a binding order for the production of documents or, indeed, any binding order?

As stated above, the International Tribunal is not vested with any enforcement or sanctionary

power *vis-à-vis* States. It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council.

The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded. The International Tribunal's power to report to the Security Council is derived from the relationship between the two institutions. The Security Council established the International Tribunal pursuant to Chapter VII of the United Nations Charter for the purpose of the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. A logical corollary of this is that any time a State fails to fulfil its obligation under Article 29, thereby preventing the International Tribunal from discharging the mission entrusted to it by the Security Council, the International Tribunal is entitled to report this non-observance to the Security Council.

34. The aforementioned powers have been incorporated by the International Tribunal into its Rules. According to Rule 7 *bis* :

> (A) In addition to cases to which Rule 11 [Non-compliance with a Request for Deferral] Rule 13 [Non Bis in Idem], Rule 59 [Failure to Execute a Warrant or Transfer Order] or Rule 61 [Procedure in Case of Failure to Execute a Warrant], applies, where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council.
>
> (B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8 [Request for Information], Rule 39 [Conduct of Investigations] or Rule 40 [Provisional Measures], the President shall notify the Security Council thereof.

In the light of the above, the adoption of Rule 7 *bis* is clearly to be regarded as falling within the authority of the International Tribunal. This conclusion is also supported by the fact that so far, either at the request of a Trial Chamber or *proprio motu* , on five different occasions the President of the International Tribunal has reported to the Security Council a failure by a State or an Entity to comply with Article 29[47]. The Security Council, far from objecting to this procedure, has normally followed it up with a statement made, on behalf of the whole body, by the President of the Security Council and addressed to the recalcitrant State or Entity[48].

35. It is appropriate at this juncture to illustrate the power of the International Tribunal to make such a judicial finding. When faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber or the President must be satisfied that the State has clearly failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a*

fortiori from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal[49].

36. Furthermore, the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding.

As already mentioned, the International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter. Furthermore, as the Appeals Chamber has stated above (paragraph 26), every Member State of the United Nations has a legal interest in seeking compliance by any other Member State with the International Tribunal's orders and requests issued pursuant to Article 29. Faced with the situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each Member State of the United Nations may act upon the legal interest referred to; consequently it may request the State to terminate its breach of Article 29. In addition to this possible unilateral action, a collective response through other intergovernmental organizations may be envisaged. The fundamental principles of the United Nations Charter and the spirit of the Statute of the International Tribunal aim to limit, as far as possible, the risks of arbitrariness and conflict. They therefore give pride of place to collective or joint action to be taken through an intergovernmental organization. It is appropriate to emphasise that this collective action:

> (i) may only be taken after a judicial finding has been made by the International Tribunal; and
>
> (ii) may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions.

In addition, collective action would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace.

37. It should be added that, apart from the cases provided for in Rule 7 *bis* (B), the President of the International Tribunal simply has the role of *nuncius* , that is to say, he or she shall simply transmit to the Security Council the judicial finding of the relevant Judge or Chamber.

C. Whether The International Tribunal Is Empowered To Issue Binding Orders To State Officials

1. Can the International Tribunal subpoena State officials?

38. The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries[50], restated many times since. More recently, France adopted a position based on that rule in the *Rainbow Warrior* case[51]. The rule was also clearly set out by the Supreme Court of Israel in the *Eichmann* case[52].

2. Can the International Tribunal direct binding orders to State officials?

39. The Appeals Chamber will now consider the distinct but connected question of whether State officials may be the proper addressees of binding orders issued by the International Tribunal.

Croatia has submitted that the International Tribunal cannot issue binding orders to State organs acting in their official capacity. It argues that such a power, if there is one, would be in conflict with well-established principles of international law, in particular the principle, restated in Article 5 of the Draft Articles on State Responsibility adopted by the International Law Commission, whereby the conduct of any State organ must be considered as an act of the State concerned, with the consequence that any internationally wrongful act of a State official entails the international responsibility of the State as such and not that of the official[53]. The Prosecutor takes the opposite view. According to her, the power of the International Tribunal to address compulsory orders to State officials is based on substantially two grounds: first of all Article 7, paragraphs 2 and 4, and Article 18, paragraph 2, of the Statute[54]. It is the Prosecutor's contention that these provisions show that: "State officials acting in their official capacity may be bound by decisions, determinations and orders of the Tribunal"[55]. In particular, Article 18, paragraph 2, by providing that, "the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned", envisages that State officials may be directly addressed by the International Tribunal[56]. The other argument put forward by the Prosecutor is substantially based on a syllogism. The major premise is that the International Tribunal, under Article 29, must be endowed with the power to issue compelling orders to States. By the same token, it is also entitled to issue such orders to individuals, because an international criminal court exhibiting the attributes of the International Tribunal "cannot possibly lack the power to direct its orders to individuals. Otherwise its powers would be wholly inferior to those of the national criminal courts over whom it has primacy"[57]. The minor premise of the syllogism is that, of course, State officials are individuals, although they act in their official capacity. The conclusion of the syllogism is that the International Tribunal must perforce be endowed with the power to address its orders to State officials[58].

40. The Appeals Chamber wishes to emphasise at the outset that the Prosecutor's reasoning, adopted by the Trial Chamber in its Subpoena Decision[59], is clearly based on what could be called "the domestic analogy". It is well known that in many national legal systems, where courts are part of the State apparatus and indeed constitute the judicial branch of the State

apparatus, such courts are entitled to issue orders to other (say administrative, political, or even military) organs, including senior State officials and the Prime Minister or the Head of State. These organs, subject to a number of well-specified exceptions, can be summoned to give evidence, can be compelled to produce documents, can be requested to appear in court, etc. This is taken for granted in modern democracies, where nobody, not even the Head of State, is above the law (*legibus solutus)* .

The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.

41. It is therefore only natural that the Appeals Chamber, in order to address the issue raised above, should start by enquiring into general principles and rules of customary international law relating to State officials. It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.

The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium).* The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. Similarly, other classes of persons (for example, spies, as defined in Article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907), although acting as State organs, may be held personally accountable for their wrongdoing.

The general rule at issue has been implemented on many occasions, although primarily with

regard to its corollary, namely the right of a State to demand for its organs functional immunity from foreign jurisdiction (*see* above, paragraph 38)[60]. This rule undoubtedly applies to relations between States *inter se* . However, it must also be taken into account, and indeed it has always been respected, by international organizations as well as international courts. Whenever such organizations or courts have intended to address recommendations, decisions (in the case of the Security Council acting under Chapter VII of the United Nations Charter) or judicial orders or requests to States, they have refrained from turning to a specific State official; they have issued the recommendation, decision or judicial order to the State as a whole, or to "its authorities"[61]. In the case of international courts, they have, of course, addressed their orders or requests through the channel of the State Agent before the court or the competent diplomatic officials.

42. The question that the Appeals Chamber must therefore address is as follows: are there any provisions or principles of the Statute of the International Tribunal which justify a departure from this well-established rule of international law?

As already noted, in her Brief the Prosecutor laid much stress on Article 7, paragraphs 2 and 4, and Article 18, paragraph 2, of the Statute. The Appeals Chamber will consider whether this emphasis is correct, looking first at Article 7, paragraphs 2 and 4, of the Statute[62]. Clearly, these are provisions that envisage the criminal responsibility of State officials, thus confirming the exception to the general rule on the protection of the internal organization of States, mentioned above. These provisions cannot therefore support the Prosecutor's submissions.

Neither do the Prosecutor's submissions find support in Article 18, paragraph 2. As rightly pointed out by Croatia[63], Article 18, paragraph 2, envisages the power of the Prosecutor to call upon a particular State official to lend assistance for the Prosecutor's investigations. It would be fallacious to infer from a provision which simply lays down the power to seek assistance from a State official, the existence of an obligation for such State official to cooperate. It follows from Article 18, paragraph 2, that the State cannot prevent the Prosecutor from seeking the assistance of a particular State official. This, however, does not mean that the particular State official has an international obligation to provide assistance. This obligation is only incumbent upon the State. Furthermore, the fact that the provision under consideration is not couched in mandatory terms becomes even more apparent if one contrasts it with the preceding provision in the same paragraph ("The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations"). Article 18, paragraph 2, was conceived of in the "cooperative" perspective rightly emphasised by the Prosecutor in her Brief and mentioned above. It cannot be attributed a mandatory purport which would be at odds with the plain text of the provision.

As for the other argument advanced by the Prosecutor, and based on a syllogism, it is unpersuasive, for it does not take into account the rule of customary international law referred to above; as noted above (paragraph 40), it is substantially based on a "domestic analogy".

43. The Appeals Chamber therefore finds that, both under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials. Even if one does not go so far as to term the obligation laid down in Article 29 as an obligation of result, as asserted by one of the *amici curiae* [64], it is indubitable that States, being the addressees of such obligation, have some choice or leeway in identifying the persons

responsible for, and the method of, its fulfilment. It is for each such State to determine the internal organs competent to carry out the order. It follows that if a Judge or a Chamber intends to order the production of documents, the seizure of evidence, the arrest of suspects etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State.

44. The Appeals Chamber considers that the above conclusion is not only warranted by international law, but is also the only one acceptable from a practical viewpoint. If, *arguendo,* one were to admit the power of the International Tribunal to address compelling orders to State officials, say, for the production of documents, there are two hypothetical situations which could result in the failure of the addressee to deliver the documents without undue delay and a consequent request by the International Tribunal for his appearance before the relevant Trial Chamber. It may be that the State official has been ordered by his authorities to refuse to surrender the documents; in this case, what would be the practical advantage of his being summoned before the International Tribunal, as was indicated in the *subpoena duces tecum* under discussion? Clearly, the State official would be unable to disregard the instructions of his Government: *ad impossibilia nemo tenetur* . Even the advantage of having the State official explaining publicly in court that his State refuses to surrender the documents is one that could be obtained by making public the official response of the relevant State authorities, declining to comply with Article 29. On the other hand, it may happen that a State official, on his own initiative, refuses to hand over the documents although his superior authorities intend to cooperate with the International Tribunal; this, for instance, may occur if that official places on the national legislation concerning his tasks and duties an interpretation different from that advocated by his superior authorities. In this and other similar cases the Appeals Chamber fails to see the advantage of summoning such official before the International Tribunal. It is for his State to compel him, through all the national legal remedies available, to comply with the International Tribunal's order for the production of documents (*see,* however, the exception that the Appeals Chamber envisages below, at paragraph 51). Clearly, as State officials are mere instrumentalities in the hands of sovereign States, there is no practical purpose in singling them out and compelling them to produce documents, or in forcing them to appear in court. It is the State which is bound by Article 29 and it is the State for which the official or agent fulfils his functions that constitutes the legitimate interlocutor of the International Tribunal. States shall therefore incur international responsibility for any serious breach of that provision by their officials.

45. Whilst from a legal viewpoint the International Tribunal is barred from addressing orders to State officials as such, the Appeals Chamber accepts that it might prove useful in practice for the Registrar of the International Tribunal to notify the relevant State officials of the order sent to the State. This notification would serve exclusively to inform State officials who, according to the Prosecutor or defence counsel, may hold the documents, of the order sent to the State. If the central authorities are prepared and willing to comply with Article 29, this practical procedure may speed up the internal process for the production of documents.

D. Whether The International Tribunal May Issue Binding Orders To Individuals Acting In Their Private Capacity

1. Is the International Tribunal empowered to subpoena individuals acting in their private capacity?

46. Neither Croatia nor the Prosecutor denies that the International Tribunal may issue binding orders in the form of subpoenas (that is, under threat of penalty), to individuals acting in their private capacity. However, the Appeals Chamber deems it necessary to consider this matter with particular reference to the question of whether or not State officials may be subpoenaed *qua* private individuals. Furthermore, there seems to be disagreement about the remedies available to the International Tribunal in case of non-compliance.

47. The Appeals Chamber holds the view that the spirit of the Statute, as well as the purposes pursued by the Security Council when it established the International Tribunal, demonstrate that a Judge or a Chamber is vested with the authority to summon witnesses, to compel the production of documents, etc. However, the basis for this authority is not that, as the International Tribunal enjoys primacy over national criminal courts, it cannot but possess at least the same powers as those courts. Such an argument is flawed, for the International Tribunal exhibits a number of features that differentiate it markedly from national courts. It is, therefore, tantamount to a *petitio principii:* only after proving that the essential powers and functions of the two types of courts (the International Tribunal and national courts) are similar, could one infer that the International Tribunal has the same powers as national courts to compel individuals to produce documents, appear in court, etc. As stated above, the International Tribunal's power to issue binding orders to individuals derives instead from the general object and purpose of the Statute, as well as the role the International Tribunal is called upon to play thereunder. The International Tribunal is an international criminal court constituting a novelty in the world community. Normally, individuals subject to the sovereign authority of States may only be tried by national courts. If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation. Thus, the relation between national courts of different States is "horizontal" in nature. In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).

In addition, the aforementioned power is spelt out in provisions such as Article 18, paragraph 2, first part, which states: "The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations" (emphasis added); and in Article 19, paragraph 2: "Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial" (emphasis added).

48. The spirit and purpose of the Statute, as well as the aforementioned provisions, confer on the International Tribunal an incidental or ancillary jurisdiction over individuals other than

those whom the International Tribunal may prosecute and try. These are individuals who may be of assistance in the task of dispensing criminal justice entrusted to the International Tribunal. Furthermore, as stated above, Article 29 also imposes upon States an obligation to take action required by the International Tribunal *vis-à-vis* individuals subject to their jurisdiction.

2. Classes of persons encompassed by the expression "Individuals acting in their private capacity"

49. It should be noted that the class of "individuals acting in their private capacity" also includes State agents who, for instance, witnessed a crime before they took office, or found or were given evidentiary material of relevance for the prosecution or the defence prior to the initiation of their official duties. In this case, the individuals can legitimately be the addressees of a subpoena. Their role in the prosecutorial or judicial proceedings before the International Tribunal is unrelated to their current functions as State officials.

50. The same may hold true for the example propounded by the Prosecutor in her Brief[65]: "a government official who, while engaged on official business, witnesses a crime within the jurisdiction of the [International] Tribunal being committed by a superior officer". According to the Prosecutor: "It cannot be argued that the official concerned is immune from orders to testify as to what was seen"[66]. In this case, the individual was undoubtedly present at the event in his official capacity; however, arguably he saw the event *qua* a private individual. This can be illustrated by the example of a colonel who, in the course of a routine transfer to another combat zone, overhears a general issuing orders aimed at the shelling of civilians or civilian objects. In this case the individual must be deemed to have acted in a private capacity and may therefore be compelled by the International Tribunal to testify as to the events witnessed. By contrast, if the State official, when he witnessed the crime, was actually exercising his functions, i.e., the monitoring of the events was part of his official functions, then he was acting as a State organ and cannot be subpoenaed, as is illustrated by the case where the imaginary colonel overheard the order while on an official inspection mission concerning the behaviour of the belligerents on the battlefield.

The situation differs for a State official (e.g., a general) who acts as a member of an international peace-keeping or peace-enforcement force such as UNPROFOR, IFOR or SFOR. Even if he witnesses the commission or the planning of a crime in a monotoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country. His mandate stems from the same source as that of the International Tribunal, i.e., a resolution of the Security Council[67], and therefore he must testify, subject to the appropriate requirements set out in the Rules[68].

51. Another instance can be envisaged, which, although more complicated, is not unrealistic in States facing extraordinary circumstances such as war or the aftermath of war. Following the issue of a binding order to such a State for the production of documents necessary for trial, a State official, who holds that evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal may refuse to do so, and the central authorities may not have the legal or factual means available to enforce the International Tribunal's request. In this scenario, the State official is no longer behaving as an

instrumentality of his State apparatus. For the limited purposes of criminal proceedings, it is sound practice to "downgrade", as it were, the State official to the rank of an individual acting in a private capacity and apply to him all the remedies and sanctions available against non-complying individuals referred to below (paragraphs 57-59): he may be subpoenaed and, if he does not appear in court, proceedings for contempt of the International Tribunal could be instituted against him. Indeed, in this scenario, the State official, in spite of the instructions received from his Government, is deliberately obstructing international criminal proceedings, thus jeopardising the essential function of the International Tribunal: dispensation of justice. It will then be for the Trial Chamber to determine whether or not also to call to account the State; the Trial Chamber will have to decide whether or not to make a judicial finding of the State's failure to comply with Article 29 (on the basis of Article 11 of the International Law Commission's Draft Articles on State Responsibility[69]) and ask the President of the International Tribunal to forward it to the Security Council.

3. Whether the International Tribunal may enter into direct contact with individuals or must instead go through the national authorities

52. Two more questions must be considered by the Appeals Chamber: the means by which the International Tribunal enters into contact with individuals, and the legal remedies available in case of non-compliance by individuals.

53. The Appeals Chamber will make two general and preliminary points. Firstly, a distinction should be drawn between the former belligerent States or Entities of ex-Yugoslavia and third States. The first class encompasses States: (i) on the territory of which crimes may have been perpetrated; and in addition, (ii) some authorities of which might be implicated in the commission of these crimes. Consequently, in the case of those States, to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardise investigations by the Prosecutor or defence counsel. In particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions. The States and Entities of the former Yugoslavia are obliged to cooperate with the International Tribunal in such a manner as to enable the International Tribunal to discharge its functions. This obligation (which, it should be noted, was restated in the Dayton and Paris Accords), also requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance.

54. Secondly, the implementing legislation of the International Tribunal's Statute enacted by some States[70] provides that any order or request of the International Tribunal should be addressed to a specific central body of the country, which then channels it to the relevant prosecutorial or judicial agencies. It may be inferred from this that any order or request should therefore be addressed to that central national body.

Clearly, these laws tend to apply to the relations between national authorities and the International Tribunal the same approach that they normally adopt in their bilateral or multilateral treaties of judicial cooperation. These treaties are, of course, between equal sovereign States. Everything is therefore placed on a "horizontal" plane and each State is concerned with its sovereign attributes when it comes to the fulfilment of prosecutorial or

judicial functions. It follows that any manifestation of investigative or judicial activity (the taking of evidence, the seizure of documents, the questioning of witnesses, etc.) requested by one of the contracting States is to be exercised exclusively by the relevant authorities of the requested State. This same approach has been adopted by these States *vis-à-vis* the International Tribunal, in spite of the position of primacy accruing to the International Tribunal under the Statute and its "vertical" status alluded to above[71]. However, whenever such implementing legislation turns out to be in conflict with the spirit and the word of the Statute, a well-known principle of international law can be relied upon to prevent States from shielding behind their national law in order to evade international obligations[72].

55. After these general remarks, the Appeals Chamber emphasises that a distinction should be drawn between two classes of acts or transactions:

> (i) those which may require the cooperation of the prosecutorial or judicial organs of the State where the individual is located (conduct of on-site investigations, execution of search or arrest warrants, seizure of evidentiary material, etc.); and
>
> (ii) those which may be carried out by the private individual who is the addressee of a subpoena or order, acting either by himself or together with an investigator designated by the Prosecutor or by defence counsel (taking of witness statements, production of documents, delivery of video-tapes and other evidentiary material, appearance in court at The Hague, etc.).

For the first class of acts, unless authorized by national legislation or special agreements, the International Tribunal must turn to the relevant national authorities[73]. This is subject to an exception which relates to the States or Entities of the former Yugoslavia: in their situation, for the reasons set out above, some activities such as, in particular, the conduct of on-site investigations, may justifiably be carried out by the International Tribunal itself.

With respect to the second class, the International Tribunal will normally turn, once again, to the national authorities for their cooperation[74]. However, there are two situations where the International Tribunal may enter directly into contact with a private individual:

> (i) when this is authorized by the legislation of the State concerned[75];
>
> (ii) when the authorities of the State or Entity concerned, having been requested to comply with an order of the International Tribunal, prevent the International Tribunal from fulfilling its functions. This might arise in the above example (paragraph 49) of a State official who witnessed a crime or acquired possession of a document prior to becoming a State official, or in the other cases of State officials mentioned above (paragraph 50). In these examples the State authorities may be able, pursuant to their legislation or practice, to prevent the individual from testifying or delivering a particular document[76].

In the above-mentioned scenarios, the attitude of the State or Entity may jeopardise the discharge of the International Tribunal's fundamental functions. It is therefore to be assumed that an inherent power to address itself directly to those individuals inures to the advantage of the International Tribunal. Were it not vested with such a power, the International Tribunal would be unable to guarantee a fair trial to persons accused of atrocities in the former

Yugoslavia. As was forcefully stated by the Prosecutor before the Appeals Chamber:

> So, if theoretically, [a State enacted] legislation barring access to its citizens for the purpose of compelling them to give evidence, we would say that in international law that legislation is invalid. We would then assert the Tribunal's entitlement to reach out directly to the individual by issuing an order to that effect, presumably permitting the individual to obey the higher order of international law, even in disobedience to his own domestic law. I think it would be counterproductive to suggest that we are at the mercy of using a State machinery when its citizens may be more willing than their government to discharge their obligations to this institution.
> . . .
> [If] there are reasons to believe that the witness would be willing to comply but the State, either because of its legislation or its attitude, if it has not enacted legislation, is not willing to assist, . . . we would have every entitlement to reach out directly, by mail might be the preferable, more prudent, course than sending members of our personnel to an unfriendly territory for that simple purpose.[77]

56. In the two aforementioned situations the International Tribunal may directly summon a witness, or order an individual to hand over evidence or appear before a Judge or Trial Chamber. In other words, the International Tribunal may enter into direct contact with an individual subject to the sovereign authority of a State. The individual, being within the ancillary (or incidental) criminal jurisdiction of the International Tribunal, is duty-bound to comply with its orders, requests and summonses.

4. The legal remedies for non-compliance

57. The second question which the Appeals Chamber will now consider is that of the legal remedies available for non-compliance by an individual with a subpoena or order issued by the International Tribunal. Here, a distinction needs to be made between:

> (i) the sanctions and penalties that can be imposed by the authorities of the State where the individual is located; and
> (ii) those that can be imposed by the International Tribunal.

The first set of sanctions or penalties is enumerated or hinted at in a number of implementing laws of States: these laws provide that, in case of non-compliance with an order of the International Tribunal, the national authorities shall apply the same remedies and penalties provided for in case of disregard of an order or injunction issued by a national authority[78]. In addition, as demonstrated in the valuable survey submitted by *amicus curiae* [79], most States, whether of common-law or civil-law persuasion, generally provide for the enforcement of summonses or subpoenas issued by national courts. It is plausible that, in those States, the national authorities will be ready to assist the International Tribunal by resorting to their own national criminal legislation.

58. The Appeals Chamber holds the view that, normally, the International Tribunal should turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual with a subpoena or order issued by a Judge or a Trial Chamber. Legal remedies or sanctions put in place by the national authorities themselves are more likely to work effectively and expeditiously. However, allowance should be made for cases where resort to

national remedies or sanctions would not prove workable. This holds true for those cases where, from the outset, the International Tribunal decides to enter into direct contact with individuals, at the request of either the Prosecutor or the defence, on the assumption that the authorities of the State or Entity would either prevent the International Tribunal from fulfilling its mission (*see* above, paragraph 55) or be unable to compel a State official to comply with an order issued under Article 29 (*see* above, the case mentioned in paragraph 51). In these cases, it may prove pointless to request those national authorities to enforce the International Tribunal's order through national means.

59. The remedies available to the International Tribunal range from a general power to hold individuals in contempt of the International Tribunal (utilising the inherent contempt power rightly mentioned by the Trial Chamber[80]) to the specific contempt power provided for in Rule 77. It should be added that, if the subpoenaed individual who fails to deliver documents or appear in court also fails to attend contempt proceedings, *in absentia* proceedings should not be ruled out. The Prosecutor contended in her oral submissions that it would be "hypothetical and speculative in the extreme to contemplate a trial *in absentia* on a charge of contempt"[81]. By contrast, counsel for Croatia conceded in their oral submissions that *in absentia* proceedings would be admissible, provided they met "the requirement of due process" and amounted to what in United States courts is called "civil contempt", "which would not be imposing 'criminal penalties', but could nonetheless compel someone by even imprisonment until they decided to comply with the court's order"[82].

The Appeals Chamber finds that, generally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal (i.e., persons accused of crimes provided for in Articles 2-5 of the Statute). Indeed, even when the accused has clearly waived his right to be tried in his presence (Article 21, paragraph 4 (d), of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused. By contrast, *in absentia* proceedings may be exceptionally warranted in cases involving contempt of the International Tribunal, where the person charged fails to appear in court, thus obstructing the administration of justice. These cases fall within the ancillary or incidental jurisdiction of the International Tribunal.

If such *in absentia* proceedings were to be instituted, all the fundamental rights pertaining to a fair trial would need to be safeguarded. Among other things, although the individual's absence would have to be regarded, under certain conditions, as a waiver of his "right to be tried in his presence", he should be offered the choice of counsel. The Appeals Chamber holds the view that, in addition, other guarantees provided for in the context of the European Convention on Human Rights should also be respected[83].

60. Of course, if a Judge or a Chamber decides to address a *subpoena duces tecum* or *ad testificandum* directly to an individual living in a particular State and at the same time notifies the national authorities of that State of the issue of the subpoena, this procedure will make it easier for those national authorities to assist the International Tribunal by enforcing the orders in case of non-compliance. If, by contrast, the Judge or Chamber decides not to notify those national authorities, the only response by the International Tribunal to an individual's failure to obey the subpoena will, necessarily, be resort to its own contempt proceedings.

E. The Question Of National Security Concerns

1. Whether the International Tribunal is barred from examining documents raising national security concerns

61. Croatia has submitted that the International Tribunal does not have the power to judge or determine Croatia's national security claims[84]. Relying upon the *Corfu Channel* case, Croatia contends that "[t]he determination of the national security needs of each State is a fundamental attribute of its sovereignty"[85]. Both the Trial Chamber in the Subpoena Decision[86] and the Prosecutor[87] take the opposite view. The Trial Chamber, at the end of its extensive treatment of this delicate matter, concludes that:

> [A] State invoking a claim of national security as a basis for non-production of evidence requested by the International Tribunal, may not be exonerated from its obligation by a blanket assertion that its security is at stake. Thus, the State has the onus to prove its objection.[88]

The Trial Chamber goes on to suggest that:

> [F]or the purpose of determining the validity of the assertions of a particular State relating to national security concerns, the Trial Chamber [seized with the criminal case in question] may hold *in camera* hearings, in a manner which accords with the provisions of Sub-rule 66 (C) and Rule 79. Furthermore, with a view to . . . the secrecy of the information it may initially conduct an *ex parte* hearing in a manner analogous to that provided for in Sub-rule 66 (C).[89]

In her Brief, the Prosecutor has among other things averred that the Croatian position would "prevent the [International] Tribunal from fulfilling its Security Council-given mandate to effectively prosecute persons responsible for serious violations of international humanitarian law and thus, defeat its essential object and purpose. The effective administration of justice would be severely prejudiced"[90].

62. The Appeals Chamber holds that the claim submitted by Croatia must be dismissed, on three grounds.

Firstly, reliance upon the *Corfu Channel* case is inapposite. It is true that the International Court of Justice confined itself to taking note of the British refusal to produce, on account of "naval secrecy", the naval documents requested by the Court[91]. However, this request had been made on the strength of Article 49 of the Statute of the International Court of Justice[92] and Article 54 of its Rules[93]; the first of these two provisions, of course more authoritative, was undoubtedly couched in non-mandatory terms. The situation is different with the International Tribunal: Article 29 of its Statute is worded in strong mandatory language. More pertinent precedents include the so-called *Sabotage* cases brought before the United States - German Mixed Claims Commission in the 1930s[94], the *Ballo* [95] case decided by the Administrative Tribunal of the International Labour Organisation in 1972; the *Cyprus* v. *Turkey* case, decided by the European Commission on Human Rights in 1976[96], and the *Godinez Cruz* case, decided by the Inter-American Court of Human Rights on 20 January 1989[97]. These cases show that there have been instances in which States have complied with judicial requests for the production of sensitive or confidential documents. The scrutiny of documents in those cases was undertaken by the judicial body *in camera*. In the *Cyprus v.*

Turkey case, where the State in question had refused to comply with the request, the international body made a judicial finding of such refusal and reported it to the competent political body[98].

63. Secondly, a plain reading of Article 29 of the Statute makes it clear that it does not envisage any exception to the obligation of States to comply with requests and orders of a Trial Chamber. Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly, as demonstrated by Article 21, paragraph 4 (g), which bars the International Tribunal from "compelling" an accused "to testify against himself or to confess guilt". It follows that it would be unwarranted to read into Article 29 limitations or restrictions on the powers of the International Tribunal not expressly envisaged either in Article 29 or in other provisions of the Statute.

64. Croatia has argued that, as the Statute operates within the framework of customary international law, there was no need for its drafters to restate therein the principles of State sovereignty, national security and the "act of State doctrine". These principles are firmly anchored in the Statute - so the argument goes - and there was "absolutely no need to provide explicit exemptions for that in the Statute"[99]. The Appeals Chamber takes the view that, in the context of national security, this argument is inapplicable.

Admittedly, customary international rules do protect the national security of States by prohibiting every State from interfering with or intruding into the domestic jurisdiction, including national security matters, of other States. These rules are reflected in Article 2, paragraph 7, of the United Nations Charter with regard to the relations between Member States of the United Nations and the Organization. However, Article 2, paragraph 7, of the Charter provides for a significant exception to the impenetrability of the realm of domestic jurisdiction in respect of Chapter VII enforcement measures[100]. As the Statute of the International Tribunal has been adopted pursuant to this very Chapter, it can pierce that realm.

Furthermore, although it is true that the rules of customary international law may become relevant where the Statute is silent on a particular point, such as the "act of State" doctrine, there is no need to resort to these rules where the Statute contains an explicit provision on the matter, as is the case with Article 29. Considering the very nature of the innovative and sweeping obligation laid down in Article 29, and its undeniable effects on State sovereignty and national security, it cannot be argued that the omission of exceptions in its formulation was the result of an oversight. Had the "founding fathers" intended to place restrictions upon this obligation they would have done so, as they did in the case of Article 21, paragraph 4 (g). Article 29 therefore clearly and deliberately derogates from the customary international rules upon which Croatia relies.

In short, whilst in the case of State officials the Statute clearly does not depart from general international law, as stated above (paragraphs 41 and 42) in the case of national security concerns the Statute manifestly derogates from customary international law. This different attitude towards general rules can be easily explained. In the case of State officials there is no compelling reason warranting a departure from general rules. To make use of the powers flowing from Article 29 of the Statute, it is sufficient for the International Tribunal to direct its orders and requests to States (which are in any case the addressees of the obligations laid down in that provision). By contrast, as the Appeals Chamber will demonstrate in the following paragraph, to allow national security considerations to prevent the International

Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions.

65. Thirdly, as was persuasively submitted by the Prosecutor[101], to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and "defeat its essential object and purpose". The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'ê tre* of the International Tribunal would then be undermined.

66. An important consequence follows from the foregoing considerations. Those instruments of national implementing legislation, such as the laws passed by Australia[102] and New Zealand [103], which authorise the national authorities to decline to comply with requests of the International Tribunal if such requests would prejudice the "sovereignty, security or national interests" of the State, do not seem to be fully in keeping with the Statute[104].

2. The possible modalities of making allowance for national security concerns

67. Having asserted the basic principle that States may not withhold documents because of national security concerns, the Appeals Chamber wishes, however, to add that the International Tribunal should not be unmindful of legitimate State concerns related to national security, the more so because, as the Trial Chamber has rightly emphasised[105], the International Tribunal has already taken security concerns into account in its Rules 66 (C) and 77 (B).

The best way of reconciling, in keeping with the general guidelines provided by Rule 89 (B) and (D), the authority of the International Tribunal to order and obtain from States all documents directly relevant to trial proceedings, and the legitimate demands of States concerning national security, has been rightly indicated by the Trial Chamber in the Subpoena Decision, where it suggested that *in camera, ex parte* proceedings might be held so as to scrutinise the validity of States' national security claims. The Appeals Chamber, while adopting the same approach, will now suggest practical methods and procedures that may differ from those recommended by the Trial Chamber.

68. First of all, account must be taken of whether the State concerned has acted and is acting bona fide. As the International Court of Justice pointed out in the *Nuclear Tests* case, "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international

cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential"[106]. The degree of bona fide cooperation and assistance lent by the relevant State to the International Tribunal, as well as the general attitude of the State *vis-à-vis* the International Tribunal (whether it is opposed to the fulfilment of its functions or instead consistently supports and assists the International Tribunal), are no doubt factors the International Tribunal may wish to take into account throughout the whole process of scrutinising the documents which allegedly raise security concerns.

Secondly, the State at issue may be invited to submit the relevant documents to the scrutiny of one Judge of the Trial Chamber designated by the Trial Chamber itself. Plainly, the fact that only one Judge and he or she alone undertakes a perusal of the documents should increase the confidence of the State that its national security secrets will not accidentally become public.

Thirdly, to ensure maximum confidentiality, if the documents are in a language other than one of the two official languages of the International Tribunal, in addition to the original documents the State concerned should provide certified translations, so that there is no need for the documents to be seen by translators of the International Tribunal.

Fourthly, the documents should be scrutinised by the Judge *in camera,* in *ex parte* proceedings, and no transcripts should be made of the hearing.

Fifthly, the documents that the Judge eventually considers to be irrelevant to the proceedings, as well as those the relevance of which is outweighed, in the appraisal of the Judge, by the need to safeguard legitimate national security concerns, should be returned to the State without being deposited or filed in the Registry of the International Tribunal. As to other documents, the State concerned may be allowed to redact part or parts of the documents, for instance, by blacking out part or parts; however, a senior State official should attach a signed affidavit briefly explaining the reasons for that redaction.

Finally, one should perhaps make allowance for an exceptional case: the case where a State, acting bona fide, considers one or two particular documents to be so delicate from the national security point of view, while at the same time of scant relevance to the trial proceedings, that it prefers not to submit such documents to the Judge. In this case, a minimum requirement to be met by the State is the submission of a signed affidavit by the responsible Minister: (i) stating that he has personally examined the document in question; (ii) summarily describing the content of the documents; (iii) setting out precisely the grounds on which the State considers that the document is not of great relevance to the trial proceedings; and (iv) concisely indicating the principal reasons for the desire of the State to withhold those documents. It will be for the Judge to appraise the grounds offered for withholding the documents. In case of doubt, he may request a more detailed affidavit, or a detailed explanation during *in camera, ex parte* proceedings. If the Judge is not satisfied that the reasons adduced by the State are valid and persuasive, he may request the Trial Chamber to make a judicial finding of non-compliance by the State with its obligations under Article 29 of the Statute and ask the President of the International Tribunal to transmit such finding to the Security Council.

69. It goes without saying that it will be for the relevant Trial Chamber to decide whether to adopt any of the aforementioned methods or procedures or to provide for other practical arrangements or protective measures, if need be in consultation with the interested State.

III. DISPOSITION

For the foregoing reasons the **APPEALS CHAMBER**

(1) Unanimously **FINDS** that the International Tribunal is empowered to issue binding orders and requests to States, which are obliged to comply with them pursuant to Article 29 of the Statute and that, in case of non-compliance, a Trial Chamber may make a specific judicial finding to this effect and request the President of the International Tribunal to transmit it to the United Nations Security Council;

(2) Unanimously **FINDS** that the International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity;

(3) Unanimously **FINDS** that the International Tribunal may summon, subpoena or address other binding orders to individuals acting in their private capacity and that, in case of non-compliance, either the relevant State may take enforcement measures as provided in its legislation, or the International Tribunal may instigate contempt proceedings;

(4) Unanimously **FINDS** that States are not allowed, on the claim of national security interests, to withhold documents and other evidentiary material requested by the International Tribunal; however, practical arrangements may be adopted by a Trial Chamber to make allowance for legitimate and bona fide concerns of States;

(5) Unanimously **DECIDES** to quash the *subpoena duces tecum* issued by Judge McDonald and reinstated by Trial Chamber II addressed to Croatia and the Croatian Defence Minister, Mr. Gojko Susak, it being understood that the Prosecutor is at liberty to submit to the appropriate Chamber, being Trial Chamber I, a request for a binding order addressed to Croatia alone.

Done in English and French, the English text being authoritative.

.....
.....

Antonio Cassese
Presiding

Judge Adolphus G. Karibi-Whyte attaches a Separate Opinion to this Judgement.

Dated this twenty-ninth day of October 1997
At The Hague
The Netherlands

[Seal of the International Tribunal]

1. Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* , *Prosecutor v. Tihomir Blackic* , Case No. IT-95-14-PT, T.Ch. II, 18 July 1997 *("Subpoena Decision")* .

2. *Subpoena duces tecum* to the Republic of Croatia and to the Defence Minister Gojko Susak, *ibid.*, Judge McDonald, 15 Jan. 1997.
3. *Subpoena duces tecum* to Bosnia and Herzegovina and to the Custodian of the Records of the Central Archive of what was formely the Ministry of Defence of the Croatian Community of Herzeg Bosna, *ibid.*, Judge McDonald, 15 Jan. 1997.
4. Indictment, *ibid.*, 10 Nov. 1995.
5. Letter from Mr. Sre~ko Jelini~, *ibid.*, 10 Feb. 1997.
6. Order of a Judge to ensure compliance with a *subpoena duces tecum, ibid.*, Judge McDonald, 14 Feb. 1997. Judge McDonald also, on 14 February 1887, issued an Order to ensure compliance with a *subpoena duces tecum* to Bosnia and Herzegovina and Mr. Ante Jelavic, the Minister of Defence; she issued further orders of compliance on 20 February 1997, 28 February 1997 and 7 March 1997 to Bosnia and herzegovina and Mr. Jelavic, all pertaining to *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-PT.
7. Order of a Judge suspending *subpoena duces tecum, ibid.*, 20 Feb. 1997.
8. Order compelling the production of documents, *ibid.*, Judge Jan, 28 Apr. 1997.
9. Order regarding *subpoena duces tecum, ibid.*, 7 Mar. 1997.
10. Order submitting the matter to Trial Chamber II and inviting *amicus curiae, ibid.*, 14 Mar. 1997.
11. Order denying application in respect of the issues regarding *subpoenae duces tecum, ibid.*, T. Ch. II, 27 Mar. 1997.
12.Order inviting defence to participate in hearing in respect of the issues regarding *subpopenae duces tecum, ibid.*, 1 Apr. 1997.
13. Decision on the Croatian request for recusation of Judge McDonald, *ibid.*, Bureau, 16 Apr. 1997.
14. Those who addressed the Trial Chamber were Alain Pellet, Luigi Condorelli, Vladimir Lujbanovic on behalf of the Croatian Association of Criminal Science and Practise, Andreas Zimmermann for the Max-Planck-Institute, Ruth Wedgwood, Peter Malanczuk, and Donald Donovan for the Lawyers Committee for Human Rights.
15. Decision on the admissibility of the request for review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *subpoenae duces tecum*) and Scheduling Order, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-AR108 *bis* , A. Ch., 29 July 1997.
16. Decision on prosecution motion to set aside the Decision of the Appeals Chamber of 29 July 1997, *ibid.*, A. Ch., 12 Aug. 1997.
17. *Subpoena Decision, supra* n. 1, para. 62, and *see also* paras. 64 and 78.
18. *ibid.*, para. 61.
19. *Ibid.*, para 61.
20. *See amicus curiae* brief submitted by B.Simma, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-PT, 14 Apr. 1997, *("Simma Brief")* p. 9.
21. *Ibid.*, p. 12. It should be noted that according to this *amicus curiae* , in any case, even in Anglo-American legal systems, "the issuance of a *subpoena* does not inevitably trigger the imposition of penalties in case of a non-compliance" (*ibid.*, p. 10).
22. *See amicus curiae* brief submitted by A. Pellet and Juristes sans frontières, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-AR 108 *bis* , 11 Apr. 1997.
23. *Subpoena Decision, supra* n. 1, para. 1.
24. *Ibid.*, paras. 62, 77 and 92.
25. As held in *Abbot Laboratories v. Gardner* , 387 U.S. 136 (1967), by the United States Supreme Court, ripeness consists of a two-pronged test: first, are the issues fit for judicial review? Secondly, what hardship would the parties face if review is denied?
26. Transcript, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-AR 108 *bis,* 22 Sept. 1997, ("*Appeals Transcript* "), pp. 26-27.
27. Consonant with the case-law of the International Court of Justice, the Appeals Chamber prefers to speak of "inherent powers" with regard to those functions of the International Tribunal which are judicidal in nature and not expressly provided for in the Statute, rather than to "implied powers". The "implied powers" doctrine has normally been applied in the case-law of the World Court with a view to expanding the competencies of *political organs* of international organisations. *See, e.g..,* P.C.I.J. Reports, *Competence of the International Labour Organisation* (Advisory Opinion of 23 July 1926), Ser. B, no. 13, p. 18; P.C.I.J. Reports, *Jurisdiction of the European Commission of the Danube* (Advisory Opinion of 8 Dec. 1927), Ser. B, no. 14, pp. 25-37; *Reparation for Injuries suffered in the Service of the United Nations,* I.C.J. Reports 1949, pp. 182-83; *International Status of South-West Africa* , I.C.J Reports 1950, p. 136; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* , I.C.J Reports 1954, pp. 56-58; *Certain Expenses of the United Nations* , I.C.J. Reports 1962, pp. 167-68; *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* I.C.J Reports 1971, pp. 47-49, 52.

As is well known, reference to the Court's "inherent powers" was made by the International Court of Justice in the *Northern Cameroons* case (I.C.J. Reports 1963, p. 29) and in the *Nuclear Tests* case. In the latter case the Court stated that it "possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute. . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded" (*Nuclear Tests* case, I.C.J. Reports 1974, pp. 259-60, para. 23).

28. *Subpoena Decision, supra* n. 1, paras. 61-64, 78.

29. Prosecutor's Brief in response to the Brief of the Republic of Croatia in opposition to *subpoena duces tecum* , 8 Sept. 1997, ("*Prosecutor's Brief* ") para. 24; *Appeals Transcript, supra* n. 26, pp. 90-91, 93.

30. Brief on appeal of the Republic of Croatia in opposition to *subpoena duces tecum* , 18 Aug. 1997 ("*Croatia's Brief* "), pp. 5-14; *Appeals Transcript, supra* n. 26, pp. 10-12, 36-37. But *see ibid.,* p. 38 and pp. 42-43, where Croatia stated that under Article 29 of the Statute, the International Tribunal has the power to issue binding orders to States.

31. "1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents; (d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal."

32. "The Security Council, . . . *Acting* under Chapter VII of the Charter of the United Nations,

. . .

4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute".

33. As is well known, in the *Barcelona Traction , Power & Light Co.* case, the International Court of Justice mentioned obligations of States "towards the international community as a whole" and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission* , 1992, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his Third Report on State Responsibility (*see ibid.,* 1991, vol. II, Part One, p. 35, para. 121; *see also* his Fourth Report, *ibid,* 1992, vol. Two, Part One, p. 34, para. 92).

34. It is worth mentioning that in the *Lockerbie* case, the United States contended before the International Court of Justice that "irrespective of the right claimed by Libya under the Montreal Convention, Libya has a Charter-based duty to accept and carry out the decisions in the Security Council resolution [784 (1992)], and other States have a Charter-based duty to seek Libya's compliance" (I.C.J. Reports 1992, p. 126, para. 40). The Court did not however take any stand on this contention, in its Order of 14 April 1992 (*ibid.*). The fact that the obligation is incumbent on all States while the correlative "legal interest" is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the "injured States" entitled to claim the cessation of any breach of Article 29 or to promote the taking of remedial measures. *See* on this matter Article 40 of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (c): "[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organisation concerned, are entitled to the benefit of that right", in International Law Commission, Report to the Forty-eighth Session of the General Assembly, 1996, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/51/10), ("*I.L.C. Draft Articles* ").

35. This Article provides that:

"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

36. *See* the Federal Order on Cooperation with the International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law of 21 December 1995.

As for the Federal Republic of Yugoslavia (Serbia and Montenegro), even if one were to doubt, in light of the

General Assembly res. 47/1 of 22 September 1992, its status as a Member of the United Nations, its signing of the Dayton/Paris Accord of 1995 would imply its voluntary acceptance of the obligation flowing from Article 29 (*see* Article IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, General Assembly - Security Council, A/50/790, S/1995/999, 30 Nov. 1995, p. 4).

37. *Prosecutor's Brief, supra* n. 29, pp. 3-4, 21-23; *Appeals Transcript, supra* n. 26, pp. 77-79.

38. *See amicus curiae* brief submitted by R. Wedgwood, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-AR108 *bis* , 15 Sept. 1997, p. 3 ff.

39. On this customary obligation, see the United States military manual, *The Law of Land Warfare* , 1956, para. 506 (b).

40. *See Prosecutor's Brief, supra* n. 29, p.15.

41. *Ibid.*

42. *Ibid.,* pp. 14-16, para. 27; *see also Appeals Transcript, supra* n. 26, pp. 74-75.

43. *Prosecutor's Brief, supra* n. 29, p. 15.

44. *Croatia's Brief, supra* , n. 30, p. 50 and see pp. 43-52.

45. *Subpoena Decision, supra* n. 1, para. 105.

46. *Appeals Transcript, supra* n. 26, p. 140.

47. In the case of *Prosecutor v. Dragan Nikolic* , Case No. IT-94-2-R61, see the President's Report of 31 October 1995 (S/1995/910) concerning the failure or refusal of the Bosnian Serb administration in Pale to cooperate with the International Tribunal; in the case of *Prosecutor v. Mile Mrksic, Miroslav Radic and Veselin Sljivancanin* , Case No. IT-95-13-R61, *see* the President's Report of 24 April 1996 (S/1996/319) concerning the failure or refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the International Tribunal; *see also* the President's Report of 22 May 1996 (S/1996/364) to the effect that the Federal Republic of Yugoslavia (Serbia and Montenegro) had violated its obligation to cooperate with the International Tribunal by failing to arrest General Ratko Mladic and Colonel Veselin [ljivan~anin whilst on its territory; in the cases *Prosecutor v. Radovan Karad'ic and Ratko Mladic* , Cases Nos. IT-95-5-R61 and IT-95-18-R61, *see* the President's Report of 11 July 1996 (S/1996/556) concerning the refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to effect service of the warrant of arrest on the accused; in the case of *Prosecutor v. Ivica Rajic* , Case No. IT-95-12-R61, *see* the President's Report of 16 September 1996 (S/1996/763) concerning the refusal of the Federation of Bosnia Herzegovina and the Republic of Croatia to cooperate with the International Tribunal.

48. *See* the preambular para. 7 of the Security Council resolution of 9 November 1995 (S/1995/940) referring to the President's Report (S/1995/910) in the matter of *Prosecutor v. Dragan Nikolic* , Case No. IT-94-2-R61; the statement of the President of the Security Council on 8 May 1996 concerning non-cooperation by the Federal Republic of Yugoslavia (Serbia and Montenegro) described in the Report of the President of the International Tribunal (S/1996/319); the statement of the President of the Security Council on 8 August 1996 (S/PRST/1996/34 - SC/6253) in reply to the Report of the President of the International Tribunal of 11 July 1996 (S/1996/556); the statement of the President of the Security Council on 20 September 1996 (S/PRST/1996/39) in reply to the Report of the President of the International Tribunal of 16 September 1996 (S/196/763).

49. The significance of this judicial finding of the International Tribunal has been perceptively emphasised in the *amicus curiae* brief submitted by Luigi Condorelli, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-PT, 11 Apr. 1997, ("*Condorelli Brief* "), para. 6.

50. *See, e.g.,* the statement made as early as 1797 by the United States Attorney-General in the *Governor Collot* case. A civil suit had been brought against Mr. Collot, Governor of the French island of Guadeloupe. The United States Attorney-General wrote: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under colour, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation", J. B. Moore, *A Digest of International Law* , 1906, vol. II, p. 23. The famous *McLeod* case should also be mentioned. On the occasion of the Canadian rebellion of 1837 against the British authorities (Canada being at the time under British sovereignty), rebels were assisted by American citizens who several times crossed the Niagara (the border between Canada and the United States) on the ship *Caroline* , to provide the insurgents with men and ammunitions. A party of British troops headed by Captain McLeod was then sent to attack the ship. They boarded it in the United States port of Fort Schlosser, killed a number of men and set the ship on fire. A few years later, in 1840, Captain McLeod was arrested in Lewiston (New York territory) on charges of murder and arson. An exchange of diplomatic notes between the two Governments ensued. The official position of the United States - which had already been set out in similar terms by Great Britain in 1838, with regard to the possible trial of another member of the British team that attacked the *Caroline* - was clearly enunciated by the

United States Secretary of State Webster: "That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilised nations, and which the Government of the United States has no inclination to dispute . . . [W]hether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war", *British and Foreign State Papers* , vol. 29, p. 1139.

51. When the two French agents who had sunk the *Rainbow Warrior* in New Zealand were arrested by the local police, France stated that their imprisonment in New Zealand was not justified "taking into account in particular the fact that they acted under military orders and that France [was] ready to give an apology and to pay compensation to New Zealand for the damage suffered" (*see* the Ruling of 6 July 1986 of the United Nations Secretary-General, in United Nations Reports of International Arbitral Awards, vol. XIX, p. 213).

52. The Court stated among other things that "The theory of 'Act of State' means that the act performed by a person as an organ of the State - whether he was head of the State or a responsible official acting on the Government's orders - must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty", International Law Reports, vol. 36, at pp. 308-09; it should be noted that after this passage the Court expressed reservations about this Act of State doctrine; arguably, these reservations were set out for the main purpose of further justifying the proposition that the doctrine did not apply to war crimes and crimes against humanity.

53. *Croatia's Brief, supra* n. 30, pp. 52-59.

54. *Prosecutor's Brief, supra* n. 29, pp. 30-31, paras. 56-60.

55. *Ibid.,* para. 56.

56. *Ibid.,* para. 58.

57. *Ibid.,* para. 49.

58. *See also Appeals Transcript, supra* n. 26, pp. 76, 85-87, 108-09.

59. *Subpoena Decision, supra* n. 1, paras. 67-69.

60. This is only natural: States have always taken for granted that they are not allowed to address authoritative instructions or orders to a foreign State official; the only area where practical problems have arisen relates to cases where national courts endeavoured to sit in judgement over foreign individuals acting as State agents.

61. On the decisions of the Security Council, *see Condorelli Brief, supra* n. 49, para. 4 and note 9. According to this learned author, the Security Council has also addressed its resolutions to specific national organs or institutions.

62. However, in her oral arguments before the Appeals Chamber the Prosecutor substantially reduced her emphasis on this point, *see Appeals Transcript, supra* n. 26, pp. 106-09.

63. *Croatia's Brief, supra* n. 30, p. 55, note 30.

64. That Article 29 lays down an obligation of result has been pointed out by Simma, *Simma Brief, supra* n. 20, p. 15.

Under Article 21, paragraph 1, of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission, "There is a breach by a State of an international obligation requiring to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation", *I.L.C. Draft Articles, supra* n. 34.

65. *Prosecutor's Brief, supra* n. 29, para. 63.

66. *Ibid.*

67. This would also apply to forces deployed under Article 53 of the United Nations Charter.

68. This should apply to a *subpoena ad testificandum* . By contrast, it might not appear appropriate to issue to this officer a *subpoena duces tecum* concerning, for instance, a memorandum he submitted to his superior authorities with regard to the incident he witnessed. It would appear to be more proper to address the international organization on behalf of which he was to produce the document.

69. This Article provides that:

"1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of Articles 5 to 10."

Articles 5 to 10 deal with the imputability of wrongful acts to States, and also cover the responsibility of States for unlawful acts of individuals, *I.L.C. Draft Articles, supra* n. 34.

70. *See, e.g.,* Section 7 (1) of the Australian International War Crimes Act of 1995; Article 5 of the Belgian

Law on the Recognition of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda of 1996; Articles 7 and 8 of the French Law No. 95-1 of 2 January 1995; Article 2 of the Hungarian Act XXXIX of 1996; Article 2 (2) of the Italian Decree-Law No. 544 of 28 December 1993; Section 4 (2) of the New Zealand International War Crimes Tribunal Act of 1995; Article 3 (1) of the Spanish Organization Act 15/1994 of 1994; Section 2 of the Swedish Act amending the Act relating to the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1995; Article 4 of the Swiss Federal Order on co-operation with the International Criminal Tribunal for the Former Yugoslavia of 1995; Articles 4 and 15 of the 1996 United Kingdom Statutory Instrument 1996 No. 716. *See also* Article 7 (2) of the Bosnia-Herzegovina Decree on Extradition at the Request of the International Tribunal of 1995; Article 2 of the 1996 Croatian Constitutional Act on the co-operation with the International Criminal Tribunal.

It should however be pointed out that other national laws prove more flexible. Thus, for instance, while Section 6 (1) of the Austrian Federal Law on co-operation with the International Tribunals of 1996 provides for the general principle that communication with the International Tribunal shall pass through the Ministry of Foreign Affairs, Section 6 (3) provides that: "In urgent cases as part of official criminal police assistance, direct communication between the Austrian authorities and the International Tribunal or communication through the International Criminal Police Organisation INTERPOL shall be permitted". Similarly, Section 2 of the Finnish Act on the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia of 1995, after designating the Ministry of Justice as the authority competent to receive "requests and notifications" from the International Tribunal, provides that the International Tribunal is allowed directly to contact the competent authorities either through diplomatic channels or through INTERPOL. Furthermore, under Section 3 of the Norwegian Act Relating to the Incorporation into Norwegian Law of the UN S.C. Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1994, legal assistance to the International Tribunal is the responsibility of "Norwegian courts and other authorities".

71. As perceptively pointed out in the *amicus curiae* brief submitted by J.A. Frowein *et al.* on behalf of the Max-Planck-Institute for Comparative Public Law and International Law, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-PT, ("*Frowein Brief* "), p. 11, the Statute of the International Tribunal to some extent reflects an oscillation, in the mind of the drafters, between the "horizontal" approach and the "vertical" approach. The former is reflected in the expression, used in Article 29, paragraph 2, "request for assistance"; the latter in the word, to be found in the same provision, "orders".

72. *See, e.g.,* the *Polish Nationals in Danzig* case, where the Permanent Court of International Justice stated that: "It should . . . be observed that . . . according to generally accepted principles . . . a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (P.C.I.J., Ser. A/B, no. 44, 1931, at p. 24). In the *Georges Pinson* case, brought before the France - Mexico Claims Commission, the umpire dismissed the view that in case of conflict between the Constitution of a State and international law, the former should prevail, by pointing out that this view was "absolutely contrary to the very axioms of international law *(absolument contraire aux axiomes mêmes du droit international)* " (decision of 18 October 1928, in United Nations Reports of International Arbitral Awards, vol. V, pp. 393-94; unofficial translation). *See also* Article 27, first sentence, of the 1969 Vienna Convention on the Law of Treaties, whereby: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

73. For instance, Section 9, para. 1 of the Austrian Federal Law of 1996 allows the International Tribunal to "hear independently witnesses and accused persons in Austria and to inspect localities and take other evidence, provided that the Federal Ministry of Foreign Affairs has been advised in advance of the time and subject of such investigations". Similarly, Section 7 of the Finnish Act of 1994 allows the International Tribunal to operate on Finnish territory to take evidence or seek other forms of legal assistance from Finnish courts.

74. This is the practice of the International Tribunal. For instance, on 16 October 1997, Trial Chamber II issued *subpoenae ad testificandum* to five witnesses and at the same time a request to the Goverment of Bosnia and Herzegovina to the effect that it serve the subpoenas on the five witnesses and also seek the appearance before the Chamber of the Custodian of the Records of the same Government. *See* Request to the Government of Bosnia and Herzegovina, *Prosecutor v. Delalic et al* , Case No. IT-96-21-T, 16 Oct. 1997.

75. It is worth noting that under Section 11, para. 1 of the Austrian Federal Law the International Tribunal may forward a summons and other "documents" to persons in Austria by mail. Under Section 11, para. 2, a witness is under a legal duty to execute a summons directly addressed to him or her. Furthermore, Article 23 of the Swiss Law provides that the procedural decisions of the International Tribunal may be directly mailed to the addressee domiciled in Switzerland. Section 8 of the Finnish Law provides that a witness "who in Finland has been summoned by the Tribunal to appear before the Tribunal is under the duty to comply with the summons". Section 4, para. 2, of the German Law provides that "should the Tribunal request the personal appearance of a person, . . . their appearance may be enforced with the same judicial means as may be ordered in the case of a summons by a German court or a German Prosecutor's Office". According to Frowein "this formula indicates

that the Tribunal may directly summon individuals", *Frowein Brief* , supra n. 71, p. 45.
See also Section 7, para. 2, of the Dutch law (reference is made to persons "being transferred to the Netherlands by the authorities of a foreign State as witnesses or experts in the execution of a subpoena issued by the Tribunal).
76. In this respect, it should be noted that on 20 August 1996 the Presiding Judge of Trial Chamber II, Judge McDonald, issued, at the request of the defence, summonses to certain witnesses to travel to The Hague to testify in the *Tadic* case. The summonses pointed out that under Rule 77 "[a] witness who refuses without sufficient cause to appear before the Tribunal is liable to a fine not exceeding US$10,000 or a term of imprisonment not exceeding six months" (*see Prosecutor v. Dusko Tadic* , Case No. IT-94-1-T, Summons to testify before a Trial Chamber, 20 Aug. 1996). The summonses were handed to the witnesses by the defence counsel, and the witnesses testified in court.
77. *See Appeals Transcript, supra* n. 26, pp. 118-20.
78. *See, e.g.,* the laws of Finland (Section 8, para. 2), Germany (Sections 4, paras. 2 and 4); Italy (Article 10, para. 7); The Netherlands (Section 6); Norway (Section 7 refers to Sections 163-67 of the Penal Code for punishing witnesses who have given false testimony before the International Tribunal); Spain (section 7, para. 1); the United Kingdom (Article 9).
79. *See amicus curiae* brief submitted by the Max Planck Institute for Foreign and International Criminal Law, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-AR108 *bis* ("*Max Planck Brief* "), 15 Sept. 1997, pp. 3-10.
80. *Subpoena Decision, supra* n. 1, para. 62.
81. *Appeals Transcript, supra* n. 26, p. 121.
82. *Ibid.,* p. 59.
83. In the *Colozza* case (judgement of 12 Feb. 1985), the European Court on Human Rights held that trials by default, which are not prohibited by Art. 6, para. 1, of the European Convention of Human Rights (whereby every person charged with a criminal offence is entitled to take part in the hearing) must however fulfil some basic conditions required by the notion of "right to a fair trial". It follows, among other things, that any waiver of the right to be present "must be established in an unequivocal manner" (*Publications of the European Court of Human Rights* , Ser. A, vol. 89, p. 14, para. 28); serious attempts must be made to trace the indictee and notify him of the opening of criminal proceedings (*ibid.*); in addition, once the indictee becomes aware of the criminal proceedings against him, he "should . . . be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge"(*ibid.,* p. 15, para. 29).
84. *Croatia's Brief, supra* n. 30, pp. 59-64.
85. *Ibid.,* p. 60; *see also Appeals Transcript, supra* n. 26, p. 65.
86. *Subpoena Decision, supra* n. 1, paras. 107-49.
87. *Prosecutor's Brief, supra* n. 29, paras. 67-73.
88. *Subpoena Decision, supra* n. 1, para. 147.
89. *Ibid.,* para. 148.
90. *Prosecutor's Brief, supra* n. 29, para. 73.
91. *See Corfu Channel* case, I.C.J. Reports 1949, p. 32.
92. "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." (Emphasis added.)
93. Article 54 of the Rules of the Court adopted on 6 May 1946 provided as follows: "The Court may request the parties to call witnesses or experts, or may call for (*demander*) the production of any other evidence on points of fact in regard to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute." Article 44 provides that:
"1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.
2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot." It would seem that this provision has been replaced in the current Rules of the Court (adopted on 14 April 1978) by Article 62, paragraph 1, whereby: "The Court may at any time call upon (*inviter*) the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose."
94. The German Agent asked to be allowed to inspect certain files of the United States Department of Justice. The Umpire dismissed the request, noting that it was "obvious that the Commission ha[d] no power to call on either Government to produce from its confidential files what, for reasons of State, it consider[ed] would be detrimental to its interests to produce, or would cause improper and unnecessary exposure of private persons and their conduct" (text reproduced in Sandifer, *Evidence Before International Tribunals* , (1st ed., 1939), p. 266). However, before reaching this decision the Umpire stated as follow: "I went to the [United States] Attorney-General and he was good enough to open the files to me confidentially, and while I think it not relevant to the point, I found that the conditions were very much as Mr. Martin [counsel to the Agent of the United

States] had described them in his statement to the Commission. The Attorney-General stated that for reasons of state policy the Department could not permit a stranger, or, indeed, any American citizen, to go through those files. He allowed me to examine as many of the files touching the German matters as I desired, and perhaps it is fair for me to say that after an examination of them I can quite understand the Attorney-General's position in the matter, and can understand that it is a proper one in view of what the files contain" (*ibid.*, pp. 266-67).

95. The Administrative Tribunal ordered the relevant organization (UNESCO) to make confidential files available to it. "Since the Organisation refused to include these documents in the dossier on the grounds that they had no bearing on Mr. Ballo's situation and that some of them were confidential, the Tribunal ordered them to be produced and took cognisance of them in camera. Noting that the documents were indeed of a confidential character, it decided not communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them. . . . After further consideration, however, the Tribunal reached its decision without relying on these documents." *See* , I.L.O. Administrative Tribunal, *Ballo v. UNESCO* , Judgement No. 191, 15 May 1972, in International Labour Office, *Official Bulletin* , vol. LV, Nos. 2, 3 and 4, 1972, p. 224 ff, at 227.

96. Article 28 (a) of the European Convention on Human Rights provides that the Commission, "with a view to ascertaining the facts," "shall . . . undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities" (emphasis added). In the case at issue, Turkey, the respondent State, refused to permit the taking of evidence in the northern part of Cyprus, under Turkish control; the European Commission, lacking any power to enforce the obligation laid down in Article 28 (a), confined itself to submitting a report on Turkey's failure to comply with that provision to the Committee of Ministers of the Council of Europe (*see* Application 6780/74, Report of 10 July 1976, pp. 21-24).

97. In an Order of 7 October 1987, the Court requested the Government of Honduras "to provide the organisational chart showing the structure of Battalion 316 and its position within the Armed Forces of Honduras". In response to this Order, the Government of Honduras "with respect to the organisational structure of Battalion 316, requested that the Court receive the testimony of its Commandant in closed hearing 'because of strict security reasons of the State of Honduras' ". In spite of the objections of the Inter-American Commission of Human Rights, the Court decided to hear the testimony on the structure of Battalion 316 in closed session (Organization of American States, Inter-American Court of Human Rights, Series C, no. 5, *Godinez Cruz* case, Judgement of 20 Jan. 1989, pp. 96-97).

98. It should be mentioned that in the *McIntire* case the respondent (The Food and Agricultural Organization) had refused to disclose a letter, contending that it came from the government of a sovereign State (United States), and that it must "for that reason be treated in the same way as a diplomatic communication". The Administrative Tribunal took note of this refusal and stated the following: "[W]hile it [the Tribunal] has not the power to express an opinion as to the merits of the reason given by the defendant Organisation, [it] deems it inadmissible that the considerations alleged by that Organisation can in any way prejudice the legitimate interests of the complainant; . . . the existence of a secret document concerning the complainant, the content of which is unknown to him and against which he is consequently powerless to defend himself obviously vitiates the just application of the Regulations to the complainant and affects not only the interests of the staff as a whole but also the interests of justice itself." *See* I.L.O. Administrative Tribunal, *McIntire v. FAO* , Judgement no. 13, 3 Sept. 1954, in International Labour Office, *Official Bulletin* , vol. XXXVIII, 1954, p. 273 ff, at 277-78 (emphasis added).

99. *Appeals Transcript, supra* n. 26, p. 151.

100. Article 2, para. 7, provides that:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

101. *Prosecutor's Brief, supra* n. 29, paras. 70-73. *See also* the *amicus curiae* brief submitted by A. Ciampi and G. Gaja, *Prosecutor v. Tihomir Blaskic* , Case No. IT-95-14-PT, 7 Apr. 1997, pp. 5-6.

102. *See* Australian International War Crimes Tribunal Act 1995, Section 26, para. 3.

103. *See* New Zealand International War Crimes Tribunals Act 1995, Section 57.

104. It would seem that the Austrian Federal Law on Cooperation with the International Tribunals is more in keeping with the Statute for, after providing for the power of the Austrian authorities to withhold material affecting national security, it adds that the International Tribunal will be consulted by the Austrian authorities as to whether it can guarantee that the information be kept secret, if disclosed (Section 12, paras. 2 and 3).

105. *Subpoena Decision, supra* n. 1, paras. 113-15.

106. *Nuclear Tests case, supra* n. 27, para. 46, at p. 268.

STEFFEN WIRTH*

IMMUNITIES, RELATED PROBLEMS, AND ARTICLE 98 OF THE *ROME STATUTE*

The *Rome Statute of the International Criminal Court* establishes a cooperation regime, in part IX, that obliges States parties to cooperate with the International Criminal Court (ICC) if the Court so requires.[1] Article 98 covers possible conflicts between the obligation of States parties to cooperate with the Court and other obligations that may bind them under international law. Thus, in order to understand the provision and its effect on the Court's work, it seems important to form an idea of the nature and scope of norms of international law that may cause problems with regard to a request for cooperation. The major part of the following analysis focuses on the most problematic group of such norms, namely the rules of immunities under international law. It attempts to define their current status under public international law, considering in particular prosecutions of the international crimes of genocide, crimes against humanity and war crimes, which are the core crimes of the *Rome Statute*.[2] It will examine the customary international law principle of state immunity,[3] diplomatic and consular immunities, and the immunity of military forces including the effect of status of forces agreements (hereinafter SOFAs). Finally,

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[1] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9. The International Criminal Court will be established following the deposit of the sixtieth ratification, something which is expected during the year 2002.

[2] Although aggression is also a core crime under article 5 of the *Statute*, its elements are not yet defined in the *Statute*. Until such definition is achieved, the International Criminal Court cannot prosecute the crime.

[3] However, treaties like the *European Convention on State Immunity*, E.T.S. No. 74, and statutes, like the United Kingdom *State Immunity Act of 1977*, 18 I.L.M. 1132, and the *United States Foreign Sovereign Immunities Act*, 28 U.S.C. ss. 1330, 1602–1611, regarding state immunity are not covered.



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article 27 of the *Rome Statute* is considered. After clarifying the legal context of article 98, the provision itself is described. In this regard, SOFAs and "other agreements requiring consent of a sending state" are the most difficult issues.[4]

1. STATE IMMUNITY

1.1. *Types of State Immunities and Its Purposes*

The principle of sovereign equality of states requires that no state can issue any binding order towards another state: *par in parem non habet imperium*[5] (or *iudicium*). Accordingly, it is an old principle of customary international law that every state enjoys immunity from the jurisdiction of other states.[6] Immunity (which should not be confused with the act of state doctrine[7]) is an exception or a limitation to a state's jurisdiction. A state may not, in general, exercise its jurisdiction over a foreign state or state official, even if the relevant conduct takes place on the territory of the state or would for other reasons come under the state's jurisdiction.[8] With regard to criminal law, immunity, if available, prohibits all kinds of measures,[9] including extradition and surrender, and not only the actual trial.

State immunity serves two purposes. The first is the protection of the ability of a state to carry out its functions without external interference.[10]

[4] Due to restrictions of space, the history and the contentious question of the scope of Rule 195(2) of the *Draft Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF3/Add.1 is not discussed. See the paper of the Coalition for an International Criminal Court – German Committee (CICC.DE), "The Legality of the Proposed 'Supplemental Document to the UN-ICC Relationship Agreement' under International Law", available at <http://www.iccnow.org/html/n.g.o.html>; Carsten Stahn, 60 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 631 (2000).

[5] Bartolus, quoted in Alfred Verdross and Bruno Simma, UNIVERSELLES VÖLKERRECHT. THEORIE UND PRAXIS 763, §1168 (3rd edn., 1984); also *Schooner Exchange* v. *McFaddon et al.*, 11 U.S. 116, 137.

[6] For a short overview see Rudolf Geiger, GRUNDGESETZ UND VÖLKERRECHT 338 *et seq.* (2nd edn., 1994); see also Burkhard Heß, STAATENIMMUNITÄT BEI DISTANZDELIKTEN 29 *et seq.* (1992).

[7] On this doctrine, see Steffen Wirth, *Staatenimmunität für Internationale Verbrechen – das zweite Pinochet Urteil des* House of Lords, 22 JURISTISCHE AUSBILDUNG 70, 72–73 (2000), with further references.

[8] On the scope of national jurisdiction, see Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 302 (5th edn., 1998); Karl Doehring, VÖLKERRECHT nos. 808–826 (1999).

[9] Kai Ambos, *Der Fall Pinochet und das anwendbare Recht*, 54 JURISTENZEITUNG 16, 21, 23 (1999).

[10] *Ibid.*, p. 23.

The second – less important – purpose of state immunity is to protect a state's dignity, which may suffer if the sovereign state has to comply with another state's orders.[11] It is evident that the more important object of protection, the ability of a state to function, is especially endangered in the case of *mala fide* procedures.[12]

The legal entity that state immunity is intended to protect from being sued or charged before foreign courts or being bound by foreign administrative acts is the state itself.[13] Only the state – never an individual – can waive immunity.[14] However, it would be all too easy to circumvent state immunity if one could simply sue or order the representatives or agents of the state instead of the state itself. Therefore, state immunity does not only exist for the state as a legal entity but also for state officials.[15] As the ICC has jurisdiction only over individuals (not over states), it is this derivative immunity of the state's individual agents which must be taken into consideration with regard to article 98 of the *Rome Statute*.

When considering the (derivative) immunity of state officials it is important to distinguish two different kinds of immunities. The first, so called immunity *ratione materiae*, concerns the official acts of a state official, *i.e.*, the acts performed in pursuit of his or her official tasks. To distinguish such official acts from merely private ones one has to determine the purpose of the act (*i.e.*, the restitution of public order) and not whether the act was legal or illegal under national or international law. This was stated correctly by Lord Hope in the third decision of the House of Lords in the *Pinochet* case.[16] The most important legal value protected by immunity *ratione materiae* is a state's dignity. It is felt that procedures against a state agent for his or her conduct in office are tantamount to proceeding against the state itself and disregarding its sovereignty.

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[11] Ian Brownlie, *supra* note 8, p. 329; also *Schooner Exchange*, *supra* note 5, pp. 136–137.

[12] Even if it is not clear that no war crimes were committed by the NATO forces during the Kosovo bombing, the war crimes trial held in Belgrade in autumn 2000 against heads of state and NATO officials remains highly questionable (SÜDDEUTSCHE ZEITUNG, 19 September 2000, p. 7, 22 September 2000, p. 8).

[13] On the different forms of jurisdiction, see Ian Brownlie, *supra* note 8, p. 301; I OPPENHEIM'S INTERNATIONAL LAW: PEACE 341 *et seq.*, §109 (Sir Robert Jennings and Sir Arthur Watts, 9th edn., 1992); Alfred Verdross and Bruno Simma, *supra* note 5, pp. 762 *et seq.*, §§1168 *et seq.*

[14] Ian Brownlie, *supra* note 8, pp. 343–344.

[15] I OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 13, p. 346, §109); Alfred Verdross and Bruno Simma, *supra* note 5, p. 773, §1177.

[16] *R.* v. *Bow Street Magistrate, Ex parte Pinochet* (1999) 2 W.L.R. 827, 38 I.L.M. 430 (H.L.), pp. 880–881, 889 (W.L.R.). See, however, the opinion of Lord Hutton, *ibid.*, p. 899.

The second kind of immunity for state agents, so called immunity *ratione personae*, is an absolute immunity; *i.e.*, an immunity that not only protects the state agent acting on behalf of the state but renders him or her completely immune from any foreign jurisdiction regardless of whether the act is official or private. Only very few state agents (including heads of state and foreign ministers abroad)[17] are vested with immunity *ratione personae* and only as long as they are on active duty. As soon as they leave their post, immunity *ratione personae* ceases and only immunity *ratione materiae* for official acts remains.[18] (This was the case for Pinochet[19]). Whereas the exact extent of immunity *ratione personae* is not quite clear with regard to civil actions concerning private acts,[20] no state seems to have attempted to institute criminal procedures against a sitting head of state.[21]

The value protected by immunity *ratione personae* is much more important than the value protected by immunity *ratione materiae*. Immunity *ratione personae* protects the functionality of a state (and not only its mere dignity). As opposed to other state agents (such as civil servants), a head of state cannot easily be replaced. Thus, procedures – including arrest – against a head of state or other leading state officials might seriously impair the state's ability to discharge its functions properly, including the function to maintain peace. This is the precise reason why immunity *ratione personae* provides complete protection against any foreign exercise of jurisdiction whereas immunity *ratione materiae* covers only official acts, leaving the state agent unprotected against any foreign procedures with regard to private conduct. Moreover, this is also the reason why immunity *ratione personae* vanishes once the term of office has finished: then the person who was formerly head of state is no longer important for the functioning of the state and immunity *ratione materiae* is sufficient to protect the state's dignity with respect to official acts.

It may be added that the immunity that protects the state as a legal entity serves both of the named purposes. It protects the state's ability to function without foreign interference because foreign states cannot exercise jurisdiction in such a way as to oblige or even force a foreign state to adopt a certain conduct, and it protects the state's dignity as foreign authorities

[17] Monika Lüke, IMMUNITÄT STAATLICHER FUNKTIONSTRÄGER 91 *et seq.* (2000); Alfred Verdross and Bruno Simma, *supra* note 5, pp. 641–642, §1027.

[18] I OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 13, pp. 1043–1044, §456.

[19] See *R. v. Bow Street Magistrate, Ex parte Pinochet*, *supra* note 16, p. 921.

[20] I OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 13, p. 1042, §455.

[21] On the question of international tribunals charging sitting heads of state (such as *Milosevic*) see below.

are not entitled to embarrass the state by pronouncing on the legality of its conduct.

1.2. *The Commercial Activity Exception*

Whereas originally the immunity of a foreign state was an absolute one,[22] modern international law accepts certain exceptions to state immunity. For example, it is now widely accepted that immunity exists only for *acta iure imperii*, *i.e.*, a state exercising its governmental powers. In contrast, if a state takes part in economic exchange, like a private entity (*i.e.*, *iure gestionis*), it will be treated like a private entity and consequently can be subjected to civil proceedings before foreign courts with respect to the obligations incurred in the course of the commercial conduct.[23]

1.3. *An Exception from Immunity for Core Crimes?*

However, the *Pinochet* case of the House of Lords suggests that there is another exception to state immunity. Human rights violations amounting to core crimes, *i.e.*, genocide, crimes against humanity and war crimes, might not be covered by the principle of state immunity. As far as genocide is concerned this is clear from article IV of the *Genocide Convention* itself. For the reasons given in *Pinochet*, it is also obvious that the *Torture Convention*[24] abrogates most immunities for torture. The same seems to hold true for war crimes pursuant to Geneva law.[25]

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[22] Kay Hailbronner in III VÖLKERRECHT margin no. 76 (Wolfgang Graf Vitzthum, ed., 1997); on the development of the law, see Sir Ian Sinclair, *The Law of Sovereign Immunity. Recent Developements* [1980] II RECUEIL DES COURS 113, 121 *et seq.*; also Shobha Varughese George, *Head of State Immunity in the United States Courts: Still Confused after all these Years*, 64 FORDHAM L. REV. 1051 (1995), 1056 *et seq.*

[23] *Bundesverfassungsgericht* Decision of 30 April 1963 (*Iranian Embassy*) – 2 BvM 1/62, 16 Entscheidungen des *Bundesverfassungsgerichts*, 27, 33–61 (1964); Christian Tomuschat, *Jurisdictional Immunities of States and their Property. The Draft Convention of the International Law Commission*, in Law of Nations. LAW OF INTERNATIONAL ORGANIZATIONS. WORLD'S ECONOMIC LAW. LIBER AMICORUM HONOURING IGNAZ SEIDL-HOHENVELDERN 603, 604 (Gerhard Hafner, ed., 1988); Rudolf Geiger, *Staatenimmunität: Grundsatz und Ausnahme*, 40 NEUE JURISTISCHE WOCHENSCHRIFT 1124 (1987), p. 1125; Knut Ipsen, VÖLKERRECHT §26 margin number. 17 *et seq.* (3rd edn., 1990); Shobha Varughese George, *ibid.*, p. 1057.

[24] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1987) 1465 U.N.T.S. 85.

[25] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1950) 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (1950) 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (1950) 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilians*

As far as the remaining core crimes are concerned (*i.e.*, crimes against humanity and war crimes in internal armed conflicts), the *Pinochet* judgment is a good starting point. It not only constitutes state practice and *opinio iuris*, but also provides a useful argument for an approach towards the problem of immunity for core crimes under customary international law.

1.3.1. *The House of Lords'* Pinochet *decision as state practice and* opinio iuris

It is accepted that judicial decisions of national courts must be regarded as state practice[26] and there can be no doubt that judgments by their very nature are also manifestations of *opinio iuris*. The decision of the seven Law Lords who rendered the last and decisive *Pinochet* judgment on immunity for core crimes is therefore worth a closer look. Clearly, the Law Lords would grant state immunity to a sitting head of state under all circumstances. They held that immunity *ratione personae* would shield its bearer even against prosecutions for core crimes[27] including torture pursuant to the *Torture Convention*.[28]

This is not the case, however, for immunity *ratione materiae*, which was the only kind of state immunity available for Pinochet as a retired head of state. Most of the Law Lords were of the opinion that as a party to the *Torture Convention*, Chile could not assert immunity (*ratione materiae*),[29] for the reasons explained by Lord Browne Wilkinson:

> Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity [art. 1 (1)]. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution

(1950) 75 U.N.T.S. 287; *Protocol Additional I to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts* (1979) 1125 U.N.T.S. 3; *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts* (1979) 1125 U.N.T.S. 3.

[26] Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1,10 (1974–1975).

[27] See for example Lord Hutton, in *R.* v. *Bow Street Magistrate, Ex parte Pinochet*, *supra* note 16, p. 898; Lord Saville, *ibid.*, p. 902; Lord Millet, *ibid.*, p. 913; Lord Phillips, *ibid.*, pp. 915–916.

[28] The crime of torture as defined in article 1 of the *Torture Convention* has a greater scope than the crime against humanity of torture, because the *Convention* also comprises isolated acts of torture whereas crimes against humanity can be committed only in the context of a widespread and systematic attack (*Rome Statute*, *supra* note 1, art. 7).

[29] *R.* v. *Bow Street Magistrate, Ex parte Pinochet*, *supra* note 16, p. 847 (per Lord Browne-Wilkinson); Lord Saville, *ibid.*, pp. 903–904. For a summary see Steffen Wirth, *supra* note 7, p. 75.

for torture can be brought unless the State of Chile is prepared to waive its right to its official's 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 [art. 5(2) and 7 (1)] – will have been frustrated.[30]

Nevertheless, the *Pinochet* decision would be of limited use for the protection of human rights if its scope were limited to cases of torture under the *Torture Convention.* In fact, four of the seven Law Lords considered the matter of immunity in the much broader framework of international (core) crimes, as their individual opinions reveal.

Lord Hope's opinion is the least consistent of the four, as the outset of his discussion of immunity is plainly misleading. It starts with a quote from Lord Slynn the first decision of the House of Lords in the *Pinochet* case.[31] Lord Slynn had claimed that head of state immunity (*ratione materiae*) exists unless it is abrogated in an international treaty.[32] He did not accept that the *Torture Convention* abrogated state immunity for former heads of state.[33] The context of this quote suggests that Lord Hope agrees.[34] However, such agreement seems very strange because – contrary to Lord Hope[35] – Lord Slynn concluded that Pinochet could claim immunity. Indeed, at the end of Lord Hope's opinion it turns out that, despite the misleading quote, there is no agreement with Lord Slynn in that immunity for core crimes exists unless a state has waived it in a convention. Lord Hope states:

A head of state is still protected while in office by the immunity ratione personae, but the immunity ratione materiae on which he would have to rely on leaving office must be denied to him. *I would not regard this as a case of waiver.* Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity ratione materiae with respect to all acts of official torture as defined in article 1. It is just that the obligations which were recognised by *customary international law* in the case of such *serious international crimes* by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity

30 *Ibid.* Because immunity *ratione personae* is available only to very few state officials this argument could not be opposed to the Law Lords opinion that the Torture Convention is not incompatible with the availability of immunity *ratione personae* for acts of torture.

31 *R.* v. *Bow Street Magistrate, Ex parte Pinochet* [1998] 3 W.L.R. 1456, 37 I.L.M. 1302 (H.L.). The decision was invalidated because one of the judges was deemed to have lacked the appearance of impartiality.

32 *Ibid.*, p. 1475 (per Lord Slynn).

33 *Ibid.*, p. 1477.

34 *R.* v. *Bow Street Magistrate, Ex parte Pinochet, supra* note 16, p. 882 (per Lord Hope).

35 *Ibid.*, p. 887.

ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available.[36]

There can be no doubt that, according to Lord Hope, under customary international law, immunity is excluded not only where torture is concerned but also with regard to other "serious international crimes".[37]

Lord Hutton is of the opinion that Pinochet could not claim immunity *ratione materiae* for procedures regarding alleged acts of torture because torture cannot be regarded as a task of the state and, accordingly, cannot be covered by *state* immunity.[38] However, more important than this – questionable – reasoning is that, with the exception of the *Torture Convention*, all sources that Lord Hutton adduces to support his opinion are of such a nature as to exclude immunity for all core crimes.[39] Moreover, Lord Hutton explicitly puts torture and other core crimes on an equal footing: "[S]ince the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. *Torture* has been recognised *as such a crime*."[40] Thus it is a necessary implication of his argument that core crimes, in general, cannot be regarded as official acts and that, consequently, immunity is not only excluded for torture but for all core crimes.

Lord Millet's argument is linked very closely to the *Torture Convention*. However, in his view, the reason Pinochet could not claim immunity is not Chile's ratification of the *Torture Convention*, because "[i]n my opinion *there was no immunity to be waived*". A few lines later he is even clearer: "International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."[41] That it is indeed his intention to deny immunity for all international crimes which must be qualified as *ius cogens* (which is clearly the case for core

[36] *Ibid.*, pp. 886–887 (emphasis added).

[37] He is most probably referring to war crimes and crimes against humanity which, as he states earlier in his opinion "have been separated out from the generality of conduct which customary international law has come to regard as criminal"; *ibid.*, p. 881.

[38] *Ibid.*, pp. 895–899 (per Lord Hutton).

[39] Lord Hutton cited, *inter alia*, article 7 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind of the International law Commission (available at <www.un.org/law/ilc/convents.htm>) and article 27 of the *Rome Statute*, *supra* note 1.

[40] *Ibid.*, p. 897 (per Lord Hutton) (emphasis added).

[41] *Ibid.*, p. 913 (emphasis added).

crimes)[42] is apparent from his concluding remarks: "In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence."[43]

Lord Phillips' starting point is to state that (almost) no criminal cases exist in which immunity has been granted[44] and to dismiss the case law concerning civil proced ure as irrelevant.[45] He reaches the conclusion that "no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime". Moreover, he affirms his belief that state immunity *ratione materiae* cannot co-exist with international crimes because "[a]n international crime is as offensive, if not more offensive, to the international community when committed under colour of office".[46] When referring to the *Torture Convention*, he does not understand it as a waiver of immunity but as an expression of the premise (on which the *Convention*'s drafters based their work) that "no immunity could exist ratione materiae in respect of torture, a crime contrary to international law".[47]

Regardless of the persuasiveness of the reasons given by the Law Lords, it is the conclusions in these four opinions that are to be taken into account in determining state practice and, in particular, *opinio iuris*. In the light of these conclusions the House of Lords' denial of immunity for Pinochet must be understood as state practice of the United Kingdom confirming the international norm that immunity *ratione materiae* is not available for *any* prosecution regarding core crimes; *i.e.*, the scope of the decision as state practice and *opinio iuris* for the purpose of determining customary international law is not limited to cases of torture under the *Torture Convention*, but comprises all core crimes.[48]

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[42] Wolff Heintschel von Heinegg in Knut Ipsen, *supra* note 23, §15 margin number 51; for a detailed analysis see: Lauri Hannikainen, PEREMPTORY NORMS (IUS COGENS) IN INTERNATIONAL LAW. HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 429 *et seq.* (1988).

[43] *R.* v. *Bow Street Magistrate, Ex parte Pinochet, supra* note 16, p. 914 (per Lord Millet).

[44] *Ibid.*, p. 917 *et seq.* (per Lord Phillips).

[45] *Ibid.*, p. 923.

[46] *Ibid.*, p. 924.

[47] *Ibid.*, p. 925.

[48] The reason why immunity for murder – a crime against humanity, if committed as part of a widespread or systematic attack – was not given much attention in the judgment can be found in the extradition law of the United Kingdom. Spain requested the extradition of Pinochet for murder on the grounds that the victims were Spanish citizens under the so called passive personality principle. However, unlike Spain, the United Kingdom does not prosecute under the passive personality principle; *i.e.*, if Pinochet (or any other foreigner)

1.3.2. *The doctrinal argument against state immunity* (ratione materiae) *for core crimes*

The reasons Lord Phillips gives for the denial of state immunity to Pinochet seem to be the most interesting. As we have seen, he distinguishes between criminal cases and civil cases, disregarding the latter ones as irrelevant (in fact he also excludes cases regarding mere national crimes from the relevant state practice because his examples concern – and his conclusion is limited to – international crimes).

1.3.3. *The background of Lord Phillips' argument*

Obviously Lord Phillips' argument is related to the question of the formation of new customary international law. The issue here is generalisation[49] of state conduct in such a way as to derive a *general* rule from the observation of various *particular* acts of different states. States often indicate that they consider their *concrete* practice in a *particular* case in accordance with a certain legal obligation. However, such indications are usually brief and rarely (if ever) explain the complete content and extension of the respective obligation. If, for example, a national authority refuses to exercise its jurisdiction towards a foreign state official it might indicate that it does so with regard to the law of state immunity. But even a court will usually restrict its reasons to the particularities of the case – which in most circumstances would be a private law case – and not give an exact and exhaustive definition of the elements and the scope of state immunity as a whole. Thus, only decisions like the *Pinochet* judgment can be expected to deal explicitly with state immunity in the context of core crimes prosecutions.

As a result, the international lawyer, when searching for customary international law, is confronted with several particular cases in which states indicated that they felt obliged (or not) by the international law of state immunity to adopt a certain conduct (for example to abstain from the exercise of jurisdiction). It is then up to her or him to induce from the

had murdered United Kingdom citizens abroad, the courts of the United Kingdom would not have jurisdiction to prosecute. As a consequence the double criminality requirement of the United Kingdom's 1989 Extradition Act was not met with regard to the charges of murder, and the issue of immunities did not arise. Lord Hope stated: "None of the other charges which are made against him are extradition crimes for which, even if he had no immunity, he could be extradited" (*ibid.*, p. 887, *per* Lord Hope). See also Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC and a Wake-Up Call for Former Heads of State*, 50 CASE WESTERN RESERVE L. REV. 127 (1999), fn. 222 and accompanying text.

[49] Albert Bleckmann, *Zur Feststellung und Auslegung von Völkergewohnheitsrecht*, 37 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 504 (1977), p. 505.

concrete cases an *abstract* rule of state immunity. It is precisely this task which is taken up by Lord Phillips when he points out that the pre *Pinochet* case law rarely dealt with state immunity in criminal law and, apparently, never in the context of alleged commission of core crimes.

1.3.4. *Existing state practice regarding state immunity*

The vast majority of available state practice concerns civil matters[50] (including actions for damages for alleged human rights violations such as torture[51]). Even if such decisions make general statements like the one in *Underhill* v. *Hernandez* ("[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory"[52]), this cannot cover the issue of immunity against core crimes prosecutions. In 1897, at the time of *Underhill* v. *Hernandez*, the whole concept of core crimes had not even been developed and until most recently the prosecution of foreign state officials for core crimes was, for political reasons, almost unthinkable.[53]

Only a few cases recognise state immunity in the context of criminal proceedings.[54] Whereas these cases indicate that immunities exist with regard to prosecutions of national criminal law cases, especially if the defendant is a sitting head of state, they simply leave the question open whether or not the applied rule of immunity covers core crimes prosecutions. In the famous *McLeod* case, a member of the British forces took part in an attack on the United States vessel *Caroline* (which supported Canadian insurgents) on United States territory. He was arrested and

[50] *Schooner Exchange*, *supra* note 5, *Underhill* v. *Hernandez*, 168 U.S. 250 (1897); *Reichsgericht*, Judgment of 12 December 1905 – Rep. 2 193/5, 12 Entscheidungen des Reichsgerichts in Zivilsachen, 165; *Bundesverfassungsgericht* (*Iranian Embassy*), *supra* note 23; *Bundesgerichtshof*, Judgment of 26 September 1978 (*Scotland Yard*) – VI ZR 267/76, 32, 32 Neue Juristische Wochenschrift 1101 (1979). On the Swiss practice, see: Jörg Paul Müller and Luzius Wildhaber, PRAXIS DES VÖLKERRECHTS, 447–462 (3rd edn., 2001).

[51] *Siderman de Blake et al.* v. *Republic of Argentina et al.*, 965 F.2d 699, 714. However, in this case Argentina was held to have waived its immunity with respect to the Sidermans' claims of torture as it previously had availed itself of United States courts in proceedings against the Sidermans, *ibid.*, pp. 720–722); *Al-Adsani* v. *Government of Kuwait et al.*, 103 I.L.R. 420 (1996) (England, High Court, Queen's Bench Division).

[52] *Underhill* v. *Hernandez*, *supra* note 50, p. 252.

[53] What happens if a court is aware of the matter but sees no need to pronounce on it has been demonstrated recently by a German court which left the question expressly open, *Oberlandesgericht Köln*, decision of 15 May 2000 – 2 Zs 1330/99, 20 NEUE ZEITSCHRIFT FÜR STRAFRECHT 667 (2000).

[54] The most recent is the decision of the *Cour de Cassation* of 13 March 2001 in the case of Ghaddafi, the current head of state of Libya (unpublished, text on file with the author). The Court held that a sitting head of state could not be charged with terrorism.

tried in the United States in 1840.[55] The United States secretary of state replied to the British Ambassador that "the government of the United States entertains no doubt" that persons taking part in a "public transaction authorized and undertaken by the British authorities" ought not to be tried.[56] Whereas the case is clear evidence that ordinary crimes are covered by state immunity nothing can be deduced from it with regard to core crimes because no such crimes were involved. Moreover, *McLeod* is roughly 160 years old, whereas international crimes "are new arrivals in the field of public international law".[57]

Two much more recent German trials have involved sitting heads of state. The 1984 case of the Bundesgerichtshof (BGH), the Federal Supreme Court, dealt with proceedings against Honecker, then Staatsratsvorsitzender of the German Democratic Republic.[58] The 2000 case of the Oberlandesgericht Köln (OLG) considered a criminal charge against the head of state of the Republic of Iraq.[59] In both cases it was decided that the Bundesrepublik Deutschland had no jurisdiction on grounds of state immunity.[60] Moreover, the OLG contended that the alleged crimes were not crimes under international criminal law and, thus, left the question as to whether immunity is available in core crimes cases expressly open.[61] The BGH did not even mention the question of international crimes or core crimes.

As yet, there is very little state practice denying state immunity in criminal cases. Some of these cases concern state agents who have acted

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[55] He was acquitted for reasons unrelated to the matter of immunity.

[56] Lord Phillips did not deal with the *McLeod* case. For a description of the case see: Sir Robert Jennings, 32 AM. J. INT'L L. 82 (1938), p. 92 *et seq.*; for a summary and the quotation reproduced above see; I OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 13, p. 1158, §558), note 12.

[57] *R.* v. *Bow Street Magistrate, Ex parte Pinochet*, *supra* note 16, p. 924 (per Lord Phillips).

[58] *Bundesgerichtshof*, decision of 14 December 1984 – 2 ARs 252/84, 33 Entscheidungen des Bundesgerichtshofes in Strafsachen, 97.

[59] *Oberlandesgericht Köln*, decision of 15 May 2000, *supra* note 53, p. 667.

[60] *Bundesgerichtshof*, decision of 14 December 1984, *supra* note 58, p. 98; *Oberlandesgericht Köln*, decision of 15 May 2000, *supra* note 53, pp. 886–868.

[61] *Oberlandesgericht Köln*, decision of 15 May 2000, *supra* note 53, pp. 667–668. However, the Court's opinion on the nature of the crimes under scrutiny is not correct. The crime which the head of state of Iraq allegedly committed, namely the taking of foreigners as hostages and using them as human shields in order to deter NATO strikes on Iraqi military facilities, is clearly a war crime pursuant to art. 147 of the fourth *Geneva Convention*; cf., Steffen Wirth, *Case Note*; 21 NEUE ZEITSCHRIFT FÜR STRAFRECHT 665 (2000).

secretly on foreign territory (for example spies).[62] In the present context, however, a second group of cases concerning core crimes is of greater interest. The first and most important of these is the *Pinochet* case, which has already been mentioned. It constitutes state practice not only of the United Kingdom but also of states which requested the extradition of Pinochet, namely Spain,[63] Belgium, Switzerland and France. Moreover the German Bundesgerichtshof, in response to a charge against Pinochet, determined a competent court for further inquiry and consideration.[64] As the same court had refused to make such a determination in *Honecker*, on the grounds that state immunity forbade any procedures against Honecker, one might conclude that the Bundesgerichtshof was at least inclined to the view that Pinochet could not claim immunity.[65]

In the Netherlands the Gerechtshof Amsterdam, the Amsterdam Court of Appeal, decided that Bouterse, the former head of state of Surinam, could not claim state immunity against prosecutions for the crime against humanity of torture, because the commission of the crimes Bouterse was charged with could not be "considered to be one of the official duties of a head of state"[66] (the same argument was made by Lord Hutton in *Pinochet*).

Finally, Belgium issued an arrest warrant for war crimes and crimes against humanity against Ndombasi, the former *directeur du cabinet* to the President of the Democratic Republic of Congo, who now serves as the country's Minister of Foreign Affairs. The issue is presently before the International Court of Justice.[67] Interestingly, the Congo has based its application not on the international law of state immunity but on diplomatic immunity under the *Vienna Convention on Diplomatic Relations*[68] and on a lack of Belgian jurisdiction.[69] Thus, even the Democratic

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[62] Alfred Verdross and Bruno Simma, *supra* note 5, p. 73, §1177, with further references in footnote 52.

[63] Spanish courts denied immunity to Pinochet on several occasions; see Pigrau Sole, *The Pinochet Case in Spain*, 6 ILSA J. INT'L & COMP. L. 653 (2000), pp. 674–675.

[64] *Bundesgerichtshof*, Decision of 18 November 1998, 2 ARS 471/98 and 2 ARS 474/98, reprinted *in* DER FALL PINOCHET(S). AUSLIEFERUNG WEGEN STAATSVERSTÄRKTER KRIMINALITÄT? 100 (Heiko Ahlbrecht and Kai Ambos, eds., 1999).

[65] Monika Lüke, *supra* note 17, p. 99, fn. 276; Kai Ambos, *supra* note 8, p. 23.

[66] *Gerechtshof Amsterdam*, 20 November 2000, Nederlandse Jurisprudentie (2001), 302 (No. 51), 303 (translation by the International Commission of Jurists, available at <www.icj.org/objectives/decision.htm>).

[67] See <www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

[68] 500 U.N.T.S. 95.

[69] Application instituting proceedings, 17 October 2000 (available at <www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>), chapter IV.

Republic of Congo seems to accept that state immunity is not available for core crimes.

In contrast to the state practice named above, the statutes and decisions of the international tribunals for the former Yugoslavia and Rwanda are of little use in determining the current status of state immunity. This is not only because there may be doubts as to whether the practice of the tribunals can be regarded as state practice but also because the unavailability of immunity for defendants before these tribunals is not necessarily due to the fact that there exists no state immunity against core crimes prosecutions. The reason for the unavailability of state immunity before the *ad hoc* tribunals[70] may be explained as a *waiver* by United Nations Member States. Under Chapter VII of the *Charter of the United Nations*, the Member States have vested the Security Council with an almost unlimited power to take any measure it considers necessary to protect internation al peace. In establishing the tribunals, the Security Council was free to protect international peace with institutions empowered to disregard any immunities which might exist under international law.

Nevertheless, the *Blaskic* decision of the International Criminal Tribunal for the former Yugoslavia is an important statement of experts and, moreover, evidence of the state of international law in accordance with article 38(1)(d) of the Statute of the International Court of Justice. According to the Tribunal:

> The general rule under discussion is well established in international law and is based on the sovereign equality of States (par in parem non habet imperium) ... [E]xceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[71]

1.3.5. *Generalizing state practice*

Besides the decision of the House of Lords in *Pinochet*, other judgments indicate that certain states may at last claim the right to prosecute core crimes committed by former foreign heads of states while they held office. However, compared to case law granting state immunity, the "new" state practice denying immunity for core crimes prosecutions is still negligible.

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[70] *Statute of the International Criminal Tribunal for the former Yugoslavia*, U.N. Doc. S/RES/827 (1993), annex, art. 7(2); *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955 (1994), annex, art. 6(2).

[71] *Prosecutor* v. *Blaskic* (Case no. IT-95-14-A), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 41.

Thus, a "conservative" lawyer might still contend that the "new" state practice is simply in contradiction with the established traditional customary international law doctrine and therefore illegal. In fact, Lord Lloyd, who dissented in the House of Lords' first decision in *Pinochet* on the question of immunity, cited two civil cases to support his view that the international law of immunity covers prosecutions for torture.[72] However, if the scope of application of the traditional doctrine is limited to private law matters, and prosecutions of violations of national criminal law,[73] and does not extend to prosecutions for core crimes, then there can be no contradiction between the traditional doctrine and the new state practice regarding core crimes. Is state practice regarding private and national criminal law cases an expression of a rule granting immunity *even for core crimes*, as Lord Lloyd held, or is it an expression of a rule granting immunity merely for *private and national* criminal law cases? If the latter is the case, there can be no contradiction between the traditional doctrine and the new state practice. Accordingly, the new state practice cannot be considered illegal.

Given that in pre-*Pinochet* decisions no express *opinio iuris* on this question exists, the only way to determine the scope of the traditional doctrine is to ask which rule would be more sensible in the view of the states which exercised the respective practice. To this end it is necessary to recall the legal values that are protected by state immunity and to weigh them against the legal values that are affected adversely by state immunity.[74] Two values protected by immunity have been identified, namely, a state's ability to carry out its functions without external interference, and a state's dignity, which may suffer from the "humiliation" of being submitted to another state's orders. It has also been explained that a state's ability to function is protected by immunity *ratione personae* whereas immunity *ratione materiae* primarily protects the dignity of a state. The immunity that prohibits foreign procedures against the state itself (as a legal entity) protects both a state's ability to function and its dignity. The legal values which may be impaired if immunity is granted will now be considered.

In civil cases, the impaired interest is mostly of a financial nature, *i.e.*, the assets of the plaintiff will suffer. However, in most such cases no immunity is available in any case, because the commercial activity excep-

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[72] *Al-Adsani*, *supra* note 51; *Siderman de Blake*, *supra* note 51; *R.* v. *Bow Street Magistrate, Ex parte Pinochet*, *supra* note 31, pp. 1489–1490 (per Lord Lloyd).

[73] The term "*national* criminal law" is used here in contrast with the term "core crimes", which belong to *international* criminal law.

[74] "Legal value" is hereinafter used as a translation of the German term *Rechtsgut* (Italian *bene giuridico*; Spanish *bien juridico*).

tion for *acta iure gestionis* applies. In criminal cases, where a violation of national criminal law is concerned, the interest impaired if immunity prevents prosecutions is the deterrence of conduct deemed criminal under national law. In other words, the impaired interests are all legal values that a particular state considers important enough to justify criminal prosecution.

At first glance, the purposes of core crimes prosecutions are similar to the purposes of criminal prosecutions under national law. However, there are two very important differences, a material difference and a formal difference. The material difference is that the prosecution of national crimes may protect such legal values as personal property or the safety of road traffic, whereas the prohibition of core crimes protects the most fundamental human rights against the most atrocious crimes known to mankind. The importance of the deterrence of core crimes is second only to measures which maintain international or internal peace. Moreover, effect deterrence requires that prosecutions for core crimes be conducted in as many states and by as many (national) courts as possible, in order to ensure that the risk of punishment is clearly visible to every potential perpetrator. International tribunals (where the problem of immunities might be less pressing) will never be able to try a sufficient number of offenders, and therefore "prosecution before national courts, ... will necessarily remain the norm even after a permanent international tribunal is established".[75]

The formal difference between the legal values protected by national criminal law and the legal values protected by the prohibition of core crimes is that the former are at the disposition of every single state whereas the latter are recognized by *international* law and their violation is punishable under *international* criminal law. Consequently, these legal values are accepted by the whole of the international community, and no state can claim that it does not consider them important.

In attempting to determine a hierarchy of the values protected by immunity and the values impaired by immunity, the outstanding importance of a state's ability to discharge its functions because international as well as internal peace depend on this ability cannot be gainsaid, as is clearly demonstrated by examples like Somalia. International and internal wars are probably the most detrimental events known to mankind and, moreover, they are almost always accompanied by the commission of core crimes. Thus, a core crimes prosecution against a head of state depriving a country of its leadership and probably arousing very powerful nationalistic emotions may lead to war which, in turn, is more than likely to result in

[75] *R.* v. *Bow Street Magistrate, Ex parte Pinochet, supra* note 16, p. 914 (per Lord Millet).

evils (including the commission of core crimes) much graver than the core crimes of which the head of state has been charged (or which could have been deterred by prosecution). Therefore it seems very arguable that the ability of states to discharge their functions is even more important than the deterrence of core crimes by criminal prosecutions. On the other hand, if core crimes prosecutions, protecting the most fundamental human rights, are held up alongside immunity *ratione materiae*, which mainly safeguards a state's dignity against "humiliation", the prohibition of core crimes must take precedence. Finally, the state's ability to discharge its functions as well as maintain its dignity must, as a rule, be considered more important than the legal values protected by national private or criminal law. This is because, in a public international law context, legal values that are merely defined on the national level cannot trump internationally recognised legal values (like the values protected by state immunity) unless the national values happen to coincide with international ones.

Which rule of state immunity makes more sense, one that grants immunity only for civil and national criminal law cases or a more comprehensive one that also applies to core crimes prosecutions? Obviously, the more sensible rule will be of such a nature as not to sacrifice more important legal values in favour of less important ones. The ability of a state to discharge its functions (which, *inter alia*, is necessary to maintain peace) must prevail over all other named legal values. As a consequence, especially in the context of possible *mala fide* prosecutions, a sensible rule of immunity will grant immunity *ratione personae*, which protects the functionality of a state, even if core crimes prosecutions are concerned.[76] With regard to immunity *ratione materiae*, however, the case is different. Immunity *ratione materiae* cannot be opposed to core crimes prosecutions. This is because a sensible rule would not sacrifice the efficient protection of the most fundamental human rights to safeguard the somewhat outdated concept of a state's dignity. Moreover, one can also argue *a maiore ad minus* that if even mere financial interests are important enough to justify an exception, namely the commercial activity exception for *acta iure gestionis*, the most fundamental human rights clearly must prevail over immunity *ratione materiae*. Finally, as both financial interests and the legal values protected by national criminal law are less important than state dignity, a sensible rule will grant state immunity with regard to any

[76] Of course, such a rule of customary international law would not apply where international treaties abrogated all immunities based on official capacity including expressly "constitutionally responsible rulers" (*Genocide Convention*, art. IV) or "a head of state or government" (*Rome Statute*, art. 27).

exercise of jurisdiction for civil cases (concerning *acta iure imperii*) and national criminal cases.

To summarise, the sensible rule of state immunity that states must be assumed to have applied when granting immunity in pre-*Pinochet* (civil and national criminal law) cases grants immunity *ratione personae* against any exercise of foreign jurisdiction to the persons entitled to it. Likewise it grants immunity in civil cases (regarding *acta iure imperii*) and national criminal law cases. However, it denies immunity (*ratione personae*) to any (former) state official who is not entitled to immunity *ratione personae*.[77] The *Pinochet* decision supports this conclusion. Moreover, a rule prescribing that immunity is unavailable against prosecutions of core crimes is also supported by post-*Pinochet* state practice. These rules should be sufficiently effective in deterring the commission of core crimes because the only immunity available against core crimes prosecutions, immunity *ratione personae*, is granted to very few state officials, and only while they are in office. As a consequence, no perpetrator can exclude the possibility that he or she will have to face criminal justice one day.

2. DIPLOMATIC AND CONSULAR IMMUNITY

2.1. *Diplomatic and Consular Immunity and Their Purposes*

Pursuant to the *Vienna Convention on Diplomatic Relations* of 1961,[78] diplomatic agents and their families enjoy immunity *ratione personae* during their term of office (arts. 31 and 37(1)), with some minor exceptions for certain civil and administrative matters (art. 31(1)(a)–(c)). The same holds true for administrative and technical staff, including their families, with more extensive exceptions regarding administrative and civil jurisdiction (art. 37(2)). Service staff members are only immune *ratione materiae* with regard to acts performed in the course of their duties (art. 37(3)). If diplomatic agents are nationals of or permanent residents in the receiving state, they only enjoy immunity *ratione materiae* for acts performed in the course of their duties (art. 38(1)). There is no immunity for other staff members if they are nationals of or permanent residents in the receiving state.

[77] In theory, the immunity for a state as a legal entity (protecting both the functionality of the state and its dignity) would also prevail over core crimes prosecutions, but as legal entities usually cannot be defendants in criminal procedures the issue needs no further discussion.

[78] *Supra* note 68.

Whereas any immunity *ratione personae* ends with the term of office, immunities *ratione materiae* regarding acts performed in the exercise of the function of the person as a member of the diplomatic mission persist, be it for diplomatic agents or for any other staff member enjoying immunities (art. 39(2)). The norms in the *Vienna Convention on Consular Relations* of 1963 are very similar.[79] However, the immunity *ratione personae* available to consular officers is, *inter alia*, restricted with regard to grave crimes (art. 41). As a consequence, this kind of immunity can never shield a consular officer from core crimes prosecutions. The *Vienna Convention on Consular Relations* does not provide a similar restriction for immunity *ratione materiae* regarding acts performed in the course of consular functions, which is available for consular officers and employees without any time limitation (arts. 43 and 53(4)). Apart from some exemptions from tax and certain other duties there are no immunities for family members or other staff of consular posts. Whereas there are some obvious similarities between concepts of state immunity and diplomatic or consular immunity, for example in that immunities *ratione personae* cease with the end of office whereas immunities *ratione materiae* continue, there are also important differences. The most important is that diplomatic or consular immunity only has a bilateral effect between the sending and the receiving state, whereas state immunity must be respected by every other state. Moreover, every diplomatic and consular employee enjoys not only the respective diplomatic and consular immunities but also state immunity (*ratione materiae*) like every (other) state official.[80]

The purposes of diplomatic immunity are expressed in the preamble of the *Vienna Convention on Diplomatic Relations*, which emphasises the maintenance of international peace and the promotion of friendly relations. However, the principle of sovereign equality is mentioned as well. Very similar language can be found in the *Vienna Convention on Consular Relations*. It seems that diplomatic and consular immunity *ratione materiae* protect the same legal value as state immunity *ratione materiae*, namely the state's dignity. This is expressed in the reference to sovereign equality in the preambles according to which no state may give orders to another. Consular posts in particular, which serve as administrative offices of the

[79] 596 U.N.T.S. 262.

[80] The German *Bundesverfassungsgericht* holds a different view, Decision of 10 June 1997 (*Syrian Ambassador*) – 2 BvR 1516/96, 16, Entscheidungen des Bundesverfassungsgerichts, 96, 68 (1998). However, this decision has been subject to harsh criticism: Bardo Fassbender, *Case Note*, 18 *Neue Zeitschrift für Strafrecht* 144 (1998), Karl Doehring and Georg Ress, *Diplomatische Immunität und Drittstaaten. Überlegungen zur erga omnes-Wirkung der diplomatischen Immunität und deren Beachtung im Falle der Staatensukzession*, 37 ARCHIV DES VÖLKERRECHTS 68 (1999).

sending state (art. 5, *Vienna Convention on Consular Relations*), rendering services to individuals and promoting economic and cultural relations between states (but are not concerned with their political relations), do not need full immunity *ratione personae* for their officials because an impairment of their functionality would not have the gravest consequences.

This is different in the case of diplomatic missions. Diplomats represent the sending state in the receiving state and negotiate with it (art. 3(1)(a), (c), *Vienna Convention on Diplomatic Relations*). As the conduct of negotiations, that is, avoiding misunderstandings beforehand and developing solutions after the emergence of a crisis, may be a means to prevent war, the functionality of diplomatic missions serves *inter alia* the maintenance of international peace. For this reason diplomatic agents are vested with full immunity *ratione personae* while they hold office (art. 31).

2.2. *Diplomatic Immunity for Core Crimes?*

In considering whether diplomatic and consular immunities may be used in defence against core crimes prosecutions it again seems appropriate to distinguish between immunity *ratione materiae* and immunity *ratione personae*. As to the latter, the chapeau of article 31(1) of the Vienna Convention clearly states: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state." Does this provision include core crimes prosecutions? It is unlikely that the drafters considered the issue. But had they been aware of the problem, the answer would presumably have been the same as in the case of state immunity *ratione personae*. The legal values protected by diplomatic immunity *ratione personae*, like state immunity *ratione personae*, include the maintenance of international peace, which is even more important than the deterrence of core crimes. Therefore, diplomatic immunity *ratione personae* should be granted even against core crimes prosecutions,[81] unless such immunities are expressly abrogated in a special treaty like the *Genocide Convention* (art. IV) or the *Rome Statute* (art. 27).[82] It should be recalled, however, that even diplomatic immunities *ratione personae* bind only the receiving state and certain other states mentioned in the respective conventions. Therefore,

[81] This was expressly noted by Lord Millet, in *R.* v. *Bow Street Magistrate, Ex parte Pinochet, supra* note 16, p. 913.

[82] Lord Millet was of the opinion that immunity *ratione personae* is not abrogated by the *Torture Convention*. As Geneva law is similar to the *Torture Convention*, in that it would be incompatible with a comprehensive immunity for official acts but not necessarily with an immunity *ratione personae* for a very limited group of especially important officials, I consider that the House of Lords' reasoning on the *Torture Convention* applies also to Geneva law. The *Geneva Conventions* do not stipulate expressly that no immunities exist for war crimes.

such immunity may be opposed to measures of cooperation in the named states but not necessarily to prosecutions before the International Criminal Court.

Diplomatic and consular immunity *ratione materiae*, like state immunity *ratione materiae*, should be treated differently than immunity *ratione personae*. However, in the case of diplomatic and consular immunity *ratione materiae* it is easier to argue that it should be denied if core crimes prosecutions are concerned: the applicable conventions provide that immunity (*ratione materiae*) "with respect to the acts performed [...] in the exercise of [diplomatic or consular] *functions*, immunity shall continue to subsist [after the end of the term of office]."[83] The conventions define these functions as "protecting in the receiving state the interests of the sending state and of its nationals [...] *within the limits permitted by international law*."[84]

Thus, in contrast with the definition of official acts under general international law, the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations* exclude acts which are illegal under international law from the functions of a member of a diplomatic mission or a consular post. As immunity *ratione materiae* in both conventions is granted only for acts performed in the exercise of such functions, no diplomatic or consular immunity *ratione materiae* exists for acts illegal under international law such as the commission of core crimes.

3. IMMUNITIES OF MILITARY FORCES

Unfortunately, members of military forces are among the persons most likely to commit core crimes. The question of their immunity may become one of the most frequent issues in the enforcement of international criminal law. As far as war crimes in international conflicts are concerned, the unavailability of immunity *ratione materiae* results from the treaties regarding the law of armed conflicts. The argument brought forward by the House of Lords with respect to the *Torture Convention* also applies also to Geneva law. Article 146 of the fourth *Geneva Convention*, for example, provides: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be

[83] *Vienna Convention on Diplomatic Relations*, *supra* note 68, art. 39(2); *Vienna Convention on Consular Relations*, *supra* note 79, art. 53(4) (emphasis added).

[84] *Vienna Convention on Diplomatic Relations*, *supra* note 68, art. 3(b); *Vienna Convention on Consular Relations*, *supra* note 79, art. 5(a) (emphasis added); also, *Vienna Convention on Diplomatic Relations*, *supra* note 68, art. 3(d); *Vienna Convention on Consular Relations*, *supra* note 79, art. 5(c).

committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[85]

Because soldiers (at least in international conflicts) are state officials, the obligation to search for and try suspects of war crimes would be without application if immunities *ratione materiae* were available for war crimes. Thus, Geneva law must be understood to have abrogated immunities (*ratione materiae*) regarding war crimes. With regard to crimes against humanity, the general rule developed above denying immunities (*ratione materiae*) against any core crime applies to soldiers, as they are also state officials.

3.1. *Foreign Forces Present Without the Consent of the State*

Foreign military forces present without the consent of the state are regarded as immune or extraterritorial under the traditional doctrine of international law.[86] In case of a belligerent occupation such forces are not under the jurisdiction of the occupied state but remain under the jurisdiction of the occupying state, subject to the *Hague Convention on Land Warfare*.[87] In other cases, hostile foreign soldiers abroad enjoy, in principle, immunity for acts committed in their official capacity. However, the scope of this immunity is very narrow, as most crimes committed by foreign soldiers will be punishable as war crimes, for which no immunity is available. Killing the enemy's civilians or stealing and destroying their property, for example, constitute the crimes wilful killing or extensive destruction and appropriation of property.[88] Immunity exists only for such crimes when a foreign soldier steals from his or her comrades. It is evident that the international law of state immunity *ratione materiae* regarding war crimes, crimes against humanity and genocide cannot be affected by this special status. Therefore, the special status of hostile foreign forces abroad remains without effect for prosecutions before the ICC.

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[85] *Geneva Convention Relative to the Protection of Civilians*, *supra* note 25.

[86] Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 AIR FORCE LAW REVIEW, 137, 138 (1994). Stephan Verosta, *Extraterritorialität*, in: I WÖRTERBUCH DES VÖLKERRECHTS 499, 501 (Karl Strupp & Hans-Jürgen Schlochauer, 1960). Cf. also the *McLeod* case, *supra* note 56; the case is quoted in this context in I OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 13, p. 1155, §557 note 3.

[87] *International Convention Concerning the Laws and Customs of War by Land*, [1910] B.T.S. 9.

[88] Cf. *Geneva Convention Relative to the Protection of Civilians*, *supra* note 25, art. 147.

3.2. *Foreign Forces Present with the Consent of the Receiving State and SOFAs*

Where foreign forces are present with the consent of the receiving state their status is usually regulated by Status of Forces Agreements (SOFAs), such as that of the North Atlantic Treaty Organisation (NATO).[89] NATO-type SOFAs do not contain immunities in the strict sense, but establish a concurrent jurisdiction giving the sending or the receiving state a primary right to exercise its jurisdiction, for example, in cases where the alleged crime has been committed in the performance of official duties.[90] In other words, even if the sending state has primary jurisdiction in a certain case, the receiving state has the right to exercise its jurisdiction if the sending state chooses not to try the alleged perpetrator. Thus, it seems that problems of immunity are unlikely to arise under NATO-type SOFAs.

The situation is very different in the case of another type of SOFA concluded frequently by the United States by means of an exchange of notes.[91] Members of forces are accorded a "status equivalent to that accorded to administrative and technical staff of the United States Embassy under the Vienna Convention on Diplomatic Relations". As such a status would imply full immunity *ratione personae* at least with regard to any criminal procedures[92] prosecutions for core crimes would be impossible.

However, full immunity for core crimes would violate several international treaties. Both the *Torture Convention* and Geneva law require states to prosecute on the basis of universal jurisdiction,[93] and this requirement would be without practical application if immunity *ratione materiae* existed for torture or war crimes. It is a characteristic of human rights treaties (as well as, for example, environmental protection treaties) that they regulate obligations *erga omnes partes* which can be met or violated only against all other parties to the treaty. In contrast, a multilateral customs agreement (which may be construed as a bundle of bilateral obligations) can be observed with respect to one party and violated with respect

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89 *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces*, 199 U.N.T.S. 67.

90 *Ibid.*, art. VII(1)(a) and (b), together with (3).

91 For example, *Agreement Regarding the Status of Military Personnel and Civilian Employees of the US Department of Defense who may be Present in the Republic of South Africa in Connection with Mutually Agreed Exercises and Activities (1999)*, State Dept. No 99-84.

92 *Vienna Convention on Diplomatic Relations*, *supra* note 68, art. 37(2).

93 The treaty obligation to prosecute is not based on universal jurisdiction in the strict sense but rather on a treaty-wide jurisdiction.

to another.[94] The obligation to prosecute war crimes or torture cannot be abrogated in a bilateral agreement between two states parties to the *Torture Convention* or the *Geneva Conventions*, whereas the obligations under a multilateral customs agreement maybe derogated bilaterally. Therefore, a SOFA providing for immunities for torture or war crimes that previously did not exist would violate the obligation of the parties to that SOFA under the said treaties.

The same holds true for the *Genocide Convention*. The *Convention* itself seems to state no obligation to prosecute genocide on a basis of universal jurisdiction. However, article IV of the *Convention* prescribes that official status of any kind shall not prevent the punishment of offenders. The scope of the provision cannot be limited to an abrogation of immunities[95] for genocide but must also comprise a prohibition to establish such immunities. This follows from the principle of good faith treaty interpretation,[96] if not from the clear wording of the *Genocide Convention*. Consequently a SOFA providing for immunities for genocide would violate the obligation of the parties to that SOFA under the *Genoci de Convention*.

4. ART. 27 OF THE ROME STATUTE AS A TREATY-BASED WAIVER OF IMMUNITIES

Article 27 of the *Rome Statute of the International Criminal Court* clearly intends to abrogate any existing immunities based on official capacity with regard to prosecutions before the Court. However, immunities are not only abrogated for procedures against persons already in the custody of the Court itself. According to the first sentence of article 27, "[t]he *Statute shall apply equally* to all persons without any distinction based on official capacity" (emphasis added). Thus, the States parties to the *Statute* have waived any existing immunities concerning application of the *Statute*, including the Cooperation Regime in part IX. Moreover, they have also submitted to an obligation not to establish any new immunities. Consequently, States parties to the *Statute* must not respect any immunities with regard to nationals of other States parties when complying with a request of the Court for arrest or surrender. It goes without saying that, with

[94] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, art. 41(1)(b). On this issue see Sir Ian Sinclair, THE VIENNA CONVENTION OF THE LAW OF TREATIES 108–109 (2nd edn., 1984).

[95] This is the abrogation of immunity *ratione personae*, as, according to the position taken in the present analysis, immunities *ratione materiae* never existed for core crimes.

[96] *Vienna Convention on the Law of Treaties*, *supra* note 94, art. 31.

regard to *national* core crimes prosecutions, existing immunities under international law (*i.e.*, immunities *ratione personae* for war crimes and crimes against humanity) remain unaffected.

However, even with regard to prosecutions under the *Rome Statute*, the scope of article 27 is limited. Whereas immunities between the parties to the *Rome Statute* have been waived for purposes of prosecutions before the Court, immunities of non-party states cannot be abrogated by the *Statute*, because of the rule of *pacta tertiis*.[97] Thus, immunities *ratione personae* for war crimes and crimes against humanity (but not for genocide under the *Genocide Convention*) must be considered to be still in force for officials of non-party states.[98] As a head of state of a non-party state is very unlikely to commit a core crime in his or her conduct *on the territory* of a State party to the *Statute*, the Court will regularly lack jurisdiction to try him or her.[99] Diplomats of non-party states are the only remaining group protected by immunities *ratione personae* against prosecutions before the Court. With regard to this group of persons, article 27 must be interpreted taking into account the "relevant rules of international law"[100] and, consequently, in such a way as to allow immunities against all aspects of prosecution under the *Statute* for diplomats of non-party states, except in the case of genocide.

5. ARTICLE 98 OF THE ROME STATUTE

Article 98 of the *Rome Statute* governs conflicts of obligations with regard to the cooperation regime of the *Statute*. Clashes may arise, for example, where a State party to the *Statute* is bound by a request of the Court, for example, to arrest a person, but cannot comply with its obligation to cooperate without violating another obligation under international law, for example, to respect the immunity of this person.

5.1. *The Legal Mechanism of Article 98*

Pursuant to article 98, once it has been established that a norm exists under international law making it illegal for a state to comply with a request from

97 *Ibid.*, arts. 34, 35.

98 The jurisdiction of the Court is jurisdiction transferred to it by the States parties to the Statute. According to the principle *nemo dat quod non habet*, these states cannot transfer a jurisdiction to the Court that was not limited by the immunities these states would have to observe in national procedures.

99 *Rome Statute*, *supra* note 1, art. 12(2)(a).

100 *Vienna Convention on the Law of Treaties*, *supra* note 94, art. 31(3)(c).

the Court, the Court, in general,[101] may not issue the request. The Court is barred from requiring a state to arrest and surrender a foreign diplomat of a state not party to the *Statute* for the alleged commission of crimes against humanity, for example. In other cases, the Court may also be barred from requiring a state to deliver certain documents from the archives of any foreign embassy, even from embassies of States parties to the *Statute*.[102] Clearly, if a State waives its immunities, a request from the Court for cooperation will no longer imply that the requested state would be acting illegally to comply with the request. It seems somewhat superfluous that article 98(1) expressly contemplates this possibility. However, the provision clarifies that the Court has the authority to enter into negotiations with third states to obtain a waiver of their rights.

Whether the compliance of a state with a request for cooperation amounts to a violation of another norm of international law is not to be decided by the requested state but by the Court.[103] However, in accordance with Rule 195(1) of the Draft Rules of Procedure and Evidence,[104] a state may inform the Court that it sees a problem with respect to article 98 and submit necessary information. Any third states involved may also submit information.[105] Thus, the Court will have an appropriate factual basis on which to rule. In the author's opinion, it may also be expedient to allow states to challenge a decision of the Court under article 98 before the Appeals Chamber without, however, allowing the state to delay its prompt compliance with the request. If the Appeals Chamber quashes the original request the surrendered or arrested person must be transferred back or released.

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[101] If the conclusion of the agreement must be regarded as a violation of the *Statute* (*e.g.*, if two States parties to the *Statute* conclude an agreement prohibiting the surrender of their respective nationals to the Court), the Court might not be bound to accept such an illegal agreement, in accordance with art. 98.

[102] Article 27 of the *Rome Statute* does not concern the inviolability of the documents of foreign missions (*Vienna Convention on Diplomatic Relations*, *supra* note 68, art. 24), or any other obligations with regard to foreign property. On this issue, see Christian Tomuschat, *supra* note 23, pp. 623–627.

[103] Hans-Peter Kaul and Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 YEARBOOK INT'L HUMANITARIAN L. 143 (1999), p. 164.

[104] *Supra* note 4.

[105] The rule speaks of "additional information", suggesting that the third state can only submit information if the requested state has already done so. However, the rule should be interpreted in such a way as to allow the third state to provide information regardless of whether the requested state has already done so or not.

5.2. *"Obligations under International Agreements" and Art. 98(2)*

5.2.1. *Extradition treaties*

Bilateral or multilateral extradition agreements usually provide that an extradited person may not be re-extradited to a third state.[106] States parties to the *Statute* seem to have waived their right to demand non re-extradition (or re-surrender) to the Court, pursuant to article 89. However the prohibition of non re-extradition should continue to be observed with regard to non-party States.[107] Thus, if a non-party state extradites a person to a State party, this cannot be understood as an implied agreement to re-surrender the extradited person to the Court.

5.2.2. *SOFAs and other agreements requiring consent of a sending state to surrender a person*

Article 27 of the Statute must be regarded as *lex posterior* with respect to any other existing treaty if all concerned parties to this treaty are at the same time States parties to the *Rome Statute*.[108] Consequently, any SOFA or other agreement barring the exercise of jurisdiction because of the respective person's official capacity becomes subject to article 27 and is, in effect, suspended. This is also true in the case of NATO-type SOFAs that attach primary jurisdiction to official capacity. In such a case, the receiving state is entitled to arrest and surrender a member of the sending state's forces, even if the sending state claims its primary jurisdiction.

The situation is different if the SOFA is not suspended by article 27 of the *Rome Statute* because one concerned party of the SOFA is not a party to the Statute. In such a case article 98(2) of the *Statute* requires that the request for surrender be reconcilable with the state's obligations under the SOFA. The authority to interpret SOFAs for purposes of the *Statute* rests with the Court.[109]

NATO-type SOFAs do not provide immunity but only a primary right to exercise the jurisdiction of the sending state for certain crimes including crimes committed in the performance of official duties. This is very similar

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[106] *European Convention on Extradition*, E.T.S. No. 24, art. 15.

[107] Because States parties to the *Statute* have agreed that ICC law and procedure be compatible with their own law, they should not regard a surrender of their own nationals to the Court as extradition to a foreign legal system.

[108] *Vienna Convention on the Law of Treaties*, *supra* note 94, art. 30(3).

[109] Each party to a treaty (*i.e.*, here the SOFA) is, absent other provisions, competent to interpret it. States parties to the Statute have transferred this competence to the Court for purposes of decisions under article 98. Where SOFAs provide a conflict settlement mechanism, the respective state would be under an obligation to take the view of the International Criminal Court in the proceedings.

to the complementarity regime in the *Statute*.[110] Such SOFAs should be interpreted in a manner similar to that prescribed by article 17 of the *Statute*: mock prosecutions with the sole purpose of shielding the suspect from criminal responsibility are incompatible with the object and purpose of the jurisdictional provisions of NATO-type SOFAs. NATO-type SOFAs should pose no problem under article 98(2) of the Statute.

With regard to the second type of SOFA, the matter is different. If concluded before a State party has signed[111] or acceded to the *Statute*, the SOFA must be respected, in accordance with article 98(2) of the *Statute*. However, if the SOFA is concluded subsequently, it must be interpreted taking into account the "relevant rules of internation al law".[112] Amongst such rules is the *Rome Statute* itself. The State party to the SOFA but not to the *Rome Statute* must be deemed to have known of the other State's obligations under the *Statute*. Moreover, the State party to the SOFA but not to the *Statute* cannot assume that the State party to both treaties wanted to violate its obligation, under the *Statute* (and possibly also to Geneva law and the *Genocide Convention*), not to establish new bars to the Court's jurisdiction based on official capacity. Thus, unless there is an express provision to the contrary, such SOFAs must be interpreted *bona fide* and in a way that respects any obligations under the *Rome Statute*. Accordingly, the State party must be required to surrender alleged perpetrators of core crimes to the Court.

6. CONCLUSION

Article 98 of the *Rome Statute* requires the Court to respect the obligations which a state whose cooperation it wants to request must observe towards a third state. In such cases the legal situation depends very much on whether the third state is a party to the *Statute* or not. With regard to States parties to the *Statute*, the problem has been solved by article 27 of the *Statute*, which prescribes that "[t]he *Statute shall apply equally* to all persons without any distinction based on official capacity" (emphasis added). Due to the broad formulation, which does not refer to a particular part of the *Statute* but to the instrument as a whole, this waiver of immunities comprises measures of cooperation under Part IX. Consequently, state immunity

110 *Rome Statute*, *supra* note 1, art. 17.

111 According to article 18(a) of the *Vienna Convention on the Law of Treaties*, *supra* note 94, every state signing a treaty must "refrain from acts which would defeat the object and purpose of the treaty prior to its entry into force".

112 *Vienna Convention on the Law of Treaties*, supra note 94, art. 31(3)(c).

and immunities based on treaties which were concluded before the *Rome Statute* (for example the *Vienna Convention on Diplomatic Relations* or a Status of Forces Agreement) do not hinder a request for cooperation if the state whose immunity is concerned is a party to the *Statute*. With regard to the future, States parties to the *Statute* are under an obligation not to enter into any treaty which may impede prosecutions by the Court.

Immunities may, however, conflict with prosecutions under article 12(2)(a) of the *Statute* if the alleged perpetrator is a national of a non-party state, because the waiver of immunities in article 27 does not apply. The analysis in part one of this paper reveals that, under international law, only state immunity *ratione personae* may be opposed to the prosecution of core crimes. State immunity *ratione personae* applies only to very few state officials, including sitting heads of state, and ceases once the term of office has finished. In contrast, state immunity *ratione materiae* which, in general, protects every state official with regard to acts committed in official capacity, is not available in the case of prosecution of core crimes. The rationale of the international law of state immunity in this context is that immunity *ratione personae* protects the state's ability to discharge its functions, including the maintenance of peace. This ability would be endangered if a sitting head of state could be prosecuted and arrested. As the maintenance of peace is even more important than the prosecution of core crimes, immunity *ratione personae* may be opposed to such prosecutions. On the other hand, immunity *ratione materiae* mainly protects the state's dignity. Clearly, if weighed against the deterrence of future core crimes, the dignity of a state must yield. Thus, even a former head of state like Pinochet can be prosecuted for core crimes because former heads of state no longer enjoy immunity *ratione personae* but only immunity *ratione materiae*. In effect, no one who has committed core crimes can rely on state immunity as a lasting protection against prosecution.

Part two of this paper deals with immunities of diplomatic or consular agents which, with regard to the prosecution of core crimes, are very similar to state immunity. Diplomatic immunity *ratione personae* protects the ability of states to communicate with each other which, in turn, is indispensable for the maintenance of peace. Consequently, a sending state which is not a party to the *Rome Statute* may oppose immunity *ratione personae* to any measures of prosecution directed against its diplomats in the receiving state. Conversely, diplomatic or consular immunity *ratione materiae*, like state immunity *ratione materiae*, cannot be opposed to the prosecution of core crimes before national courts of the receiving state or before the International Criminal Court. The reason is that immunity

ratione materiae is granted in the relevant treaties only for conduct "*permitted by international law*".

The admissibility of prosecutions against members of armed forces of a non-state party is dealt with in part three of this paper. Absent any treaty law, the general rule applies. Like any other state official, soldiers enjoy immunity *ratione materiae* for their official acts unless the alleged act constitutes a core crime. However, problems may arise under Status of Forces Agreements. NATO-type SOFAs, which do not provide a full immunity but only primary jurisdiction of the sending state (*e.g.*, a non-party to the *Rome Statute*), must be interpreted in such a way that mock prosecutions with the sole purpose of protecting the alleged perpetrator do not count as a valid exercise of their jurisdiction. In such a case the receiving state (*e.g.*, a party to the *Statute*) may try the alleged perpetrator or surrender him or her to the Court. In contrast, SOFAs of a second kind, which simply grant full immunity, may be opposed to a surrender of a person to the Court. However, with regard to agreements concluded *after* the Rome Statute by a party to the *Statute*, any interpretation of this agreement must take into consideration that granting full immunity to foreigners would violate this state's obligations under the *Statute*. Consequently, any such agreement will have to be interpreted in such a way as to comply with the state's obligations under the *Statute*, unless the agreement expressly declares the opposite.

Finally, and most importantly, it must be noted that it is for the Court to decide whether a request for cooperation requires the requested state to break its obligations under international law. No State party to the *Statute* may substitute its own legal assessment for the Court's opinion.

Article 98 of the *Rome Statute* will prevent the Court from a request of cooperation or surrender only in the rarest circumstances. Prosecutions of nationals of States parties to the *Statute* will not be affected at all, as any existing immunities for these persons have been waived under article 27 of the *Statute* . Moreover, "ordinary" state officials of non-parties enjoy only immunity *ratione materiae* which, under international law, does not protect against the prosecution of core crimes. Only very few officials of non-party states, including sitting heads of state and diplomats - with regard to the receiving and certain other states - may oppose immunities *ratione personae* to a surrender to the Court, and even then, only if their home state has not waived these.

INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

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First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

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Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

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Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain,

Mr. Moka N'Golo, *Bâtonnier*,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, *Université libre de Bruxelles*,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,

Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels *Cour d'Appel*,

Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,

Mr. Tom Vanderhaeghe, Assistant at the *Université libre de Bruxelles*,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

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10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> 1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
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> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

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13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all

resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued."

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

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22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

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23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases *(Australia* v. *France)* and

(New Zealand v. *France)*, in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

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29. The second objection presented by Belgium is the following:

"That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further

in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

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33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

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37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the *Chambre du conseil* that the accused can defend himself before the *Chambre* and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person

who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

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45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities 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".

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly "no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity

from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant in absentia", issued on 11 April 2000 by an investigating judge of the Brussels *Tribunal de première instance*, is directed against Mr. Yerodia, stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
>
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

"These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

"Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to

Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

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72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly,

infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

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* *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

[2000]1 A.C.61

[HOUSE OF LORDS]

REGINA v. BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE and Others, Ex parte PINOCHET UGARTE

1998 Nov. 4, 5, 9, 10,11, 12; 25

Lord Slynn of Hadley, Lord Lloyd of Berwick,

Lord Nicholls of Birkenhead,

Lord Steyn and Lord Hoffmann

International law - State immunity - Former head of state - Request for extradition in respect of crimes of torture and hostage-taking when applicant head of state - Whether immunity in respect of acts performed in exercise of functions as head of state - Whether governmental acts of torture and hostage-taking attributable to functions of head of state - Whether proceedings non-justiciable as involving investigation into acts of foreign state - Diplomatic Privileges Act 1964 (c. 81), s. 2(1), Sch. 1, arts. 29, 31, 39 - State Immunity Act 1978 (c. 33), ss. 1(1), 14(1), 20(1) - Taking of Hostages Act 1982 (c. 28), s. 1(1) - Criminal Justice Act 1988 (c. 33), s. 134(1)

The applicant, a former head of state of Chile who was on a visit to London, was arrested under a provisional warrant issued by a metropolitan stipendiary magistrate pursuant to section 8(1) of the Extradition Act 1989 following the receipt of an international warrant of arrest issued by the Central Court of Criminal Proceedings No. 5, Madrid alleging that the applicant, when head of state, had murdered Spanish citizens in Chile within the jurisdiction of Spain. Six days later a second section 8(1) warrant was issued by a magistrate upon receipt of a second international warrant of arrest issued by the Spanish court alleging, inter alia, that the applicant, during his period of office, had ordered his officials to commit acts falling within the definitions of hostage-taking in section 1(1) of the Taking of Hostages Act 19821 and torture in section 134(1) of the Criminal Justice Act 1988.2 The applicant issued proceedings in the Divisional Court for orders of certiorari to quash the first provisional warrant as disclosing no act amounting to an extradition crime, as defined by section 2 of the Act of 1989, and both warrants as relating to acts performed by the applicant in exercise of his functions as head of state and in respect of which he was entitled to immunity under customary international law and the provisions of sections 1(1) and 14(1) in Part I of the State Immunity Act 1978,3 and section 20(1) in Part III of the Act of 1978 read with section 2 of, and articles 29, 31 and 39 of Schedule 1 to, the Diplomatic Privileges Act 1964.4 The Divisional Court, having found that the first warrant was bad as falling outside section 2 of the Act of 1989, held with respect to both warrants that the applicant, as a former head of state, was entitled to immunity from civil and criminal process in the English courts in respect of acts committed in the exercise of sovereign power. The court quashed both warrants.

1 Taking of Hostages Act 1982, s. 1(1): see post, p. 104G.

2 Criminal Justice Act 1988, s. 134(1): see post, p. 104E-F.

3 State Immunity Act 1978, s. 1(1): see post, p. 99C.

S. 14(1): see post, p. 99D-E.

S. 20(1): see post, p. 100D-E.

4 Diplomatic Privileges Act 1964, Sch. 1, arts. 29, 31, 39: see post, pp. 100G-101B.

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (H.L.(E.))

On appeal by the Commissioner of Police of the Metropolis and the Government of Spain:-

Held, (1) that on its true construction the absolute immunity afforded by Part I of the State Immunity Act 1978 did not extend to criminal proceedings and, since extradition proceedings in respect of criminal charges were themselves regarded as criminal proceedings, the question of any immunity under sections 1(1) and 14(1) of the Act of 1978 did not arise (post, pp. 70H-71C, 99F-H, 106B, 113D-E, 118B).

(2) Allowing the appeal (Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting), that although section 20 in Part III of the Act of 1978, when read with article 39(2) of Schedule 1 to the Diplomatic Privileges Act 1964, was to be construed as conferring on a former head of state immunity from the criminal jurisdiction of the United Kingdom with respect to official acts performed in the exercise of his functions as head of state, the crimes of torture and hostage-taking fell outside what international law would regard as functions of a head of state; that any immunity accorded to a former head of state under customary international law could be no wider than that conferred by section 20 and article 39(2) and would be subject to the same qualification limiting immunity to acts performed in the exercise of functions as head of state; and that, accordingly, the applicant's status as a former head of state did not confer immunity from extradition proceedings in respect of the crimes charged against him (post, pp. 108A-B, 110E-G, 114C-D, 115F-G, 116C-D, 118B).

(3) That the provisions relating to the offences of hostage-taking in section 1(1) of the Taking of Hostages Act 1982 and torture in section 134(1) of the Criminal Justice Act 1988 allowed investigation into the conduct of officials of a foreign state; that it followed that no question could arise as to the court declining jurisdiction on grounds of avoiding an examination of the legality of the acts of a foreign government under the common law doctrine of act of state, since the doctrine could have no application in circumstances where Parliament had made express provision for the taking of jurisdiction over foreign governmental acts; and that, accordingly, since the applicant had no claim to immunity and there were no grounds for a declaration of non-justiciability, the decision to issue the second provisional warrant would be restored (post, pp. 106E-F, 107B-D, 117A, 118B).

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in their Lordships' opinions:

Al-Adsani v. Government of Kuwait (1996) 107 I.L.R. 536, C.A.

Alcom Ltd. v. Republic of Colombia [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)

Argentine Republic v. Amerada Hess Shipping

Corporation (1989) 109 S.Ct. 683

Banco Nacional de Cuba v. Sabbatino (1962) 307 F.2d 845; (1964) 376 U.S. 398

Brunswick (Duke of) v. King of Hanover (1848) 2 H.L.Cas. 1, H.L.(E.)

Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)

Demjanjuk v. Petrovsky (1985) 776 F.2d 571

Filartiga v. Pena-Irala (1980) 630 F.2d 876; (1984) 577 F.Supp. 860

Hatch v. Baez (1876) 7 Hun 596

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (H.L.(E.))

Hilao v. Estate of Marcos (1994) 25 F.3d 1467

Honecker, In re (1984) 80 I.L.R. 365

International Association of Machinists and Aerospace Workers v. Organisation of Petroleum Exporting Countries (1981) 649 F.2d 1354

Israel (Attorney-General of) v. Eichmann (1962) 36 I.L.R. 5

Jimenez v. Aristeguieta (1962) 311 F.2d 547

Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701

Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998, Mance J.

Mellerio v. Isabelle de Bourbon (1874) 1 Journal du droit international 33

Nobili v. Emperor Charles I of Austria (1921) 1 Ann.Dig. 136

Oetjen v. Central Leather Co. (1918) 246 U.S. 297

Prosecutor v. Tadic (1995) 105 I.L.R. 419; (unreported), 7 May 1997

Schooner Exchange v. M'Faddon (1812) 11 U.S. (7 Cranch) 116

Siderman de Blake v. Republic of Argentina (1992) 965 F.2d 699

Trendtex Trading Corporation v. Central Bank of

Nigeria [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.

Underhill v. Hernandez (1897) 168 U.S. 250

United States of America v. Noriega (1990) 746 F.Supp. 1506; (1997) 117 F.3d 1206

The following additional cases were cited in argument:

Aksionairnoye Obschestvo A.M. Luther v. James Sagor Co. [1921] 3 K.B. 532, C.A.

Altstötter, In re (1947) 14 Ann.Dig. 278

Buck v. Attorney-General [1965] Ch. 745; [1965] 2 W.L.R. 1033; [1965] 1 All E.R. 882, C.A.

Duff Development Co. Ltd. v. Government of Kelantan [1924] A.C. 797, H.L.(E.)

Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171; (1982) 64 I.L.R. 368, C.A.

Evans, In re [1994] 1 W.L.R. 1006; [1994] 3 All E.R. 449, H.L.(E.)

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] I.C.R. 420; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

Guinto v. Marcos (1986) 654 F.Supp. 276

Herbage v. Meese (1990) 747 F.Supp. 60

Jaffe v. Miller (1993) 13 O.R.(3d) 745

Kuwait Airways Corporation v. Iraqi Airways Co. [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694, H.L.(E.)

Letelier v. Republic of Chile (1980) 63 I.L.R. 378; 488 F.Supp. 665

Liu v. Republic of China (1989) 892 F.2d 1419

Nelson v. Saudi Arabia (1991) 88 I.L.R. 189

Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.)

Philippines (Republic of) v. Marcos (1986) 806 F.2d 344

Princz v. Federal Republic of Germany (1994) 26 F.3d 1166

Propend Finance Pty. Ltd. v. Sing, The Times, 2 May 1997; Court of Appeal (Civil Division) Transcript No. 572 of 1997, C.A.

Rayner (J. H.) (Mincing Lane) Ltd. v. Department of Trade and Industry [1989] Ch. 72; [1988] 3 W.L.R. 1033; [1988] 3 All E.R. 257, C.A.

Reg. v. Governor of Brixton Prison, Ex parte Levin [1997] A.C. 741; [1997] 3 W.L.R. 117; [1997] 3 All E.R. 289, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 504; [1974] 1 All E.R. 692, D.C. and H.L.(E.)

Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Launder [1997] 1 W.L.R. 839; [1997] 3 All E.R. 961, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Momin Ali [1984] 1 W.L.R. 663; [1984] 1 All E.R. 1009, C.A.

Smith v. Socialist People's Libyan Arab Jamahiriya (1996) 101 F.3d 239

Weizsaecker, In re (1949) 16 Ann.Dig. 344

Williams and Humbert Ltd. v. W. H. Trade Marks (Jersey) Ltd. [1986] A.C. 368; [1986] 2 W.L.R. 24; [1986] 1 All E.R. 129, H.L.(E.)

Appeal from the Divisional Court of the Queen's Bench Division.

This was an appeal, by leave of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.), by the appellants, the Commissioner of Police of the Metropolis and the Government of Spain, from the court's decision of 28 October 1998 granting orders of certiorari to quash warrants issued pursuant to section 8(1) of the Extradition Act 1989, at the request of the Central Court of Criminal Proceedings No. 5, Madrid, for the provisional arrest of Senator Augusto Pinochet Ugarte, a former head of state of the Republic of Chile, ("the applicant") (i) dated 16 October 1998, by Nicholas Evans, Bow Street Metropolitan Stipendiary Magistrate, and (ii) dated 22 October 1998, by Ronald Bartle, Bow Street Metropolitan Magistrate.

In accordance with section 1(2) of the Administration of Justice Act 1960 the Divisional Court certified that a point of law of general public importance was involved in its 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."

Leave to intervene was given to Amnesty International, the Medical Foundation for the Care of Victims of Torture, the Redress Trust, Mary Ann Beausire, Juana Francisca Beausire and Sheila Cassidy. Additionally, an order was made permitting (1) Human Rights Watch and (2) Nicole François Drouilly, a representative member of the Association of the Relatives of the Disappeared Detainees, and Marco Antonio Enriquez Espinoza, to intervene to the extent of making available to solicitors and counsel for Amnesty International the arguments and material which they wished to lay before the House, with liberty to apply after the hearing to present written submissions limited to matters not raised in oral argument relating to the certified point of law.

The facts are stated in the opinions of Lord Slynn of Hadley and Lord Lloyd of Berwick.

Alun Jones Q.C., Christopher Greenwood, James Lewis and Campaspe Lloyd-Jacob for the appellants.

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (H.L.(E.))

Ian Brownlie Q.C., Michael Fordham, Owen Davies and Frances Webber for Amnesty International and other interested parties.

Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B. Knowles for the applicant.

David Lloyd Jones as amicus curiae.

Edward Fitzgerald Q.C. and Philippe Sands for Human Rights Watch.

Nicholas Blake Q.C., Owen Davies and Raza Husain for Drouilly and Espinoza.

Their Lordships took time for consideration.

25 November. Lord Slynn of Hadley. My Lords, the applicant, the respondent to this appeal, is alleged to have committed or to have been responsible for the commission of the most serious of crimes - genocide, murder on a large scale, torture, the taking of hostages. In the course of 1998, 11 criminal suits have been brought against him in Chile in respect of such crimes. Proceedings have also now been brought in a Spanish court. The Spanish court has held that it has jurisdiction to try him. In the latter proceedings, none of these specific crimes is said to have been committed by the applicant himself.

If the question for your Lordships on the appeal were whether these allegations should be investigated by a criminal court in Chile or by an international tribunal, the answer, subject to the terms of any amnesty, would surely be yes. But that is not the question and it is necessary to remind oneself throughout that it is not the question. Your Lordships are not being asked to decide whether proceedings should be brought against the respondent, even whether he should in the end be extradited to another country (that is a question for the Secretary of State) let alone whether he in particular is guilty of the commission or responsible for the commission of these crimes. The sole question is whether he is entitled to immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was head of state. We are not, however, concerned only with this applicant. We are concerned on the arguments advanced with a principle which will apply to all heads of state and all alleged crimes under international law.

The proceedings

The proceedings have arisen in this way. On 16 October 1998 Mr. Nicholas Evans, a metropolitan stipendiary magistrate, issued a provisional warrant for the arrest of the applicant pursuant to section 8(1)(b) of the Extradition Act 1989 on the basis that there was evidence that he was accused that: "between 11 September 1973 and 31December 1983 within the jurisdiction of the Fifth Central Magistrate of the National Court of Madrid did murder Spanish citizens

in Chile within the jurisdiction of the Government of Spain."

A second warrant was issued by Mr. Ronald Bartle, a metropolitan stipendiary magistrate, on 22 October 1998 on the application of the Spanish Government, but without the applicant being heard, despite a written request that he should be heard to oppose the application. That

warrant was issued on the basis that there was evidence that he was accused: "between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties within the jurisdiction of the Government of Spain."

Particulars of other alleged offences were set out, namely: (i) between 1January 1988 and 31 December 1992, being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties; (ii) between 1 January 1982 and 31 January 1992 (a) he detained (b) he conspired with persons unknown to detain other persons ("the hostages") and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages; (iii) between January 1976 and December 1992, conspired together with persons unknown to commit murder in a Convention country. It seems, however, that there are alleged at present to have been only one or two cases of torture between 1 January 1988 and 11 March 1990.

The applicant was arrested on that warrant on 23 October. On the same day as the second warrant was issued, and following an application to the Home Secretary to cancel the warrant pursuant to section 8(4) of the Extradition Act 1989, solicitors for the applicant issued a summons applying for an order of habeas corpus. Mr. Michael Caplan, a partner in the firm of solicitors, deposed that the applicant was in hospital under medication following major surgery and that he claimed privilege and immunity from arrest on two grounds. The first was that, as stated by the Ambassador of Chile to the Court of St. James's, the applicant was "President of the Government Junta of Chile" according to Decree Law No. 1, dated 11 September 1973 from 11 September 1973 until 26 June 1974 and "Head of State of the Republic of Chile" from 26 June 1974 until 11 March 1990 pursuant to Decree Law No. 527, dated 26 June 1974, confirmed by Decree Law No. 806, dated 17 December 1974, and subsequently by the 14th Transitory Provision of the Political Constitution of the Republic of Chile 1980. The second ground was that the applicant was not and had not been a subject of Spain and accordingly no extradition crime had been identified.

An application was also made on 22 October for leave to apply for judicial review to quash the first warrant of 16 October and to direct the Home Secretary to cancel the warrant. On 26 October a further application was made for habeas corpus and judicial review of the second warrant. The grounds put forward were (in addition to the claim for immunity up to 1990) that all the charges specified offences contrary to English statutory provisions which were not in force when the acts were done. As to the fifth charge of murder in a Convention country, it was objected that this charged murder in Chile (not a Convention country) by someone not a Spanish national or a national of a Convention country. Objection was also taken to the issue of a second provisional warrant

when the first was treated as being valid.

These applications were heard by the Divisional Court (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) on 26 and 27 October. On 28 October leave was given to the applicant to move for certiorari and the

decision to issue the provisional warrant of 16 October was quashed. The magistrate's decision of 22 October to issue a provisional warrant was also quashed, but the quashing of the second warrant was stayed pending an appeal to your Lordships' House 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 the applicant was not to be released from custody other than on bail, which was granted subsequently. No order was made on the application for habeas corpus, save to grant leave to appeal and as to costs. The Divisional Court certified:

"that 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 when he was head of state."

The matter first came before your Lordships on Wednesday, 4 November. Application for leave to intervene was made first by Amnesty International and others representing victims of the alleged activities. Conditional leave was given to these interveners, subject to the parties showing cause why they should not be heard. It was ordered that submissions should so far as possible be in writing, but that, in view of the very short time available before the hearing, exceptionally leave was given to supplement those by oral submissions, subject to time limits to be fixed. At the hearing no objection was raised to Professor Brownlie, on behalf of these interveners, being heard. Leave was also given to other interveners to apply to put in written submissions, although an application to make oral submissions was refused. Written submissions were received on behalf of these parties. Because of the urgency and the important and difficult questions of international law which appeared to be raised, the Attorney-General, at your Lordships' request, instructed Mr. David Lloyd Jones as amicus curiae and their Lordships are greatly indebted to him for the assistance he provided in writing and orally at such very short notice. Many cases have been cited by counsel, but I only refer to a small number of them.

At the date of the provisional warrants and of the judgment of the Divisional Court no extradition request had been made by Spain, a party to the European Convention on Extradition 1957 (European Convention on Extradition Order 1990 (S.I. 1990 No. 1507)), nor accordingly any authority to proceed from the Secretary of State under the Extradition Act 1989.

The Divisional Court held that the first warrant was defective. The offence specified of murder in Chile was clearly not said to be committed in Spain so that section 2(1)(a) of the Act of 1989 was not satisfied. Nor was section 2(1)(b) of the Act satisfied since the United Kingdom courts could only try a defendant for murder outside

the United Kingdom if the defendant was a British citizen (section 9 of the Offences against the Person Act 1861 (24 25 Vict. c.100), as amended). Moreover, section 2(3)(a) was not satisfied, since the accused is not a citizen of Spain and it is not sufficient that the victim was a citizen of Spain. The Home

Secretary, however, was held not to have been in breach of his duty by not cancelling the warrants. As for the second provisional warrant, the Divisional Court rejected the applicant's argument that it was unlawful to proceed on the second warrant and that the magistrate erred in not holding an inter partes hearing. The court did not rule at that stage on the applicant's argument that the acts alleged did not constitute crimes in the United Kingdom at the time they were done, but added that it was not necessary that the conduct alleged did constitute a crime here at the time the alleged crime was committed abroad.

As to the sovereign immunity claim, the court found that from the earliest date in the second warrant (January 1976), the applicant was head of state of Chile and, although he ceased to be head of state in March 1990, nothing was relied on as having taken place after March 1990 and indeed the second international warrant issued by the Spanish judge covered the period from September 1973 to 1979. Section 20 in Part III of the State Immunity Act 1978 was held to apply to matters which occurred before the coming into force of the Act. The court read the international warrant as accusing the applicant not of personally torturing or murdering victims or causing their disappearance, but of using the powers of the state of which he was head to do that. They rejected the argument that section 20(1) of the Act of 1978 and article 39 of the Vienna Convention on Diplomatic Relations (1961) only applied to acts done in the United Kingdom, and held that the applicant was entitled to immunity as a former head of state from the criminal and civil process of the English courts.

A request for the extradition of the applicant, signed in Madrid on 3 November 1998 by the same judge who signed the international warrant, set out a large number of alleged murders, disappearances and cases of torture which, it is said, were in breach of Spanish law relating to genocide, to torture and to terrorism. They occurred mainly in Chile, but there are others outside Chile - e.g. an attempt to murder in Madrid, which was abandoned because of the danger to the agent concerned. The applicant personally is said to have met an agent of the intelligence services of Chile (D.I.N.A.) following an attack in Rome on the Vice-President of Chile in October 1975 and to have set up and directed "Operation Condor" to eliminate political adversaries, particularly in South America:

"These offences have presumably been committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously established and designed for the systematic elimination of the political opponents, specific segments of sections of the Chilean national groups, ethnic and religious groups, in order to remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communist (Marxist) positions, or who simply disagreed."

By order of 5 November 1998, the judges of the National Court Criminal Division in Plenary Session held that Spain had jurisdiction to try crimes of terrorism and genocide even committed abroad, including

crimes of torture which are an aspect of genocide, and not merely in respect of Spanish victims:

"Spain is competent to judge the events by virtue of the principle of universal prosecution for certain crimes - a category of international law - established by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than 50 nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings."

The validity of the arrest

Although before the Divisional Court the case was argued on the basis that the applicant was at the relevant times head of state, it was suggested that he was not entitled to such recognition, at any rate for the whole of the period during which the crimes were alleged to have been committed and for which immunity is claimed. An affidavit sworn on 2 November 1974 was produced from Professor Faundez to support this. His view was that by Decree Law No. 1 of 11 September 1973, the applicant was only made President of the Military Junta; that Decree Law was in any event unconstitutional. By Decree Law No. 527 of 26 June 1974, the applicant was designated "Supreme Chief of the Nation" and by Decree Law No. 806 of 17 December 1974, he was given the title President of the Republic of Chile. This, too, it is said was unconstitutional, as was the Decree Law No. 788 of 4 December 1974 purporting to reconcile the Decree Laws with the Constitution. He was not, in any event, appointed in a way recognised by the Constitution. It seems clear, however, that the applicant acted as head of state. In affidavits from the Ambassador of Chile to the Court of St. James's, sworn on 21 October 1998, and by affidavits of two former ambassadors, his position has been said to be that of President of the Junta from 11 September 1973 until 26 June 1974 and then head of state from 26 June 1974 until 11 March 1990. Moreover, it was the applicant who signed the letters of credential presented to the Queen by the Chilean Ambassador to the United Kingdom on 26 October 1973. Further, in the request for extradition dated 3 November 1998, the Spanish Government speak of him as being head of state. He is said not to have immunity "in regard to the allegedly criminal acts committed when [the applicant] was head of state in Chile" and in considering whether an immunity should be accorded, it was relevant to take into account that "Mr. Pinochet became head of state after overthrowing a democratically elected government by force." I accordingly accept for the purposes of this appeal that, although no certificate has been issued by the Secretary of State pursuant to section 21(a) of the Act of 1978, on the evidence at all relevant times until March 1990 the applicant was head of state of Chile.

The protection claimed by the applicant is put essentially on two different bases, one a procedural bar to the proceedings for extradition and the other an objection that the issues raised are not justiciable before the English courts. They are distinct matters, though there are

common features. See, for example, Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683, Filartiga v. Pena-Irala (1984) 577

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F.Supp. 860, Siderman de Blake v. Republic of Argentina (1992) 965 F.2d 699 and Al-Adsani v. Government of Kuwait (1996) 107 I.L.R. 536.

The claim of immunity

Chronologically, it is the procedural bar which falls to be considered first. Can the applicant say either that because the state is immune from proceedings he cannot be brought before the court, or can he say that as a former head of state he has an immunity of his own which, as I see it, is a derivative of the principle of state immunity. The starting point for both these claims is now the State Immunity Act 1978. The long title of that Act states that this is to (a) make new provision in respect of proceedings in the United Kingdom by or against other states and (b) to make new provision with respect to the immunities and privileges of heads of state. Part I deals with (a); Part III with (b).

Part I

By section 1 headed "General Immunity from Jurisdiction," it is provided: "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act." The first part of the sentence is general and the exceptions which follow in sections 2 to 11 relate to specific matters - commercial transactions, certain contracts of employment and injuries to persons and property caused by acts or omissions in the United Kingdom - and do not indicate whether the general rule applies to civil or criminal matters, or both. Some of these exceptions - patents, trademarks and business names, death or personal injury - are capable of being construed to include both civil and criminal proceedings.

Section 1 refers only to states and there is nothing in its language to indicate that it covers emanations or officials of the state. I read it as meaning states as such. Section 14, however, goes much further, since references to a state:

"include references to - (a) the sovereign or other head of that state in his public capacity; (b) the government of that state; and (c) any department of that government, but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued."

A "separate entity" is immune from jurisdiction

"if, and only if - (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a state ... would have been so immune."

This section does not deal expressly with the position of a former head

of state.

Section 16(4), however, under the heading "Excluded Matters," provides that "This Part of this Act does not apply to criminal proceedings." Mr. Nicholls contends that this must be read subject to the terms of the provision of section 1(1) which confers absolute immunity

from jurisdiction on states. Section 16(4) therefore excludes criminal proceedings from the exceptions provided in sections 2 to 11, but it does not apply to section 1(1), so that a state is immune from criminal proceedings and accordingly heads of state enjoy immunity from criminal proceedings under section 14. I am not able to accept this. Section 16(4) is in quite general terms and must be read as including section 1 as well as sections 2 to 11 of the Act. It is hardly surprising that crimes are excluded from section 1, since the number of crimes which may be committed by the state as opposed to by individuals seems likely to be limited. It is also consistent with the Foreign Sovereign Immunities Act (28 U.S.C. 1602) of the United States which, as I understand it, does not apply to criminal proceedings. Since extradition proceedings in respect of criminal charges are themselves regarded as criminal proceedings, the respondent cannot rely on Part I of the Act of 1978.

Part III

Part III of the Act contains the provisions of this Act on which it seems that this claim turns, curiously enough under the heading, "Miscellaneous and Supplementary." By section 20, "Heads of State," it is provided:

"(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;
(b) members of his family forming part of his household; and
(c) his private servants, 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 ... (5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity."

Again there is no mention of a former head of state.

The Diplomatic Privileges Act 1964, unlike the Act of 1978, provides in section 1 that the provisions of the Act, with respect to the matters dealt with therein shall "have effect in substitution for any previous enactment or rule of law." By section 2, articles of the Vienna Convention on Diplomatic Relations (1961) set out in Schedule 1, "shall have the force of law in the United Kingdom."

The Preamble to the Vienna Convention (which though not part of the Schedulemay in my view be looked at in the interpretation of the articles so scheduled) refers to the fact that an International Convention on Diplomatic Privileges and Immunities would contribute to the development of friendly relations among nations "irrespective

of their differing constitutional and social systems" and records that the purpose of such privileges and immunities is "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states." It confirmed, however, "that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."

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It is clear that the provisions of the Convention were drafted with the head and the members of a diplomatic staff of the mission of a sending state (whilst in the territory of the receiving state and carrying out diplomatic functions there) in mind and the specific functions of a diplomatic mission are set out in article 3 of the Convention. Some of the provisions of the Vienna Convention thus have little or no direct relevance to the head of state: those which are relevant must be read "with the necessary modifications."

The relevant provisions for present purposes are (i) article 29:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

(ii) By article 31(1), a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. (iii) By Article 39:

"(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the ministry for foreign affairs or such other ministry as may be agreed. (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

It is also to be noted that in article 38, for diplomatic agents who are nationals of or resident in the receiving state, immunity is limited. Such immunity is only in respect of "official" acts performed in the exercise of his functions.

Reading the provisions "with the necessary modifications" to fit the position of a head of state, it seems to me that when references are made to a "diplomatic agent" one can in the first place substitute only the words "head of state." The provisions made cover, prima facie, a head of state whilst in office. The next question is how to relate the time limitation in article 39(1) to a head of state. He does not, in order to take up his post as head of state, "enter the territory of a receiving state," i.e. a country other than his own, in order to take up his functions or leave it when he finishes his term of office. He may, of course, as head of state visit another state on an official visit and it is suggested that his

immunity and privileges are limited to those visits. Such an interpretation would fit into a strictly literal reading of article 39. It seems to me, however, to be unreal and cannot have been intended. The principle functions of a head of state are performed in his own country and it is in respect of the exercise of those functions that if he is to have immunity that immunity is most needed. I do not accept therefore that section 20 of the Act of 1978 read with article 39(2) of the Vienna Convention is limited to visits abroad.

Nor do I consider that the general context of this Convention indicates that it only grants immunity to acts done in a foreign state or in connection only with international diplomatic activities as normally understood. The necessary modification to "the moment he enters the territory of the receiving state on proceeding to take up his post" and to "the moment when he leaves the country" is to the time when he "becomes head of state" to the time "when he ceases to be head of state." It therefore covers acts done by him whilst in his own state and in post. Conversely there is nothing to indicate that this immunity is limited to acts done within the state of which the person concerned is head.

If these limitations on his immunity do not apply to a head of state they should not apply to the position of a former head of state, whom it is sought to sue for acts done during his period as head of state. Another limitation has, however, been suggested. In respect of acts performed by a person in the exercise of his functions as head of a mission, it is said that it is only "immunity" which continues to subsist, whereas "privileges and immunities normally cease at the moment when he leaves the country" - sc. when he finishes his term of office. It is suggested that all the provisions of article 29 are privileges not immunities. Mr. Nicholls replies that even if being treated with respect and being protected from an attack on his person, freedom or dignity are privileges, the provision that a diplomatic agent (sc. head of state) "shall not be liable to any form of arrest or detention" is an immunity. As a matter of ordinary language and as a matter of principle it seems to me that Mr. Nicholls is plainly right. In any event, by article 31 the diplomatic agent/head of state has immunity from the criminal jurisdiction of the receiving state: that immunity would cover immunity from arrest as a first step in criminal proceedings. Immunity in article 39(2) in relation to former heads of state in my view covers immunity from arrest, but so also does article 29.

Where a diplomatic agent (head of state) is in post, he enjoys these immunities and privileges as such - i.e. ratione personae just as in respect of civil proceedings he enjoys immunity from the jurisdiction of the courts of the United Kingdom under section 14 of the Act of 1978 because of his office.

For one who ceases to occupy a post "with respect to acts performed by such a person in the exercise of his functions as a member of the mission [head of state] immunity shall continue to subsist." This wording is in one respect different from the wording in article 38 in respect of a diplomat who is a national of the receiving state. In that case, he has immunity in respect of "official" acts performed in the exercise of his function,

but as Professor Eileen Denza suggests, the two should be read in the same way: Diplomatic Law, 2nd ed. (1998), p. 363.

The question then arises as to what can constitute acts (i.e. official acts) in the exercise of his functions as head of state. It is said (in addition to the argument that functions mean only international functions which I reject): (i) that the functions of the head of state must be defined by international law, they cannot be defined simply as a matter of national law or practice; and (ii) genocide, torture and the taking of hostages cannot be regarded as the functions of a head of state within the meaning

of international law when international law regards them as crimes against international law.

As to (i), I do not consider that international law prescribes a list of those functions which are, and those which are not, functions for the purposes of article 32. The role of a head of state varies very much from country to country, even as between presidents in various states in Europe and the United States. International law recognises those functions which are attributed to him as head of state by the law, or in fact, in the country of which he is head as being functions for this purpose, subject to any general principle of customary international law or national law, which may prevent what is done from being regarded as a function.

As to (ii), clearly international law does not recognise that it is one of the specific functions of a head of state to commit torture or genocide. But the fact that in carrying out other functions, a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great. I accept the approach of Sir Arthur Watts Q.C. in his Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours 56-57:

"Ahead of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. 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."

In the present case it is accepted in the second international warrant of arrest that in relation to the repression alleged "the plans and instructions established beforehand from the government enabled these actions to be carried out ... In this sense [the] Commander in Chief of the Armed Forces and Head of the Chilean Government at the time committed punishable acts ... " I therefore conclude that in the present case the acts relied on were done as part of the carrying

out of his functions when he was head of state.

The next question is, therefore, whether this immunity in respect of functions is cut down as a matter of the interpretation of the Vienna Convention and the Act of 1978. The provisions of the Act "fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations:" Alcom Ltd. v. Republic of Colombia [1984] A.C. 580, 597, per Lord Diplock. So also as I see it must the Convention be interpreted.

The original concept of the immunity of a head of state in customary international law in part arose from the fact that he or she was a monarch who by reason of personal dignity and respect ought not to be impleaded

in a foreign state: it was linked no less to the idea that the head of state was, or represented, the state and that to sue him was tantamount to suing an independent state extra-territorially, something which the comity of nations did not allow. Moreover, although the concepts of state immunity and sovereign immunity have different origins, it seems to me that the latter is an attribute of the former and that both are essentially based on the principles of sovereign independence and dignity, see for example, Sucharitkul in his report to the International Law Commission (1980) Vol. II Doc. A(LN 4-331 and Add.J.) and Marshall C.J. in the Schooner Exchange v. M'Faddon (1812) 11 U.S. (7 Cranch) 116.

In Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1 the Duke claimed that the King of Hanover had been involved in the removal of the Duke from his position as reigning Duke and in the maladministration of his estates. Lord Cottenham L.C. said, at. p. 17:

"a foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as sovereign."

He further said, at p. 22:

"if it be a matter of sovereign authority, we cannot try the fact, whether it be right or wrong. The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a sovereign exercising sovereign authority. If that be so, it does not require another observation to show, because it has not been doubted, that no court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacities abroad."

This case has been cited since both in judicial decisions and in the writing of jurists and in Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888, 932 was said by Lord Wilberforce to be "a case in this House which is still authoritative and which has influenced the law both here and overseas." In Hatch v. Baez (1876) 7 Hun 596, the plaintiff claimed that he had suffered injuries in the Dominican Republic as a result of acts done by the defendant in his official capacity of president of that republic. The court accepted that because the defendant was in New York, he was within the territorial jurisdiction of the state. The court said, however, at p. 600:

"But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on

international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge ... The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

Jurists since have regarded this principle as still applying to the position of a former head of state. Thus in Oppenheim's International Law, 9th ed. (1992), pp. 1043-1044, para. 456 (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.) it is said that a head of state enjoys all the privileges set out as long as he holds that position (i.e. ratione personae) but that thereafter he may be sued in respect of obligations of a private character: "For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity."

Satow's Guide to Diplomatic Practice, 5th ed. (1979) is to the same effect. Having considered the Vienna Convention on Diplomatic Relations 1961, the New York Convention on Special Missions 1969 and the European Convention on State Immunity 1972 the editors conclude, at pp. 9-10:

"2.2 The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity - probably without exception - from criminal and civil jurisdiction ...

"2.4. Ahead of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state. He cannot claim to be entitled to privileges as of right, although he may continue to enjoy certain privileges in other states on a basis of courtesy."

In his Hague Lectures, at pp. 88-89, Sir Arthur Watts wrote that a

former head of state had no immunity in respect of his private activities taking place whilst he was head of state:

"Ahead of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state."

One critical difference between a head of state and the state of course resides in the fact that a head of state may resign or be removed. As these writers show, customary international law whilst continuing to hold immune the head of state for acts performed in such capacity during his tenure of the office, did not hold him immune from personal acts of his own. The distinction may not always be easy to draw, but examples can be

found. On the one side in the United States was Hatch v. Baez, to which I have referred, and Nobili v. Emperor Charles I of Austria (1921) 1Ann.Dig. 136. On the other side, in France, is Mellerio v. Isabelle de Bourbon (1874) 1 Journal du droit international 33; more recently the former King Farouk was held not immune from suits for goods supplied to his former wife whilst he was head of state: [1964] Revue critique de droit international privé 689.

The reasons for this immunity as a general rule both for the actual and a former head of state still have force and, despite the changes in the role and the person of the head of state in many countries, the immunity still exists as a matter of customary international law. For an actual head of state, as was said in United States of America v. Noriega (1990) 746 F.Supp. 1506, 1519, the reason was to ensure that "leaders are free to perform their governmental duties without being subject to detention, arrest, or embarrassment in a foreign country's legal system." There are in my view analogous if more limited reasons for continuing to apply the immunity ratione materiae in respect of a former head of state.

Rules of customary international law change, however, and as Lord Denning M.R. said in Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529 "we should give effect to those changes and not be bound by any idea of stare decisis in international law." Thus, for example, the concept of absolute immunity for a sovereign has changed to adopt a theory of restrictive immunity in so far as it concerns the activities of a state engaging in trade (I Congreso del Partido [1983] 1 A.C. 244). One must therefore ask (see [1977] 1 Q.B. 529, 556) is there "sufficient evidence to show that the rule of international law has changed?"

This principle of immunity has, therefore, to be considered now in the light of developments in international law relating to what are called international crimes. Sometimes these developments are through Conventions. Thus, for example, article 1 of the International Convention against the Taking of Hostages 1979 (1983) (Cmnd. 9100) provides:

"Any person who seizes or detains and threatens to kill, to injure ... another person ... in order to compel a third

party, namely a state, an international inter-governmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages ... "

States undertake to prosecute if they do not extradite an offender (any offender "without exception whatsoever") through proceedings in accordance with the law of that state, but subject to "enjoyment of all the rights and guarantees provided by the law of the state in the territory of which he is present:" article 8. This Convention entered into force on 3 June 1983 and was enacted in the United Kingdom in the Taking of Hostages Act 1982 which came into force on 26 November 1982.

By article 1 of the Convention on the Prevention and Suppression of the Crime of Genocide 1948 (1970) (Cmnd. 4421):

"The contracting parties confirm that genocide" - being any of the acts specified in article 2 of the Convention - "whether committed in

time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

By article 4: "Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." The Genocide Act 1969 made the acts specified in article 2 of the Convention the criminal offence of genocide, but it is to be noted that article 4 of the Convention which on the face of it would cover a head of state was not enacted as part of domestic law. It is, moreover, provided in article 6 that persons charged with genocide "shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ... " It seems to me to follow that if an immunity otherwise exists, it would only be taken away in respect of the state where the crime was committed or before an international tribunal.

There have in addition been a number of Charters or Statutes setting up international tribunals. There is the Nuremberg Charter: Charter of International Military Tribunal, adopted by the Big Four Powers (1945) which gave jurisdiction to try crimes against peace, war crimes and crimes against humanity (article 6). By article 7: "The official position of defendants, whether as a heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment." A similar provision was found in the Tokyo Convention: Charter of the International Military Tribunal for the trial of the major war criminals in the Far East (1946). In 1993 the international tribunal for the former Yugoslavia was given power to prosecute persons "responsible for serious violations of international humanitarian law" including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages, genocide, crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population" including murder, torture, persecution on political

racial or religious grounds (Statute of the International Tribunal for the Former Yugoslavia (1993), arts. 1, 5). In dealing with individual criminal responsibility it is provided in article 7 that "the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility."

The Statute of the International Tribunal for Rwanda (1994) also empowered the tribunal to prosecute persons committing genocide and specified crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic" or other specified grounds: article 3. The same clause as to head of state as in the Yugoslav tribunal is in this statute: article 6.

The 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) provides for jurisdiction in respect of genocide as defined, crimes against humanity as defined but in each case only with respect to crimes committed after the entry into force of this statute. Official capacity as a

head of state or government shall in no case exempt the person from criminal responsibility under this statute: article 27. Although it is concerned with jurisdiction, it does indicate the limits which states were prepared to impose in this area on the tribunal.

There is thus no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or head of state or other official or diplomatic immunity when charges are brought before international tribunals.

Movement towards the recognition of crimes against international law is to be seen also in the decisions of national courts, in the resolution of the General Assembly of the United Nations (11 December 1946), in the reports of the International Law Commission and in the writings of distinguished international jurists.

It has to be said, however, at this stage of the development of international law that some of those statements read as aspirations, as embryonic. 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. I am not satisfied that even now there would be universal acceptance of a definition of crimes against humanity. They had their origin as a concept after the 1914-18 War and were recognised in the Nuremberg Tribunal as existing at the time of international armed conflicts. Even later it was necessary to spell out that humanitarian crimes could be linked to armed conflict internally and that it was not necessary to show that they occurred in international conflict. This is no doubt a developing area but states have proceeded cautiously.

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of "intransgressible principles of international customary law" when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide Convention provides only for jurisdiction before an international tribunal or the courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts.

So, starting with the basic rule to be found both in article 39(2) and in customary international law that a former head of state is entitled to immunity from arrest or prosecution in respect of official acts done by him in the exercise of his functions as head of state, the question is what effect, if any, the recognition of acts as international crimes has in itself on that immunity. There are two extreme positions. The first is that such recognition has no effect. Head of state immunity is still necessary for a former head of state in respect of his official acts; it is long established, well recognised and based on sound reasons. States must be treated as

recognising it between themselves so that it overrides any criminal act, whether national or international. This is a clear cut rule, which for that reason has considerable attraction. It, however, ignores the fact that international law is not static and that the principle may be modified by changes introduced in state practice, by Conventions and by the informed opinions of international jurists. Just as it is now accepted that, contrary to an earlier principle of absolute immunity, states may limit state immunity to acts of sovereign authority (acta jure imperii) and exclude commercial acts (acta jure gestionis) as the United Kingdom has done and just as the immunity of a former head of state is now seen to be limited to acts which he did in his official capacity and to exclude private acts, so it is argued, the immunity should be treated as excluding certain acts of a criminal nature.

The opposite extreme position is that all crimes recognised as, or accepted to be, international crimes are outside the protection of the immunity in respect of former heads of state. I do not accept this. The fact even that an act is recognised as a crime under international law does not mean that the courts of all states have jurisdiction to try it, nor in my view does it mean that the immunity recognised by states as part of their international relations is automatically taken away by international law. There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae.

There is, however, another question to be asked. Does international law now recognise that some crimes are outwith the protection of the former head of state immunity so that immunity in article 39(2) is equally limited as part of domestic law; if so, how is that established? This is the core question and it is a difficult question.

It is difficult partly because changes in international law take place slowly as states modify existing principles. It is difficult because in many aspects of this problem the appropriate principles of international law have not crystallised. There is still much debate and it seems to me still much uncertainty so that a national judge should proceed carefully. He may have to say that the position as to state practice has not reached the stage when he can identify a positive rule at the particular time when he has to consider the position. This is clearly shown by the developments which have taken place in regard to crimes against humanity. The concept that such crimes might exist was as I have said recognised, for Nuremberg and the Tokyo Tribunals in 1946 in the context of international armed conflict when the tribunals were given jurisdiction to try crimes against humanity. The Affirmation of the Principles of International Law Recognised by the Charter of Nuremberg Tribunal, adopted by the United Nations General Assembly in December 1946 (G.A. Res. 95, 1st Sess., 1144; U.N. Doc. A/236 (1946)), the International Law Commission reports and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) also recognised these crimes as international crimes. Since then there have been, as I have shown, conventions dealing with specific crimes and tribunals have been given jurisdiction over international crimes with a mandate not to treat as a defence to such crimes the holding of official office including that of head

of state. National courts as in Attorney-General of Israel v. Eichmann (1962) 36 I.L.R. 5 held that they had jurisdiction to deal with international crimes; see also In re Honecker (1984) 80 I.L.R. 365 and Demjanjuk v. Petrovsky (1985) 776 F.2d 571.

But except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question as to whether otherwise existing immunities were taken away. Nor did they always specifically recognise the jurisdiction of, or confer jurisdiction on, national courts to try such crimes.

I do not find it surprising that this has been a slow process or that the International Law Commission eventually left on one side its efforts to produce a convention dealing with head of state immunity. Indeed, until Prosecutor v. Tadic (1995) 105 I.L.R. 419 after years of discussion and perhaps even later there was a feeling that crimes against humanity were committed only in connection with armed conflict even if that did not have to be international armed conflict.

If the states went slowly so must a national judge go cautiously in finding that this immunity in respect of former heads of state has been cut down. Immunity, it must be remembered, reflects the particular relationship between states by which they recognise the status and role of each others head and former head of state.

So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state

being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.

In that connection it is necessary to consider when the pre-existing immunity is lost. In my view it is from the date when the national legislation comes into force, although I recognise that there is an argument that it is when the convention comes into force, but in my view nothing earlier will do. Acts done thereafter are not protected by the immunity; acts done before, so long as otherwise qualifying, are protected by the immunity. It seems to me wrong in principle to say that once the immunity is cut down in respect of particular crimes it has gone even for acts done when the immunity existed and was believed to exist. Equally, it is artificial to say that an evil act can be treated as a function of a head of state until an international convention says that the act is a crime when it ceases ex

post facto to have been a function. If that is the right test, then it gives a clear date from which the immunity was lost. This may seem a strict test and a cautious approach, but in laying down when states are to be taken as abrogating a long established immunity it is necessary to be satisfied that they have done so.

The crimes alleged

What is the position in regard to the three groups of crimes alleged here: torture, genocide and taking hostages?

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm. 1775) 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."

Each state party is to ensure that all acts of torture are offences under its criminal law and to establish jurisdiction over offences committed in its territory, or by a national of that state or, if the state considers it appropriate, when the victim is a national of that state: article 5. It must also establish jurisdiction where "the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 ... " Thus, where a person is found in the territory of a state in the cases contemplated in article 5, then the state must, by article 7: "if it does not extradite him, submit the case to its competent authorities for

the purpose of prosecution." States are to give each other the greatest measure of assistance in connection with criminal proceedings.

The important features of this Convention are: (1) that it involves action "by a public official or other person acting in an official capacity;" (2) that by articles 5 and 7, if not extradited, the alleged offender must be dealt with as laid down; and (3) Chile was a state party to this Convention and it therefore accepted that, in respect of the offence of torture, the United Kingdom should either extradite or take proceedings against offending officials found in its jurisdiction.

That Convention was incorporated into English law by section 134 of the Criminal Justice Act 1988. Section 134 provides:

"(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if - (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence - (i) of a public official; or (ii) of a person acting in an official capacity; and (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it."

If committed other than in the United Kingdom lawful authority, justification or excuse under the law of the place where the torture was inflicted is a defence, but in Chile the constitution forbids torture.

It is thus plain that torture was recognised by the state parties as a crime which might be committed by the persons, and be punishable in the states, referred to. In particular, the Convention requires that the alleged offender, if found in the territory of a state party, shall be, if not extradited, submitted to the prosecution authorities.

This, however, is not the end of the inquiry. The question remains - have the state parties agreed, and in particular have the United Kingdom and Chile, which asserts the immunity, agreed that the immunity enjoyed by a former head of state for acts ratione materiae, shall not apply to alleged crimes of torture? That depends on whether a head of state, and therefore a former head of state, is covered by the words "a public official or a person acting in that capacity." As a matter of ordinary usage, it can obviously be argued that he is. But your Lordships are concerned with the use of the words in their context in an international Convention. I find it impossible to ignore the fact that in the very Conventions and Charters relied on by the appellants as indicating that jurisdiction in respect of certain crimes was extended from 1945 onwards, there are specific provisions in respect of heads of state as well as provisions covering officials. These provisions may relate to jurisdiction, or to the removal of a defence, and immunity of course is different from each, both as a concept and in that it is only pleadable in bar to proceedings

in national courts. These provisions do, however, serve as a guide to indicate whether states have generally accepted that former heads of state are to be regarded as "public officials" and accordingly that the immunity has been taken away from former heads of state in the Torture Convention.

Thus, in article 7 of the Nuremberg Charter 1945, the official position of defendants "whether as heads of state or responsible officials" does not free them from responsibility. In the 1948 Genocide Convention persons committing the act shall be punished "whether they are constitutionally responsible rulers, public officials or private individuals." In article 7 of the Yugoslav and article 6 of the Rwanda Statutes: "The official position of any accused person, whether as head of state or government or as a responsible government official" is not a defence. Even as late as the Rome Statute on the International Criminal Court by article 27 "official capacity as a head of state or government ... or a government official" is not exempted from criminal responsibility. (Emphasis added.)

In these cases, states have not taken the position that the words public or government official are wide enough to cover heads of state or former heads of state, but that a specific exclusion of a defence or of an objection to jurisdiction on that basis is needed. It is nothing to the point that the reference is only to head of state. Ahead of state on ceasing to be a head of state is not converted into a public official in respect of the period when he was a head of state if he was not so otherwise. This is borne out by the experience of the International Law Commission in seeking to produce a draft in respect of state immunity. The reports of its meeting show the difficulties which arose in seeking to deal with the position of a head of state.

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (H.L.(E.))

Lord Slynn of Hadley

I conclude that the reference to public officials in the Torture Convention does not include heads of state or former heads of state, either because states did not wish to provide for the prosecution of heads of state or former heads of state or because they were not able to agree that a plea in bar to the proceedings based on immunity should be removed. I appreciate that there may be considerable political and diplomatic difficulties in reaching agreement, but if states wish to exclude the long established immunity of former heads of state in respect of allegations of specific crimes, or generally, then they must do so in clear terms. They should not leave it to national courts to do so because of the appalling nature of the crimes alleged.

The second provisional warrant does not mention genocide, though the international warrant and the request for extradition do. The 1948 Genocide Convention, in article 6, limits jurisdiction to a tribunal in the territory in which the act was committed and is not limited to acts by public officials. The provisions in article 4 making "constitutionally responsible rulers" liable to punishment is not incorporated into the (English) Genocide Act 1969. Whether or not your Lordships are concerned with the second international warrant and the request for extradition (and Mr. Nicholls submits that you are not), the Genocide Convention does not therefore satisfy the test which I consider should be applied.

The International Convention against the Taking of Hostages, which came into force in 1983, and the Taking of Hostages Act 1982 clearly make it a crime for "a person, whatever his nationality" who "in the United Kingdom or elsewhere" to take hostages for one of the purposes specified: section 1(1) of the Act of 1982. This again indicates the scope both of the substantive crime and of jurisdiction, but neither the Convention nor the Act contains any provisions which can be said to take away the customary international law immunity as head of state or former head of state.

It has been submitted that a number of other factors indicate that the immunity should not be refused by the United Kingdom: the United Kingdom's relations with Chile, the fact that an amnesty was granted, that great efforts have been made in Chile to restore democracy and that to extradite the applicant would risk unsettling what has been achieved, the length of time since the events took place, that prosecutions have already been launched against the applicant in Chile, that the applicant has, it is said, with the United Kingdom Government's approval or acquiescence, been admitted into this country and been received in official quarters. These are factors, like his age, which may be relevant on the question whether he should be extradited, but it seems to me that they are for the Secretary of State (the executive branch) and not for your Lordships on this occasion.

The alternative basis: acts of state and non-justiciability

United States courts have been much concerned with the defence of act of state as well as of sovereign immunity. They were put largely on the basis of comity between nations beginning with Schooner Exchange v.

M'Faddon, 11 U.S. (7 Cranch) 116. See also Underhill v. Hernandez (1897) 168 U.S. 250. In Banco National de Cuba v. Sabbatino (1962) 307 F.2d 845, 855 it was said:

"The act of state doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories ... This doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of international law ... [it] stems from the concept of the immunity of the sovereign because 'the sovereign can do no wrong.'"

See also American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States, 3d (1986), vol. 1, sections 443-444. In International Association of Machinists and Aerospace Workers v. Organisation of Petroleum Exporting Countries (1981) 649 F.2d 1354, 1359 the Ninth Circuit Court of Appeals took the matter further:

"The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states ... The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional ... Rather, it is a procedural doctrine designed to avoid action in sensitive areas. Sovereign immunity is a principle of international law, recognised in the United States by statute. It is the

states themselves, as defendants, who may claim sovereign immunity."

The two doctrines are separate, but they are often run together. The law of sovereign immunity is now contained in the Foreign Sovereign Immunities Act in respect of civil matters and many of the decisions on sovereign immunity in the United States turn on the question whether the exemption to a general state immunity from suit falls within one of the specific exemptions. The Foreign Sovereign Immunities Act does not deal with criminal head of state immunity. In the United States the courts would normally follow a decision of the executive as to the grant or denial of immunity and it is only when the executive does not take a position that "Courts should make an independent determination regarding immunity:" Senior Circuit Judge Kravitch in United States of America v. Noriega (1997) 117 F.3d 1206.

In Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701, the court said that, having begun with comity as the basis for the act of state doctrine, the court more recently regarded it as springing from the sense that if the judiciary adjudicated on the validity of foreign acts of state, it might hinder the conduct of foreign affairs. The Supreme Court said, at p. 705, that: "Act of state issues only arise when a court must decide - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign."

In English law the position is much the same as it was in the earlier statements of the United States courts. The act of state doctrine

"is to the effect that the courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign state or

the official or officially avowed acts of its agents, at any rate in so far as those acts involve the exercise of the state's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are not in themselves contrary to international law:" Oppenheim's International Law, 9th ed., pp. 365-366.

In the Buttes Gas case [1982] A.C. 888 Lord Wilberforce spoke of the normal meaning of acts of state as being "action taken by a sovereign state within its own territory." In his speech Lord Wilberforce asked, at p. 931, whether, apart from cases concerning acts of British officials outside this country and cases concerned with the examination of the applicability of foreign municipal legislation within the territory of a foreign state, there was not "a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states" - a principle to be considered if it existed "not as a variety of 'act of state' but one of judicial restraint or abstention."

Despite the divergent views expressed as to what is covered by the act of state doctrine, in my opinion once it is established that the former head of state is entitled to immunity from arrest and extradition on the lines I have indicated, United Kingdom courts will not adjudicate on the facts relied on to ground the arrest, but in Lord Wilberforce's words, they will exercise "judicial restraint or abstention."

Accordingly, in my opinion, the applicant was entitled to claim immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of official acts committed by him whilst he was head of state relating to the charges in the provisional warrant of 22 October 1998. I would accordingly dismiss the appeal.

Lord Lloyd of Berwick. My Lords,

Background

On 11 September 1973 General Augusto Pinochet Ugarte assumed power in Chile after a military coup. He was appointed president of the Governing Junta the same day. On 22 September the new regime was recognised by Her Majesty's Government. By a decree dated 11 December 1974 General Pinochet assumed the title of President of the Republic. In 1980 a new constitution came into force in Chile, approved by a national referendum. It provided for executive power in Chile to be exercised by the President of the Republic as head of state. Democratic elections were held in December 1989. As a result, General Pinochet handed over power to President Aylwin on 11 March 1990.

In opening the appeal before your Lordships Mr. Alun Jones took as the first of the three main issues for decision whether General Pinochet was head of state throughout the whole period of the allegations against him. It is clear beyond doubt that he was. So I say no more about that.

On 19 April 1978, while General Pinochet was still head of state, the Senate passed a decree granting an amnesty to all persons involved in criminal acts (with certain exceptions) between 11 September 1973 and 10 March 1978. The purpose of the amnesty was stated to be for the "general

tranquillity, peace and order" of the nation. After General Pinochet fell from power, the new democratic government appointed a Commission for Truth and Reconciliation, thus foreshadowing the appointment of a similar commission in South Africa. The Commission consisted of eight civilians of varying political viewpoints under the chairmanship of Don Raul Rettig. Their terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The Commission reported on 9 February 1991.

In 1994 Senator Pinochet came to the United Kingdom on a special diplomatic mission: (he had previously been appointed senator for life). He came again in 1995 and 1997. According to the evidence of Professor Walters, a former foreign minister and ambassador to the United Kingdom, Senator Pinochet was accorded normal diplomatic courtesies. The Foreign Office was informed in advance of his visit to London in September 1998, where at the age of 82 he has undergone an operation at the London Clinic.

At 11.25 p.m. on 16 October he was arrested while still at the London Clinic pursuant to a provisional warrant ("the first provisional warrant") issued under section 8(1)(b) of the Extradition Act 1989. The warrant had been issued by Mr. Evans, a metropolitan stipendiary magistrate, at his home at about 9 p.m. the same evening. The reason for the urgency was said to be that Senator Pinochet was returning to Chile the next day. We do not know the terms of the Spanish international warrant of arrest, also issued on 16 October. All we know

is that in the first provisional warrant Senator Pinochet was accused of the murder of Spanish citizens in Chile between 11 September 1973 and 31 December 1983.

For reasons explained by the Divisional Court the first provisional warrant was bad on its face. The murder of Spanish citizens in Chile is not an extradition crime under section 2(1)(b) of the Extradition Act 1989 for which Senator Pinochet could be extradited, for the simple reason that the murder of a British citizen in Chile would not be an offence against our law. The underlying principle of all extradition agreements between states, including the European Extradition Convention 1957 (European Convention on Extradition Order 1990), is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.

On 17 October the Chilean Government protested. The protest was renewed on 23 October. The purpose of the protest was to claim immunity from suit on behalf of Senator Pinochet both as a visiting diplomat and as a former head of state, and to request his immediate release.

Meanwhile the flaw in the first provisional warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the State of Spain. At all events, Judge Garzon in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism. This in turn led to a second provisional warrant of arrest in England issued on this occasion by Mr. Ronald Bartle. Senator Pinochet was re-arrested in pursuance of the second warrant on 23 October.

The second warrant alleges five offences, the first being that Senator Pinochet "being a public official conspired with persons unknown to

intentionally inflict severe pain or suffering on another in the ... purported performance of his official duties ... within the jurisdiction of the Government of Spain:" in other words, that he was guilty of torture. The reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of section 134 of the Criminal Justice Act 1988 which itself reflects article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Section 134(1) provides:

"A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

It will be noticed that unlike murder, torture is an offence under English law wherever the act of torture is committed. So unlike the first provisional warrant, the second provisional warrant is not bad on its face. The alleged acts of torture are extradition crimes under section 2 of the Extradition Act, as article 8 of the Convention required, and as Mr. Nichols conceded. The same is true of the third alleged offence, namely, the taking of hostages. Section 1 of the Taking of Hostages Act 1982 creates an offence under English law wherever the act

of hostage-taking takes place. So hostage-taking, like torture, is an extradition crime. The remaining offences do not call for separate mention.

It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither section 134 of the Criminal Justice Act 1988, nor section 1 of the Taking of Hostages Act 1982 are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act 1989. 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.

The torture allegations in the second provisional warrant are confined to the period from 1 January 1988 to 31 December 1992. Mr. Jones does not rely on conduct subsequent to 11 March 1990. So we are left with the period from 1 January 1988 to 11 March 1990. Only one of the alleged acts of torture took place during that period. The hostage-taking allegations relate to the period from 1 January 1982 to 31 January 1992. There are no alleged acts of hostage-taking during that period. So the second provisional warrant hangs on a very narrow thread. But it was argued that the second provisional warrant is no longer the critical document, and that we ought now to be looking at the complete list of crimes alleged in the formal request of the Spanish Government. I am content to assume, without deciding, that this is so.

I return to the narrative, Senator Pinochet made an application for certiorari to quash the first provisional warrant on 22 October and a second application to quash the second provisional warrant on 26 October. It was these applications which succeeded before the Divisional Court on 28 October 1998, with a stay pending an appeal to your Lordships' House. The question certified by the Divisional Court was

as to "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."

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British Government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state. This latter protest may be based on a misunderstanding. The British Government has done nothing. This is not a case where the Secretary of State has already issued an authority to proceed under section 7 of the Extradition Act 1989, since the provisional warrants were issued without his authority (the case being urgent) under section 8(1)(b) of the Act. It is true that the Secretary of State might have cancelled the warrants under section 8(4). But as the Divisional Court pointed out, it is not the duty of the Secretary of State to review the validity of provisional warrants. It was submitted that it should have been obvious to the Secretary of State that Senator Pinochet was entitled to immunity as a former head of state. But the Divisional Court rejected that submission. In the event leave to move against the Secretary of State

was refused.

There are two further points made by Professor Walters in his evidence relating to the present state of affairs in Chile. In the first place he gives a list of 11 criminal suits which have been filed against Senator Pinochet in Chile and five further suits where the Supreme Court has ruled that the 1978 amnesty does not apply. Secondly, he has drawn attention to public concern over the continued detention of Senator Pinochet.

"I should add that there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government."

Summary of issues

The argument has ranged over a very wide field in the course of a hearing lasting six days. The main issues which emerged can be grouped as follows: (1) Is Senator Pinochet entitled to immunity as a former head of state at common law? This depends on the requirements of customary international law, which are observed and enforced by our courts as part of the common law. (2) Is Senator Pinochet entitled to immunity as a former head of state under Part I of the State Immunity Act 1978? If not, does Part I of the Act of 1978 cut down or affect any immunity to which he would otherwise be entitled at common law? (3) Is Senator Pinochet entitled to immunity as a former head of state under Part III of the Act of 1978, and the articles of the Vienna Convention as set out in Schedule 1 to

the Diplomatic Privileges Act 1964? It should be noticed that despite an assertion by the Chilean Government that Senator Pinochet is present in England on a diplomatic passport at the request of the Royal Ordnance, Miss Clare Montgomery does not seek to argue that he is entitled to diplomatic immunity on that narrow ground, for which, she says, she cannot produce the appropriate evidence. (4) Is this a case where the court ought to decline jurisdiction on the ground that the issues raised are non-justiciable?

The last of these four heads is sometimes referred to as "the act of state" doctrine, especially in the United States. But act of state is a confusing term. It is used in different senses in many different contexts. So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the

grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.

Issue 1: head of state immunity at common law

As already mentioned, the common law incorporates the rules of customary international law. The matter is put thus in Oppenheim's International Law, p. 57:

"The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."

So what is the relevant rule of customary international law? I cannot put it better than it is put by the appellants themselves in paragraph 26 of their written case:

"No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head. The immunity is accorded for the benefit not of the former head of state himself but for the state of which he was once the head and any international law obligations are owed to that state and not to the individual."

The important point to notice in this formulation of the immunity principle is that the rationale is the same for former heads of state as it is

for current heads of state. In each case the obligation in international law is owed to the state, and not the individual, though in the case of a current head of state he will have a concurrent immunity ratione personae. This rationale explains why it is the state, and the state alone, which can waive the immunity. Where, therefore, a state is seeking the extradition of its own former head of state, as has happened in a number of cases, the immunity is waived ex hypothesi. It cannot be asserted by the former head of state. But here the situation is the reverse. Chile is not waiving its immunity in respect of the acts of Senator Pinochet as former head of state. It is asserting that immunity in the strongest possible terms, both in respect of the Spanish international warrant, and also in respect of the extradition proceedings in the United Kingdom.

Another point to notice is that it is only in respect of "certain categories of acts" that the former head of state is immune from the jurisdiction of municipal courts. The distinction drawn by customary international law in this connection is between private acts on the one hand, and public, official or governmental acts on the other. Again I cannot put it better than it is put by the appellants in paragraph 27 of their written case. Like paragraph 26 it has the authority of

Professor Greenwood; and like paragraph 26 it is not in dispute:

"It is generally agreed that private acts performed by the former head of state attract no such immunity. Official acts, on the other hand, will normally attract immunity ... . Immunity in respect of such acts, which has sometimes been applied to officials below the rank of head of state, is an aspect of the principle that the courts of one state will not normally exercise jurisdiction in respect of the sovereign acts of another state."

The rule that a former head of state cannot be prosecuted in the municipal courts of a foreign state for his official acts as head of state has the universal support of writers on international law. They all speak with one voice. Thus Sir Arthur Watts, K.C.M.G., Q.C. in his monograph, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," 247 Recueil des cours 89 says:

"Ahead of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state."

In Satow's Guide to Diplomatic Practice, pp. 9-10, paras. 2.2, 2.4 we find:

"2.2 The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity - probably without exception - from criminal and civil jurisdiction ... 2.4 Ahead of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head

of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state."

In Oppenheim's International Law, pp. 1043-1044, para. 456, we find:

"All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity."

It was suggested by Professor Brownlie that American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States, 3d (1986) was to the contrary effect. But I doubt if this is so. In vol. 1, section 464, p. 471 we find:

"Former heads of state or government have sometimes sought

immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states ... However, a former head of state appears to have no immunity from jurisdiction to adjudicate."

The last sentence means only that it is competent for the court of the foreign state to inquire whether the acts complained of were official acts of the head of state, or private acts. Unless the court is persuaded that they were private acts the immunity is absolute.

Decided cases support the same approach. In Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1, a case discussed by Professor F. A. Mann in his illuminating article "The Sacrosanctity of the Foreign Act of State" published in (1943) 59 L.Q.R. 42, the reigning King of Hanover (who happened to be in England) was sued by the former reigning Duke of Brunswick. It was held by this House that the action must fail, not on the ground that the King of Hanover was entitled to personal immunity so long as he was in England (ratione personae) but on the wider ground (ratione materiae) that a foreign sovereign:

"cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad:" 2 H.L.Cas. 1, 17.

In Hatch v. Baez, 7 Hun 596 the plaintiff complained of an injury which he sustained at the hands of the defendant when president of the Dominican Republic. After the defendant had ceased to be president, he was arrested in New York at the suit of the plaintiff. There was a full argument before what would now, I think, be called the Second Circuit Court of Appeals, with extensive citation of authority including Duke of Brunswick v. King of Hanover. The plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the

defendant must be regarded as having been committed in his private capacity. I quote from the argument, at pp. 596-597:

"No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the man simply, rated as other men are rated in private stations; for in the perpetration of unauthorised offences of this nature, he divests himself of his 'regal prerogatives,' and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection."

But the court rejected the plaintiff's argument. Gilbert J. said, at p. 599:

"The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of

president of that republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts."

A little later we find, at p. 600:

"The general rule, no doubt, is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge."

The court concluded:

"The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

In Underhill v. Hernandez, 168 U.S. 250 the plaintiff was an American citizen resident in Venezuela. The defendant was a general in command of revolutionary forces, which afterwards prevailed. The plaintiffs brought proceedings against the defendant in New York, alleging wrongful imprisonment during the revolution. In a celebrated passage Fuller C.J. said, at p. 252:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

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The Supreme Court approved, at p. 254, a statement by the Circuit Court of Appeals "that the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

On the other side of the line is Jimenez v. Aristeguieta (1962) 311 F.2d 547. In that case the State of Venezuela sought the extradition of a former chief executive alleging four charges of murder, and various financial crimes. There was insufficient evidence to connect the defendant with the murder charges. But the judge found that the alleged financial crimes were committed for his private financial benefit, and that they constituted "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it." The defendant argued that as a former chief executive he was entitled to sovereign immunity, and he relied on Underhill v. Hernandez. Not surprisingly the Fifth Circuit Court of Appeals rejected this argument. They said, at p. 557: "It is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies."

To the same effect is United States of America v.

Noriega, 746 F.Supp. 1506. The defendant was charged with various drug offences. He claimed immunity as de facto head of the Panamanian Government. The court considered the claim under three heads, sovereign immunity, the act of state doctrine and diplomatic immunity. Having referred to Hatch v. Baez and Underhill v. Hernandez the court continued, at pp. 1521-1522:

"In order for the act of state doctrine to apply, the defendant must establish that his activities are 'acts of state,' i.e., that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself ... 'That the acts must be public acts of the sovereign has been repeatedly affirmed' ... Though the distinction between the public and private acts of government officials may prove elusive, this difficulty has not prevented courts from scrutinising the character of the conduct in question."

The court concluded that Noriega's alleged drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state.

These cases (and there are many others to which we were referred) underline the critical distinction between personal or private acts on the one hand, and public or official acts done in the execution or under colour of sovereign authority on the other. Despite the plethora of authorities, especially in the United States, the appellants were unable to point to a single case in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office. The nearest they got was Hilao v. Estate of Marcos (1994) 25 F.3d 1467, in which a claim for immunity by the estate of former President Marcos failed. But the facts were special. Although there was no formal waiver of immunity in the case, the Government of the Philippines made plain their view that the claim should proceed. Indeed they filed a brief in which they asserted that foreign relations with the United States would not be adversely affected if claims against ex-President Marcos and his estate were litigated in U.S. courts. There is an obvious contrast with the facts of the present case.

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So the question comes to this: on which side of the line does the present case come? In committing the crimes which are alleged against him, was Senator Pinochet acting in his private capacity or was he acting in a sovereign capacity as head of state? In my opinion there can be only one answer. He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage-taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean Government, and that he did so in co-operation with other Governments under Plan Condor, and in particular with the Government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

In order to make the above point good it is necessary to quote some passages from the second international warrant:

"It can be inferred from the inquiries made that, since September 1973 in Chile and since 1976 in the Republic of Argentina a series of

events and punishable actions were committed under the fiercest ideological repression against the citizens and residents in these countries. The plans and instructions established beforehand from the government enabled these actions to be carried out ... It has been ascertained that there were co-ordination actions at international level that were called 'Operativo Condor' in which different countries, Chile and Argentina among them, were involved and whose purpose was to co-ordinate the oppressive actions among them.

"In this sense Augusto Pinochet Ugarte, Commander-in-Chief of the Armed Forces and head of the Chilean Government at the time, committed punishable acts in co-ordination with the military authorities in Argentina between 1976 and 1983 ... as he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, both Chileans and individuals from different nationalities, in Chile and in other countries, through the actions of the secret service (D.I.N.A.) and within the framework of the above-mentioned 'Plan Condor.'"

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 the secret service, the inevitable conclusion must be that he was acting in a sovereign capacity and not in a personal or private capacity.

But the appellants have two further arguments. First they say that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the ordinary rule of customary international law. Secondly they say that the crimes in question are crimes against international law, and that international law cannot both condemn conduct as a breach of international law and at the same time grant immunity from prosecution. It cannot give with one hand and take away with the other.

As to the first submission, the difficulty, as the Divisional Court pointed out, is to know where to draw the line. Torture is, indeed, a

horrific crime, but so is murder. It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law. Of course it is strange to think of murder or torture as "official" acts or as part of the head of state's "public functions." But if for "official" one substitutes "governmental" then the true nature of the distinction between private acts and official acts becomes apparent. For reasons already mentioned I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. I agree with Collins J. in the Divisional Court that it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be

attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense.

As to the second submission, the question is whether there should be an exception from the general rule of immunity in the case of crimes which have been made the subject of international conventions, such as the International Convention against the Taking of Hostages (1980) and the Convention against Torture (1984). The purpose of these conventions, in very broad terms, was to ensure that acts of torture and hostage-taking should be made (or remain) offences under the criminal law of each of the state parties, and that each state party should take measures to establish extra-territorial jurisdiction in specified cases. Thus in the case of torture a state party is obliged to establish extra-territorial jurisdiction when the alleged offender is a national of that state, but not where the victim is a national. In the latter case the state has a discretion: see article 5.1(b) and (c). In addition there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory - aut dedere aut judicare: see article 7. But there is nothing in the Torture Convention which touches on state immunity. The contrast with the Convention on the Prevention and Punishment of the Crime of Genocide (1948) could not be more marked. Article 4 of the Genocide Convention provides: "Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, or public officials, or private individuals." There is no equivalent provision in either the Torture Convention or the Taking of Hostages Convention.

Moreover when the Genocide Convention was incorporated into English law by the Genocide Act 1969, article 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would be able to plead sovereign immunity. If the Torture Convention and the Taking of Hostages Convention had contained a provision equivalent to article 4 of the Genocide Convention (which they did not) it is reasonable to suppose that,

as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these Conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the Conventions.

Nor is any distinction drawn between torture and other crimes in state practice. In Al-Adsani v. Government of Kuwait, 107 I.L.R. 536 the plaintiff brought civil proceedings against the Government of Kuwait alleging that he had been tortured in Kuwait by government agents. He was given leave by the Court of Appeal to serve out of the jurisdiction on the ground that state immunity does not extend to acts of torture. When the case came back to the Court of Appeal on an application to set aside service, it was argued that a state is not entitled to immunity in respect of acts that are contrary to international law, and that since torture is a violation of jus cogens, a state accused of torture forfeits its immunity. The argument was rejected. Stuart-Smith L. J., at p. 542, observed that the draftsman of the State Immunity Act 1978 must

have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the Torture Convention). If civil claims based on acts of torture were intended to be excluded from the immunity afforded by section 1(1) of the Act of 1978, because of the horrifying nature of such acts, or because they are condemned by international law, it is inconceivable that section 1(1) would not have said so.

The same conclusion has been reached in the United States. In Siderman de Blake v. Republic of Argentina, 965 F.2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the Government of Argentina. It was held by the Ninth Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing Filartiga v. Pena-Irala, 630 F.2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act.

Admittedly these cases were civil cases, and they turned on the terms of the State Immunity Act 1978 in England and the Foreign Sovereign Immunities Act in the United States. But they lend no support to the view that an allegation of torture "trumps" a plea of immunity. I return later to the suggestion that an allegation of torture excludes the principle of non-justiciability.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under article 17) reported on the

Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators. Notwithstanding the wide terms of the Torture Convention and the Taking of Hostages Convention, state practice does not at present support an obligation to extradite or prosecute in all cases. Mr. David Lloyd Jones (to whom we are all much indebted for his help as amicus) put the matter as follows:

"It is submitted that while there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of jus cogens, e.g. cases of torture, this does not yet constitute a rule of public international law. In particular it must be particularly doubtful whether there exists a rule of public international law requiring states not to accord immunity in such circumstances. Such a rule would be inconsistent with the practice of many states."

Professor Greenwood took us back to the charter of the International Military Tribunal for the trial of war criminals at Nuremberg, and drew attention to article 7, which provides:

"The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

One finds the same provision in almost identical language in article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia (1993), article 6(2) of the Statue of the International Tribunal for Rwanda (1994) and most recently in article 27 of the Statute of the International Criminal Court (1998). Like the Divisional Court, I regard this as an argument more against the appellants than in their favour. The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal.

Professor Greenwood's reference to these tribunals also provides the answer to those who say, with reason, that there must be a means of bringing such men as Senator Pinochet to justice. There is. He may be tried (1) in his own country, or (2) in any other country that can assert jurisdiction, provided his own country waives state immunity, or (3) before the International Criminal Court when it is established, or (4) before a specially constituted international court, such as those to which Professor Greenwood referred. But in the absence of waiver he cannot be tried in the municipal courts of other states.

On the first issue I would hold that Senator Pinochet is entitled to immunity as former head of state in respect of the crimes alleged against him on well established principles of customary international law, which principles form part of the common law of England.

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Issue 2: immunity under Part I of the State Immunity Act 1978

The long title of the State Immunity Act 1978 states as its first purpose the making of new provision with respect to proceedings in the United Kingdom by or against other states. Other purposes include the making of new provision with respect to immunities and privileges of heads of state. It is common ground that the Act of 1978 must be read against the background of customary international law current in 1978; for it is highly unlikely, as Lord Diplock said in Alcom Ltd. v. Republic of Colombia [1984] A.C. 580, 600 that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compels such a conclusion. It is for this reason that it made sense to start with customary international law before coming to the statute.

The relevant sections are:

"General immunity from jurisdiction. 1(1) A state is immune from the jurisdiction of the courts of the United Kingdom except as

provided in the following provisions of this Part of this Act. (2) A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question ..."

"States entitled to immunities and privileges. 14(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth state other than the United Kingdom; and references to a state include references to - (a) the sovereign or other head of that state in his public capacity; (b) the government of that state; and (c) any department of that government, but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued. (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if - (a) the proceedings relate to anything done by it in the exercise of sovereign authority ..."

"Excluded matters. 16(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 ... (4) This Part of this Act does not apply to criminal proceedings."

Mr. Nicholls drew attention to the width of section 1(1) of the Act. He submitted that it confirms the rule of absolute immunity at common law, subject to the exceptions contained in sections 2 to 11, and that the immunity covers criminal as well as civil proceedings. Faced with the objection that Part I of the Act is stated not to apply to criminal proceedings by virtue of the exclusion in section 16(4), he argues that the exclusion applies only to sections 2 to 11. In other words section 16(4) is an exception on an exception. It does not touch section 1. This was a bold argument, and I cannot accept it. It seems clear that the exclusions in section 16(2) (3) and (5) all apply to Part I as a whole, including section 1(1). I can see no reason why section 16(4) should not also apply to section 1(1). Mr. Nicholls referred us to an observation of the Lord Chancellor in moving the Second Reading of the Bill in the House of Lords: Hansard (H.L. Debates), 17 January 1978, col. 52. In relation to

Part I of the Bill he said "immunity from criminal jurisdiction is not affected and that will remain." I do not see how this helps Mr. Nicholls. It confirms that the purpose of Part I was to enact the restrictive theory of sovereign immunity in relation to commercial transactions and other matters of a civil nature. It was not intended to affect immunity in criminal proceedings.

The remaining question under this head is whether the express exclusion of criminal proceedings from Part I of the Act, including section 1(1), means that the immunity in respect of criminal proceedings which exists at common law has been abolished. In Al-Adsani v. Government of Kuwait, 107 I.L.R. 536, 542 Stuart-Smith L.J. referred to the State Immunity Act 1978 as providing a "comprehensive code." So indeed it does. But obviously it does not provide a code in respect of matters which it does not purport to cover. In my opinion the immunity of a former head of state in respect of criminal acts committed by him in exercise of sovereign power is untouched by Part I of the Act.

Issue 3: immunity under Part III of the State Immunity Act 1978

The relevant provision is section 20 which reads:

"(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; (b) members of his family forming part of his household; and (c) his private servants, 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 ... (5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity."

The Diplomatic Privileges Act 1964 was enacted to give force to the Vienna Convention on Diplomatic Privileges. Section 1 provides that the Act is to have effect in substitution for any previous enactment or rule of law.

So again the question arises whether the common law immunities have been abolished by statute. So far as the immunities and privileges of diplomats are concerned, this may well be the case. Whether the same applies to heads of state is more debatable. But it does not matter. For in my view the immunities to which Senator Pinochet is entitled under section 20 of the State Immunity Act 1978 are identical to the immunities which he enjoys at common law.

The Vienna Convention provides:

"29. The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention ... 31(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state ... 39(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to

the ministry for foreign affairs or such other ministry as may be agreed. (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

The critical provision is the second sentence of article 39(2). How is this sentence to be applied (as it must) to a head of state? What are the "necessary modifications" which are required under section 20 of the State Immunity Act 1978? It is a matter of regret that in such an important sphere of international law as the immunity of heads of state from the jurisdiction of our courts Parliament should

have legislated in such a roundabout way. But we must do our best.

The most extreme view, advanced only, I think, by Professor Brownlie for the interveners and soon abandoned, is that the immunity extends only to acts performed by a visiting head of state while within the United Kingdom. I would reject this submission. Article 39(2) is not expressly confined to acts performed in the United Kingdom, and it is difficult to see what functions a visiting heads of state would be able to exercise in the United Kingdom as head of state other than purely ceremonial functions.

A less extensive view was advanced by Mr. Jones as his first submission in reply. This was that the immunity only applies to the acts of heads of state in the exercise of their external functions, that is to say, in the conduct of international relations and foreign affairs generally. But in making the "necessary modifications" to article 39 to fit a head of state, I see no reason to read "functions" as meaning "external functions." It is true that diplomats operate in foreign countries as members of a mission. But heads of state do not. The normal sphere of a head of state's operations is his own country. So I would reject Mr. Jones's first submission. Mr. Jones's alternative submission in reply was as follows:

"However, if this interpretation is wrong, and Parliament's intention in section 20(1)(a) of the State Immunity Act was to confer immunity in respect of the exercise of the internal, as well as the external, functions of the head of state, then the second sentence of article 39(2) must be read as if it said: 'with respect to official acts performed by a head of state in the exercise of his functions as head of state, immunity shall continue to subsist.'"

Here Mr. Jones hits the mark. His formulation was accepted as correct by Mr. Nicholls and Miss Montgomery on behalf of the applicant, and by Mr. Lloyd Jones as amicus curiae.

So the question on his alternative submission is whether the acts of which Senator Pinochet is accused were "official acts performed by him in the exercise of his functions as head of state." For the reasons given in answer to issue 1, the answer must be that they were.

So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys

continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.

Issue 4: non-justiciability

If I am right that Senator Pinochet is entitled to immunity at common law, and under the statute, then the question of non-justiciability does not arise. But I regard it as a question of overriding importance in the present context, so I intend to say something about it.

The principle of non-justiciability may be traced back to the same source as head of state immunity, namely, Duke of Brunswick v. King of

Hanover, 2 H.L.Cas. 1. Since then the principles have developed separately; but they frequently overlap, and are sometimes confused. The authoritative expression of the modern doctrine of non-justiciability is to be found in the speech of Lord Wilberforce in Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888. One of the questions in that case was whether there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Lord Wilberforce answered the question in the affirmative. He said, at p. 932:

"In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

Lord Wilberforce traces the principle from Duke of Brunswick v. King of Hanover through numerous decisions of the Supreme Court of the United States including Underhill v. Hernandez, Oetjen v. Central Leather Co., 246 U.S. 297 and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398. In the latter case Lord Wilberforce detected a more flexible use of the principle on a case-by-case basis. This is borne out by the most recent decision of the Supreme Court in Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International, 110 S.Ct. 701. These and other cases are analysed in depth by Mance J. in his judgment in Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998, from which I have derived much assistance. In the event Mance J. held that judicial restraint was not required on the facts of that case. The question is whether it is required (or would be required if head of state immunity were not a sufficient answer) on the facts of the present case. In my opinion there are compelling reasons for regarding the present case as falling within the non-justiciability principle.

In the Buttes Gas case [1982] A.C. 888, 938 the court was being asked "to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law." Lord Wilberforce concluded that the case raised issues upon which a municipal court could not pass. In the present case the State of Spain is claiming the right to try Senator Pinochet, a former head of state, for crimes committed in Chile, some of which are said to be in

breach of international law. They have requested his extradition. Other states have also requested extradition. Meanwhile Chile is demanding the return of Senator Pinochet on the ground that the crimes alleged against him are crimes for which Chile is entitled to claim state immunity under international law. These crimes were the subject of a general amnesty in 1978, and subsequent scrutiny by the Commission of Truth and Reconciliation in 1990. The Supreme Court in Chile has ruled that in respect of at least some of these crimes the 1978 amnesty does not apply. It is obvious, therefore, that issues of great sensitivity have arisen between Spain and Chile. The United Kingdom is caught in the

crossfire. In addition there are allegations that Chile was collaborating with other states in South America, and in particular with Argentina, in execution of Plan Condor.

If we quash the second provisional warrant, Senator Pinochet will return to Chile, and Spain will complain that we have failed to comply with our international obligations under the European Convention on Extradition. If we do not quash the second provisional warrant, Chile will complain that Senator Pinochet has been arrested in defiance of Chile's claim for immunity, and in breach of our obligations under customary international law. In these circumstances, quite apart from any embarrassment in our foreign relations, or potential breach of comity, and quite apart from any fear that, by assuming jurisdiction, we would only serve to "imperil the amicable relations between governments and vex the peace of nations" (see Oetjen v. Central Leather Co., 246 U.S. 297, 304) we would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court. For an English court to investigate and pronounce on the validity of the amnesty in Chile would be to assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task. In my view this is a case in which, even if there were no valid claim to sovereign immunity, as I think there is, we should exercise judicial restraint by declining jurisdiction.

There are three arguments the other way. The first is that it is always open to the Secretary of State to refuse to make an order for the return of Senator Pinochet to Spain in the exercise of his discretion under section 12 of the Extradition Act 1989. But so far as Chile is concerned, the damage will by then have been done. The English courts will have condoned the arrest. The Secretary of State's discretion will come too late. The fact that these proceedings were initiated by a provisional warrant under section 8(1)(b) without the Secretary of State's authority to proceed, means that the courts cannot escape responsibility for deciding now whether or not to accept jurisdiction.

Secondly it is said that by allowing the extradition request to proceed, we will not be adjudicating ourselves. That will be the task of the courts in Spain. In an obvious sense this is true. But we will be taking an essential step towards allowing the trial to take place, by upholding the validity of the arrest. It is to the taking of that step that Chile has raised objections, as much as to the trial itself.

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (H.L.(E.))

Lord Lloyd of Berwick

Thirdly it is said that in the case of torture Parliament has removed any concern that the court might otherwise have by enacting section 134 of the Criminal Justice Act 1988 in which the offence of torture is defined as the intentional infliction of severe pain by "a public official or person acting in an official capacity." I can see nothing in this definition to override the obligation of the court to decline jurisdiction should the circumstances of the case so require: see the Buttes Gas case [1982] A.C. 888, 932, per Lord Wilberforce. In some cases there will be no difficulty. Where a public official or person acting in an official capacity is accused of torture, the court will usually be competent to

try the case if there is no plea of sovereign immunity, or if sovereign immunity is waived. But here the circumstances are very different. The whole thrust of Lord Wilberforce's speech was that non-justiciability is a flexible principle, depending on the circumstances of the particular case. If I had not been of the view that Senator Pinochet is entitled to immunity as a former head of state, I should have held that the principle of non-justiciability applies.

For these reasons, and the reasons given in the judgment of the Divisional Court with which I agree, I would dismiss the appeal.

Lord Nicholls of Birkenhead. My Lords, this appeal concerns the scope of the immunity of a former head of state from the criminal processes of this country. It is an appeal against a judgment of the Divisional Court of the Queen's Bench Division which quashed a provisional warrant issued at the request of the Spanish Government pursuant to section 8(1)(b) (i) of the Extradition Act 1989 for the arrest of the respondent applicant, Senator Augusto Pinochet. The warrant charged five offences, but for present purposes I need refer to only two of them. The first offence charged was committing acts of torture contrary to section 134(1) of the Criminal Justice Act 1988. The Act defines the offence:

"A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

The third offence charged was hostage-taking contrary to section 1 of the Taking of Hostages Act 1982. Section 1(1) defines the offence in these terms:

"A person, whatever his nationality, who, in the United Kingdom or elsewhere, - (a) detains any other person ('the hostage'), and (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure, or continue to detain the hostage, commits an offence."

Both these offences are punishable with imprisonment for life. It is conceded that both offences are extradition crimes within the meaning of the Extradition Act 1989.

[2000]

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1 A.C.

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Lord Nicholls of Birkenhead

The Divisional Court quashed the warrant on the ground that Senator Pinochet was head of the Chilean state at the time of the alleged offences and therefore, as a former sovereign, he is entitled to immunity from the criminal processes of the English courts. The court certified, 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," and granted leave to appeal to your Lordships' House. On this appeal I would admit the further evidence which has been produced, setting out the up-to-date position reached in the extradition proceedings.

There is some dispute over whether Senator Pinochet was technically head of state for the whole of the period in respect of which charges are laid. There is no certificate from the Foreign and Commonwealth Office, but the evidence shows he was the ruler of Chile from 11 September 1973, when a military junta of which he was the leader overthrew the previous government of President Allende, until 11 March 1990 when he retired from the office of president. I am prepared to assume he was head of state throughout the period.

Sovereign immunity may have been a single doctrine at the time when the laws of nations did not distinguish between the personal sovereign and the state, but in modern English law it is necessary to distinguish three different principles, two of which have been codified in statutes and the third of which remains a doctrine of the common law. The first is state immunity, formerly known as sovereign immunity, now largely codified in Part I of the State Immunity Act 1978. The second is the Anglo-American common law doctrine of act of state. The third is the personal immunity of the head of state, his family and servants, which is now codified in section 20 of the State Immunity Act 1978. Miss Montgomery, in her argument for Senator Pinochet, submitted that in addition to these three principles there is a residual state immunity which protects former state officials from prosecution for crimes committed in their official capacities.

State immunity

Section 1 of the State Immunity Act 1978 provides that "a state is immune from the jurisdiction of the courts of the United Kingdom," subject to exceptions set out in the following sections, of which the most important is section 3 (proceedings relating to a commercial transaction). By section 14(1) references to a state include references to the sovereign or other head of that state in his public capacity, its government and any department of its government. Thus the immunity of the state may not be circumvented by suing the head of state, or indeed, any other government official, in his official capacity.

It should be noted that the words "in his public capacity" in section 14(1), read with section 1, refer to the capacity in which the head of state is sued, rather than the capacity in which he performed the act alleged to give rise to liability. Section 1 of the Act deals with proceedings which, at the time they are started, are in form or in substance proceedings against the state, so that directly or indirectly the state will be affected by

the judgment. In the traditional language of international law, it is immunity ratione personae and not ratione materiae. It protects the state as an entity. It is not concerned with the nature of the transaction alleged to give rise to liability, although this becomes important when applying the exceptions in later sections. Nor is it concerned with whether, in an action against an official or former official which is not in substance an action against the state, he can claim immunity on the ground that in doing the acts alleged he was acting in a public capacity. Immunity on that ground depends upon the other principles to which I shall come. Similarly, Part I of the Act does not apply to criminal proceedings: section 16(4). On this point section 16(4) is unambiguous. Contrary to the contentions of

Mr. Nicholls, section 16(4) cannot be read as applying only to the exceptions to section 1.

In cases which fall within section 1 but not within any of the exceptions, the immunity has been held by the Court of Appeal to be absolute and not subject to further exception on the ground that the conduct in question is contrary to international law: see Al-Adsani v. Government of Kuwait, 107 I.L.R. 536, where the court upheld the government's plea of state immunity in proceedings where the plaintiff alleged torture by government officials. A similar conclusion was reached by the United States Supreme Court on the interpretation of the Foreign Sovereign Immunities Act 1976 in Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683. This decision was followed by the Court of Appeals for the Ninth Circuit, perhaps with a shade of reluctance, in Siderman de Blake v. Republic of Argentina, 965 F.2d 699, also a case based upon allegations of torture by government officials. These decisions are not relevant in the present case, which does not concern civil proceedings against the state. So I shall say no more about them.

Act of state: non-justiciability

The act of state doctrine is a common law principle of uncertain application which prevents the English court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it. Nineteenth century dicta (for example, in Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1 and Underhill v. Hernandez, 168 U.S. 250) suggested that it reflected a rule of international law. The modern view is that the principle is one of domestic law which reflects a recognition by the courts that certain questions of foreign affairs are not justiciable (Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888) and, particularly in the United States, that judicial intervention in foreign relations may trespass upon the province of the other two branches of government: Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398.

The doctrine has sometimes been stated in sweepingly wide terms; for instance, in a celebrated passage by Fuller C.J. in Underhill v. Hernandez, 168 U.S. 250, 252:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit

in judgment on the acts of the government of another done within its own territory."

More recently the courts in the United States have confined the scope of the doctrine to instances where the outcome of the case requires the court to decide the legality of the sovereign acts of foreign states: Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International, 110 S.Ct. 701.

However, it is not necessary to discuss the doctrine in any depth, because there can be no doubt that it 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. The definition of torture in section 134(1) of the Criminal Justice Act 1988 makes clear that prosecution will require an investigation into the conduct of officials acting in an official capacity in foreign countries. It must follow that Parliament did not intend the act of state doctrine to apply in such cases. Similarly with the taking of hostages. Although section 1(1) of the Taking of Hostages Act 1982 does not define the offence as one which can be committed only by a public official, it is really inconceivable that Parliament should be taken to have intended that such officials should be outside the reach of this offence. The Taking of Hostages Act was enacted to implement the International Convention against the Taking of Hostages, and that Convention described taking hostages as a manifestation of international terrorism. The convention was opened for signature in New York in December 1979, and its immediate historical background was a number of hostage-taking incidents in which states were involved or were suspected to have been involved. These include the hostage crisis at the United States embassy in Teheran earlier in that year, several hostage-takings following the hijacking of aircraft in the 1970s, and the holding hostage of the passengers of an El-Al aircraft at Entebbe airport in June 1976.

Personal immunity

Section 20 of the State Immunity Act 1978 confers personal immunity upon a head of state, his family and servants by reference ("with necessary modifications") to the privileges and immunities enjoyed by the head of a diplomatic mission under the Vienna Convention on Diplomatic Relations 1961, which was enacted as a schedule to the Diplomatic Privileges Act 1964. These immunities include, under article 31, "immunity from the criminal jurisdiction of the receiving state." Accordingly there can be no doubt that if Senator Pinochet had still been head of the Chilean state, he would have been entitled to immunity.

Whether he continued to enjoy immunity after ceasing to be head of state turns upon the proper interpretation of article 39(2) of the Convention:

"When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until

that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

The "necessary modification" required by section 20 of the Act of 1978 is to read "as a head of state" in place of "as a member of the mission" in the last sentence. Writ large, the effect of these provisions can be expressed thus: "A former head of state shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him in the exercise of his functions as a head of state."

Transferring to a former head of state in this way the continuing protection afforded to a former head of a diplomatic mission is not an altogether neat exercise, as their functions are dissimilar. Their positions are not in all respects analogous. Ahead of mission operates on the international plane in a foreign state where he has been received; a head of state operates principally within his own country, at both national and international levels. This raises the question whether, in the case of a former head of state, the continuing immunity embraces acts performed in exercise of any of his "functions as a head of state" or is confined to such of those acts as have an international character. I prefer the former, wider interpretation. There is no reason for cutting down the ambit of the protection, so that it will embrace only some of the functions of a head of state. (I set out below the test for determining what are the functions of a head of state.)

The question which next arises is the crucial question in the present case. It is whether the acts of torture and hostage-taking charged against Senator Pinochet were done in the exercise of his functions as head of state. The Divisional Court decided they were because, according to the allegations in the Spanish warrant which founded the issue of the provisional warrant in this country, they were committed under colour of the authority of the Government of Chile. Senator Pinochet was charged, not with personally torturing victims or causing their disappearance, but with using the power of the state of which he was the head to that end. Thus the Divisional Court held that, for the purposes of article 39(2), the functions of head of state included any acts done under purported public authority in Chile. Lord Bingham of Cornhill C.J. said the underlying rationale of the immunity accorded by article 39(2) was "a rule of international comity restraining one sovereign state from sitting in judgment on the sovereign behaviour of another." It therefore applied to all sovereign conduct within Chile.

Your Lordships have had the advantage of much fuller argument and the citation of a wider range of authorities than the Divisional Court. I respectfully suggest that, in coming to this conclusion, Lord Bingham of Cornhill C.J. elided the domestic law doctrine of act of state, which has often been stated in the broad terms he used, with the international law obligations of this country towards foreign heads of state, which section 20 of the Act of 1978 was intended to codify. In my view, article 39(2) of the Vienna Convention, as modified and applied to former heads of state by section 20 of the Act of 1978, is apt to confer immunity 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. This formulation, and this test for determining what are the functions of a head of state for this purpose, are sound in principle and were not the subject of controversy before your Lordships. International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence.

International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made 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.

This was made clear long before 1973 and the events which took place in Chile then and thereafter. A few references will suffice. Under the Charter of the Nuremberg International Military Tribunal (8 August 1945) crimes against humanity, committed before as well as during the second world war, were declared to be within the jurisdiction of the tribunal, and the official position of defendants, "whether as heads of state or responsible officials in government," was not to free them from responsibility (articles 6 and 7). The judgment of the tribunal included the following passage:

"The principle of international law which, under certain circumstance, protects the representatives of a state cannot be applied to acts condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment."

With specific reference to the laws of war, but in the context the observation was equally applicable to crimes against humanity, the tribunal stated:

"He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."

By a resolution passed unanimously on 11 December 1946, the United Nations General Assembly affirmed the principles of international law recognised by the charter of the Nurnberg tribunal and the judgment of the tribunal. From this time on, no head of state could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity. In 1973 the United Nations put some of the necessary nuts and bolts into place, for bringing persons suspected of having committed such offences to trial in the courts of individual states. States were to assist each other in bringing such persons to trial, asylum was not to be granted to such persons, and

states were not to take any legislative or other measures which might be prejudicial to the international obligations assumed by them in regard to the arrest, extradition and punishment of such persons. This was in resolution 3074, adopted on 3 December 1973.

Residual immunity

Finally I turn to the residual immunity claimed for Senator Pinochet under customary international law. I have no doubt that a current head of state is immune from criminal process under customary international law.

This is reflected in section 20 of the State Immunity Act 1978. There is no authority on whether customary international law grants such immunity to a former head of state or other state official on the ground that he was acting under colour of domestic authority. Given the largely territorial nature of criminal jurisdiction, it will be seldom that the point arises.

A broad principle of international law, according former public officials a degree of personal immunity against prosecution in other states, would be consistent with the rationale underlying section 20 of the Act of 1978. It would also be consistent with changes in the way countries are governed. In times past, before the development of the concept of the state as a separate entity, the sovereign was indistinguishable from the state: l'Etat, c'est moi. It would be expected therefore that in those times a former head of state would be accorded a special personal immunity in respect of acts done by him as head of state. Such acts were indistinguishable from acts of the state itself. Methods of state governance have changed since the days of Louis XIV. The conduct of affairs of state is often in the hands of government ministers, with the head of state having a largely ceremonial role. With this change in the identity of those who act for the state, it would be attractive for personal immunity to be available to all former public officials, including a former head of state, in respect of acts which are properly attributable to the state itself. One might expect international law to develop along these lines, although the personal immunity such a principle affords would be largely covered also by the act of state doctrine.

Even such a broad principle, however, would not assist Senator Pinochet. In the same way as acts of torture and hostage-taking stand outside the limited immunity afforded to a former head of state by section 20, because those acts cannot be regarded by international law as a function of a head of state, so for a similar reason Senator Pinochet cannot bring himself within any such broad principle applicable to state officials. 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. Torture is defined in the Torture Convention (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)) and in the United Kingdom legislation (section 134 of the Criminal Justice Act 1988) as a crime committed by public officials and persons acting in a public capacity. As already noted, the International Convention against the Taking of Hostages (1979) described hostage-taking as a manifestation of international terrorism. It is not consistent with the existence of these crimes that former officials,

however senior, should be immune from prosecution outside their own jurisdictions. The two international Conventions made clear that these crimes were to be punishable by courts of individual states. The Torture Convention, in articles 5 and 7, expressly provided that states are permitted to establish jurisdiction where the victim is one of their nationals, and that states are obliged to prosecute or extradite alleged offenders. The Taking of Hostages Convention is to the same effect, in articles 5 and 8.

I would allow this appeal. It cannot be stated too plainly that the acts

of torture and hostage-taking with which Senator Pinochet is charged are offences under United Kingdom statute law. This country has taken extra-territorial jurisdiction for these crimes. The sole question before your Lordships is whether, by reason of his status as a former head of state, Senator Pinochet is immune from the criminal processes of this country, of which extradition forms a part. Arguments about the effect on this country's diplomatic relations with Chile if extradition were allowed to proceed, or with Spain if refused, are not matters for the court. These are, par excellence, political matters for consideration by the Secretary of State in the exercise of his discretion under section 12 of the Extradition Act 1989.

Lord Steyn. My Lords, the way in which this appeal comes before the House must be kept in mind. Spain took preliminary steps under the Extradition Act 1989 to obtain the extradition of General Pinochet, the former head of state of Chile, in respect of crimes which he allegedly committed between 11 September 1973 and March 1990 when he ceased to be the President of Chile. General Pinochet applied to the Divisional Court for a ruling that he is entitled to immunity as a former head of state from criminal and civil process in the English courts. He obtained a ruling to that effect. If that ruling is correct, the extradition proceedings are at an end. The issues came to the Divisional Court in advance of the receipt of a particularised request for extradition by Spain. Such a request has now been received. Counsel for General Pinochet has argued that the House ought to refuse to admit the request in evidence. In my view it would be wrong to ignore the material put forward in Spain's formal request for extradition. This case ought to be decided on the basis of all the relevant materials before the House. And that involves also taking into account the further evidence lodged on behalf of General Pinochet.

In an appeal in which no fewer than 14 barristers were involved over six days it is not surprising that issues proliferated. Some of the issues do not need to be decided. For example, there was an issue as to the date upon which General Pinochet became the head of state of Chile. He undoubtedly became the head of state at least by 26 June 1974; and I will assume that from the date of the coup d'état on 11 September 1973 he was the head of state. Rather than attempt to track down every other hare that has been started, I will concentrate my observations on three central issues, namely (1) the nature of the charges brought by Spain against General Pinochet; (2) the question whether he is entitled to former head of state immunity under the applicable statutory provisions; (3) if he is not entitled to such immunity, the different question whether under the

common law act of state doctrine the House ought to declare that the matters involved are not justiciable in our courts. This is not the order in which counsel addressed the issues but the advantage of so considering the issues is considerable. One can only properly focus on the legal issues before the House when there is clarity about the nature of the charges in respect of which General Pinochet seeks to establish immunity or seeks to rely on the act of state doctrine. Logically, immunity must be examined before act of state. The act of state issue will only arise if the court decides that the defendant does not have immunity. And I shall attempt to show that the construction of the relevant statutory provisions relating to immunity has a bearing on the

answer to the separate question of act of state.

The case against General Pinochet

In the Divisional Court Lord Bingham of Cornhill C.J. summarised the position by saying that the thrust of the warrant "makes it plain that the applicant is charged not with personally torturing or murdering victims or ordering their disappearance, but with using the power of the state to that end." Relying on the information contained in the request for extradition, it is necessary to expand the cryptic account of the facts in the warrant. The request alleges a systematic campaign of repression against various groups in Chile after the military coup on 11 September 1973. The case is that of the order of 4,000 individuals were killed or simply disappeared. Such killings and disappearances mostly took place in Chile but some also took place in various countries abroad. Such acts were committed during the period from 11 September 1973 until 1990. The climax of the repression was reached in 1974 and 1975. The principal instrumentality of the oppression was the Dirección de Inteligencia Nacional ("D.I.N.A."), the secret police. The subsequent re-naming of this organisation is immaterial. The case is that agents of D.I.N.A., who were specially trained in torture techniques, tortured victims on a vast scale in secret torture chambers in Santiago and elsewhere in Chile. The torturers were invariably dressed in civilian clothes. Hooded doctors were present during torture sessions. The case is not one of interrogators acting in excess of zeal. The case goes much further. The request explains:

"The most usual method was 'the grill' consisting of a metal table on which the victim was laid naked and his extremities tied and electrical shocks were applied to the lips, genitals, wounds or metal prosthesis; also two persons, relatives or friends, were placed in two metal drawers one on top of the other so that when the one above was tortured the psychological impact was felt by the other; on other occasions the victim was suspended from a bar by the wrists and/or the knees, and over a prolonged period while held in this situation electric current was applied to him, cutting wounds were inflicted or he was beaten; or the 'dry submarine' method was applied, i.e. placing a bag on the head until close to suffocation, also drugs were used and boiling water was thrown on various detainees to punish them as a foretaste for the death which they would later suffer."

As the Divisional Court observed, it is not alleged that General Pinochet personally committed any of these acts by his own hand. The case is, however, that agents of D.I.N.A. committed the acts of torture and that D.I.N.A. was directly answerable to General Pinochet rather than to the military junta. And the case is that D.I.N.A. undertook and arranged the killings, disappearances and torturing of victims on the orders of General Pinochet. In other words, what is alleged against General Pinochet is not constructive criminal responsibility. The case is that he ordered and procured the criminal acts which the warrant and request for extradition specify. The allegations have not been tested in a court of law. The House is not required to examine the correctness of the allegations. The House must assume the correctness of the allegations as the backcloth of the questions of law arising on this appeal.

The former head of state immunity

It is now possible to turn to the point of general public importance involved in the Divisional 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." It is common ground that a head of state while in office has an absolute immunity against civil or criminal proceedings in the English courts. If General Pinochet had still been head of state of Chile, he would be immune from the present extradition proceedings. But he has ceased to be a head of state. He claims immunity as a former head of state. Counsel for General Pinochet relied on provisions contained in Part I of the State Immunity Act 1978. Part I does not apply to criminal proceedings: see section 16(4). It is irrelevant to the issues arising on this appeal. The only arguable basis for such an immunity originates in section 20(1) of the Act of 1978. It provides:

"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;
(b) members of his family forming part of his household; and
(c) his private servants, 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."

It is therefore necessary to turn to the relevant provisions of the Diplomatic Privileges Act 1964. The relevant provisions are contained in articles 31, 38 and 39 of the Vienna Convention on Diplomatic Relations which in part forms Schedule 1 to the Act of 1964. Article 31 provides that a diplomatic agent shall enjoy immunity from criminal jurisdiction in the receiving state. Article 38(1) reads:

"Except in so far as additional privileges and immunities may be granted by the receiving state, a diplomatic agent who is a national of or permanently resident in that state shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." (My emphasis.)

Article 39, so far as it is relevant, reads:

"(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state ... (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." (My emphasis.)

Given the different roles of a member of a diplomatic mission and a head of state, as well as the fact that a diplomat principally acts in the receiving state whereas a head of state principally acts in his own country, the legislative technique of applying article 39(2) to former a head of state is somewhat confusing. How the necessary modifications

required by section 20 of the Act of 1978 are to be achieved is not entirely straightforward. Putting to one side the immunity of a serving head of state, my view is that section 20, read with the relevant provisions of the Schedule to the Act of 1964, should be read as providing that a former head of state shall enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to his official acts performed in the exercise of his functions as head of state. That was the synthesis of the convoluted provisions helpfully offered by Mr. Lloyd Jones, who appeared as amicus curiae. Neither counsel for General Pinochet nor counsel for the Spanish Government questioned this formulation. For my part it is the only sensible reconstruction of the legislative intent. It is therefore plain that statutory immunity in favour of a former head of state is not absolute. It requires the coincidence of two requirements: (1) that the defendant is a former head of state (ratione personae in the vocabulary of international law) and (2) that he is charged with official acts performed in the exercise of his functions as a head of state (ratione materiae). In regard to the second requirement it is not sufficient that official acts are involved: the acts must also have been performed by the defendant in the exercise of his functions as head of state.

On the assumption that the allegations of fact contained in the warrant and the request are true, the central question is whether those facts must be regarded as official acts performed in the exercise of the functions of a head of state. Lord Bingham of Cornhill C.J. observed that a former head of state is clearly entitled to immunity from process in respect of some crimes. I would accept this proposition. Rhetorically, the Lord Chief Justice then posed the question: "Where does one draw the line?" After a detailed review of the case law and literature, he concluded that even in respect of acts of torture the former head of state immunity would prevail. That amounts to saying that there is no or virtually no line to be drawn. Collins J. went further. He said:

"The submission was made that it could never be in the exercise of such functions 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. One does not have look very far back in history to see examples of the sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists."

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. That is where the reasoning of the Divisional Court inexorably leads. Counsel for General Pinochet submitted that this conclusion is the inescapable result of the statutory wording.

My Lords, the concept of an individual acting in his capacity as head of state involves a rule of law which must be applied to the facts of a particular case. It invites classification of the circumstances of a case as falling on a particular side of the line. It contemplates at the

very least that some acts of a head of state may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a head of state. If a head of state kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of his functions as head of state. If a head of state orders victims to be tortured in his presence for the sole purpose of enjoying the spectacle of the pitiful twitchings of victims dying in agony (what Montaigne described as the farthest point that cruelty can reach) that could not be described as acts undertaken by him in the exercise of his functions as a head of state. Counsel for General Pinochet expressly, and rightly, conceded that such crimes could not be classified as official acts undertaken in the exercise of the functions of a head of state. These examples demonstrate that there is indeed a meaningful line to be drawn.

How and where the line is to be drawn requires further examination. Is this question to be considered from the vantage point of the municipal law of Chile, where most of the acts were committed, or in the light of the principles of customary international law? Municipal law cannot be decisive as to where the line is to be drawn. If it were the determining factor, the most abhorrent municipal laws might be said to enlarge the functions of a head of state. But I need not dwell on the point because it is conceded on behalf of General Pinochet that the distinction between official acts performed in the exercise of functions as a head of state and acts not satisfying these requirements must depend on the rules of international law. It was at one stage argued that international law spells out no relevant criteria and is of no assistance. In my view that is not right. Negatively, the development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage-taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.

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Lord Steyn

The essential fragility of the claim to immunity is underlined by the insistence on behalf of General Pinochet that it is not alleged that he "personally" committed any of the crimes. That means that he did not commit the crimes by his own hand. It is apparently conceded that if he personally tortured victims the position would be different. This distinction flies in the face of an elementary principle of law, shared by all civilised legal systems, that there is no distinction to be drawn between the man who strikes, and a man who orders another to strike. It is inconceivable that in enacting the Act of 1978 Parliament would have wished to rest the statutory immunity of a former head of state on a different basis.

On behalf of General Pinochet it was submitted that acts by police, intelligence officers and military personnel are paradigm official acts. In this absolute form I do not accept the proposition. For example, why should what was allegedly done in secret in the torture chambers of Santiago on the orders of General Pinochet be regarded as official acts? Similarly, why should the murders and disappearances allegedly perpetrated by D.I.N.A. in secret on the orders of General Pinochet be

regarded as official acts? But, in any event, in none of these cases is the further essential requirement satisfied, viz. that in an international law sense these acts were part of the functions of a head of state. The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a head of state. For my part I am satisfied that as a matter of construction of the relevant statutory provisions the charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as 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. It follows that in my view General Pinochet has no statutory immunity.

Counsel for General Pinochet further argued that if he is not entitled to statutory immunity, he is nevertheless entitled to immunity under customary international law. International law recognises no such wider immunity in favour of a former head of state. In any event, if there had been such an immunity under international law, section 20, read with article 39(2), would have overridden it. General Pinochet is not entitled to an immunity of any kind.

The act of state doctrine

Counsel for General Pinochet submitted that, even if he fails to establish the procedural bar of statutory immunity, the House ought to uphold his challenge to the validity of the warrant on the ground of the act of state doctrine. They argued that the validity of the warrant and propriety of the extradition proceedings necessarily involve an investigation by the House of governmental or official acts which largely took place in Chile. They relied on the explanation of the doctrine of act of state by Lord Wilberforce in Buttes Gas and Oil Co v. Hammer [1982] A.C. 888. Counsel for General Pinochet further put forward wide-ranging

political arguments about the consequences of the extradition proceedings, such as adverse internal consequences in Chile and damage to the relations between the United Kingdom and Chile. Plainly it is not appropriate for the House to take into account such political considerations. And the same applies to the argument suggesting past "acquiescence" by the United Kingdom Government.

Concentrating on the legal arguments, I am satisfied that there are several reasons why the act of state doctrine is inapplicable. First the House is not being asked to investigate, or pass judgment on, the facts alleged in the warrant or request for extradition. The task of the House is simply to take note of the allegations and to consider and decide the legal issues of immunity and act of state. Secondly, the issue of act of state must be approached on the basis that the intent of Parliament was not to give statutory immunity to a former head of state in respect of the systematic torture and killing of his fellow citizens. The ground of this conclusion is that such high crimes are not official acts committed in the exercise of the functions of a head of state. In those circumstances it cannot be right for the House to enunciate an enlarged

act of state doctrine, stretching far beyond anything said in the Buttes Gas case, to protect a former head of state from the consequences of his private crimes. Thirdly, any act of state doctrine is displaced by section 134(1) of the Criminal Justice Act 1988 in relation to torture and section 1(1) of the Taking of Hostages Act 1982. Both Acts provide for the taking of jurisdiction over foreign governmental acts. Fourthly, and more broadly, the Spanish authorities have relied on crimes of genocide, torture, hostage-taking and crimes against humanity. It has in my view been clearly established that by 1973 such acts were already condemned as high crimes by customary international law. In these circumstances it would be wrong for the English courts now to extend the act of state doctrine in a way which runs counter to the state of customary international law as it existed in 1973. Since the act of state doctrine depends on public policy as perceived by the courts in the forum at the time of the suit the developments since 1973 are also relevant and serve to reinforce my view. I would endorse the observation in American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States, 3d (1986), vol. 1, section 443, p. 370, to the effect that:

"A claim arising out of an alleged violation of fundamental human rights - for instance, a claim on behalf of a victim of torture or genocide - would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts."

But in adopting this formulation I would remove the word "probably" and substitute "generally." Finally, I must make clear that my conclusion does not involve the expression of any view on the interesting arguments on universality of jurisdiction in respect of certain international crimes and related jurisdictional questions. Those matters do not arise for decision.

I conclude that the act of state doctrine is inapplicable.

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Lord Steyn

Conclusions

My Lords, since the hearing in the Divisional Court the case has in a number of ways been transformed. The nature of the case against General Pinochet is now far clearer. And the House has the benefit of valuable submissions from distinguished international lawyers. In the light of all the material now available I have been persuaded that the conclusion of the Divisional Court was wrong. For the reasons I have given I would allow the appeal.

Lord Hoffmann. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Steyn, and for the reasons they give I, too, would allow this appeal.

Appeal allowed with costs.

Order of Divisional Court quashing first warrant affirmed save as to costs.

9 PInochet 1

Order of Divisional Court quashing second warrant set aside.

Second warrant restored.

Solicitors: Crown Prosecution Service Headquarters; Bindman Partners; Kingsley Napley; Treasury Solicitor; Leigh Day Co.; Winstanley-Burgess.

C. T. B.

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[HOUSE OF LORDS]

REGINA v. BOW STREET METROPOLITAN STIPENDIARY

MAGISTRATE and Others, Ex parte PINOCHET UGARTE
(No. 2)

1998 Dec. 15, 16; 17;

1999 Jan. 15

Lord Browne-Wilkinson, Lord Goff of Chieveley,

Lord Nolan, Lord Hope of Craighead

and Lord Hutton

Natural Justice - Bias - Judge in own cause - Request for extradition of former head of state for human rights crimes - Applicant claiming immunity - Human rights body joined as party to proceedings - Judge unpaid director and chairman of charity closely linked to human rights body - Connection not disclosed to parties - Whether judge automatically disqualified - Whether appearance of bias

The applicant, a former head of state of Chile who was on a visit to London, was arrested under warrants issued pursuant to section 8(1) of the Extradition Act 1989 following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity, including murder, hostage-taking and torture, committed during the applicant's period of office and for which he was knowingly responsible. The Divisional Court quashed the warrants on the ground, inter alia, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state. The quashing of the second warrant was stayed pending an appeal to the House of Lords by the prosecuting authorities on the issue of the immunity enjoyed by a former head of state. Before the main hearing A.I., a human rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored pending a decision by the Home Secretary whether to issue an authority to proceed pursuant to section 7(1) of the Act. Subsequently the applicant's advisers discovered that one of the judges who had been part of the majority was, although not a member of A.I., an unpaid director and chairman of A.I.C. Ltd., a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extra-judicial execution and disappearance. The Home Secretary signed the authority to proceed.

On a petition by the applicant for the House of Lords to set aside its previous decision on the ground of apparent bias on the part of the judge: -

Held, granting the petition, that as the ultimate court of appeal the House had power to correct any injustice caused by one of its earlier orders; that the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion

of a cause in which he was involved together with one of the parties; that, although the judge could not personally be regarded as having been a party to the appeal, A.I., which had been a party with the interest of securing the extradition of the applicant to Spain, and A.I.C. Ltd. were both parts of a movement working towards the same goals; that in order to maintain the absolute impartiality of the judiciary

there had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit; and that, accordingly, the earlier decision of the House would be set aside (post, pp. 132D, 134B-E, 135A-F, 139B-140A, 142E-143F, 146E-F).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) applied.

Decision of the House of Lords [2000] 1 A.C. 61 [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897 set aside.

The following cases are referred to in their Lordships' opinions:

Bradford v. McLeod, 1986 S.L.T. 244

Broome v. Cassell Co. Ltd. (No. 2) [1972] A.C. 1136; [1972] 2 W.L.R. 1214; [1972] 2 All E.R. 849, H.L.(E.)

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.)

Doherty v. McGlennan, 1997 S.L.T. 444

Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, H.L.(E.)

Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276

London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99, H.L.(Sc.)

McGovern v. Attorney-General [1982] Ch. 321; [1981] 2 W.L.R. 222; [1981] 3 All E.R. 493

Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.

Reg. v . Fraser (1893) 9 T.L.R. 613, D.C.

Reg. v. Gough [1993] A.C. 646; [1993] 2 W.L.R. 883; [1993] 2 All E.R. 724, H.L.(E.)

Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, C.A.

Reg. v. Rand (1866) L.R. 1 Q.B. 230

Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.

Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19, H.L.(Sc.)

Webb v. The Queen (1994) 181 C.L.R. 41

The following additional cases were cited in argument:

Amnesty International, Ex parte, The Times, 11 December 1998, D.C.

Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142

B. v. W. (Wardship: Appeal) [1979] 1 W.L.R. 1041; [1979] 3 All E.R. 83, H.L.(E.)

B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49

Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165

De Cubber v. Belgium (1984) 7 E.H.R.R. 236

Gregory v. United Kingdom (1997) 25 E.H.R.R. 577

Hauschildt v. Denmark (1989) 12 E.H.R.R. 266

Holm v. Sweden (1993) 18 E.H.R.R. 79

Kennedy and Carhill, In the marriage of (1995) F.L.C. 92-605

Langborger v. Sweden (1989) 12 E.H.R.R. 416

Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692

Porter v. Magill (1997) 96 L.G.R. 157, D.C.

Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

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Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L.(E.))

Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd. (1995) 5 H.K.P.L.R. 328

Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73; 91 L.G.R. 479, C.A.

Reg. v. Khan (Sultan) [1997] A.C. 558; [1996] 3 W.L.R. 162; [1996] 3 All E.R. 289, H.L.(E.)

Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; [1953] 2 All E.R. 652, D.C.

Reg. v. Radio Authority, Ex parte Bull [1998] Q.B. 294;

[1997] 3 W.L.R. 1094; [1997] 2 All E.R. 561, C.A.

R. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193

Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92, H.L.(E.)

Thomas v. University of Bradford (No. 2) [1992] 1 All E.R. 964

Petition

This was an application by Senator Augusto Pinochet Ugarte to set aside the decision of the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) of 25 November 1998 allowing an appeal by the Commissioner of Police of the Metropolis and the Government of Spain against a decision of the Divisional Court (Lord Bingham C.J., Collins and Richards JJ.) dated 28 October 1998 granting an order of certiorari to quash a warrant issued pursuant to section 8(1) of the Extradition Act 1989 at the request of the Central Court of Criminal Proceedings No. 5, Madrid, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate. The ground of the application was that the links between Lord Hoffmann and Amnesty International, an intervener in the proceedings, were such as to give the appearance that he might have been biased against the applicant. Leave to intervene was given to Amnesty International.

The facts are stated in the opinion of Lord Browne-Wilkinson.

Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B.Knowles for the applicant.

Montgomery Q.C. The jurisdiction of the House to hear the application was not in any real dispute. The decision had international implications and required acceptance by the wider international community. The links between the judge and Amnesty International, which were not disclosed prior to the hearing and not known to the applicant's legal advisors, were such as to undermine confidence in the decision. For examples of Amnesty International's charitable objectives: see McGovern v. Attorney-General [1982] Ch. 321. For an example of how the non-charitable parts of Amnesty International have continuously campaigned against the applicant: see Ex parte Amnesty International, The Times, 11 December 1998.

A failure of disclosure is a relevant factor in deciding whether justice was seen to be done although it does not necessarily vitiate the decision. It cannot be seriously suggested that there is a duty on the applicant's

solicitors to trawl around for information and request disclosure: see Shetreet, Judges on Trial (1976), pp. 305-306, 308, 311; In the marriage of Kennedy and Carhill (1995) F.L.C. 92-605.

It is doubtful whether the test established in Reg. v. Gough [1993] A.C. 646, of a real "danger of bias" meets the objective of the common law rule which is to preserve the appearance of non-bias rather than the fact of non-bias as determined by the court (see how the test in Gough has been interpreted in, for example, Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 151, 161). The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969): see Harris, O'Boyle, Warbrick, Law of the European Convention on Human Rights (1995), p. 235; Hauschildt v. Denmark (1989) 12 E.H.R.R. 266; Langborger v. Sweden (1989) 12 E.H.R.R. 416 and Holm v. Sweden (1993) 18 E.H.R.R. 79. Impartiality and independence are different concepts, one is sub group of the other. The position under article 6(1) should be the position under English law: see Reg. v. Sultan Khan [1997] A.C. 558 and Porter v. Magill (1997) 96 L.G.R. 157.

The New Zealand courts have preferred to follow the Australian case of Webb v. The Queen (1994) 181 C.L.R. 41 rather than Reg. v. Gough [1993] A.C. 646: see B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49. For the Canadian approach see: Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193. The court in Reg. v. Gough [1993] A.C. 646 was not referred to the Australian authorities nor even to the Scottish case of Bradford v. McLeod, 1986 S.L.T. 244.

A high standard should apply to the higher courts. At the lower levels local interests can involve everyone in the area at the higher level there is no need for any conflict of interest.

The applicant could not be said to have waived any objection he had to the judge by his subsequent actions. The connection with Amnesty International was not a matter of public record and the parties had been entitled to assume there was no such connection. Even if there was a waiver there is the issue of public interest in seeing that the judiciary is acting fairly and a duty on the House to see that confidence is maintained.

The application cannot be regarded as an abuse of process by reason of delay. Between the date of knowledge of the connection to the point of issuing proceedings there were practical problems and time was spent in investigating the facts.

The appropriate test is whether a fair minded observer with knowledge of the relevant facts would have a suspicion of bias. Non-disclosure alone is a procedural impropriety which is sufficient to raise such suspicion.

Alun Jones Q.C., David Elvin, James Lewis, Campaspe Lloyd-Jacob and James Maurici for the Commissioner of Police and the Government of Spain. The applicant raised the issue of bias with the Secretary of State before issuing the present petition. Very strong representations were made to the Secretary of State urging him to disregard the decision of the House and refuse to issue an authority to proceed. All the facts which the

applicant relies on now were known to his advisers then yet the submissions to the Secretary of State suggest that he is the only person who can uphold this point.

In effect by taking that course of action the applicant had elected to pursue his grievance before the Secretary of State rather than the House: see Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142; Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; Thomas v. University of Bradford (No. 2) [1992] 1 All E.R. 964 and Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41. It was only after the Secretary of State had made his decision that the current petition was issued. This raises issues of waiver, abuse of process and acquiescence.

The applicant's advisers had denied having any knowledge of the link between the judge and Amnesty International yet it is clear that at least two of them had some knowledge of the connection. That is surely relevant to the discretionary aspects of relief because if one is complaining about non-disclosure one should have regard to ones own position.

Applying the "real danger of bias" test laid down in Reg. v. Gough [1993] A.C. 646 to the facts in the case it was clear that there was no such danger. The duty of disclosure is subsumed in the Gough test. The test propounded in Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 of a "reasonable apprehension of bias" is effectively the same as the Gough test. That case also establishes that it is accepted that a judge brings his attitudes, experiences and views to the job.

The judge's involvement with the Amnesty International charity is an embodiment of his broader approach to the law which he brings to his decision making. Being against torture can hardly be regarded as bias. The applicant's real objection is to the judge's perceived liberal instincts. The fact that the subject matter of the complaint has a personal link with an organisation which has interests in the outcome of the decision is not determinative of there being a "real danger" of bias: see Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd. (1995) 5 H.K.P.L.R. 328; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304.

New Zealand, Canada and Hong Kong have all applied and followed the Gough approach. See also the discussion in Shetreet, Judges on Trial (1976), pp. 305-306.

Elvin following. The requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reflects principles already deeply embodied in the common law. Accordingly, nothing of substance is added by invocation of article 6(1). This can be seen from consideration of the two interrelated elements of article 6(1), the requirements for a tribunal which is both independent and impartial. The requirement of independence has an objective test and focuses on the structural and compositional aspects of the tribunal. Impartiality means lack of prejudice or bias and has a subjective test.

The European Court of Human Rights has not suggested that there is a duty of disclosure. It has said that if there is a ground for concern (after consideration of the objective and subjective tests) the judge must withdraw. As such it is the equivalent of the actual bias test under English law as described in Reg. v. Gough [1993] A.C. 646: see Campbell and Fell

v. United Kingdom (1984) 7 E.H.R.R. 165; De Cubber v. Belgium (1984) 7 E.H.R.R. 236; Gregory v. United Kingdom (1997) 25 E.H.R.R. 577, 584; Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73, 88; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304. The European Court of Human Rights has ruled that the right to an impartial tribunal may be waived: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R. 1041 were straightforward cases of failure to disclose evidence and do not have any wider application.

The Gough test concerns the appearance of bias to a reasonable observer not to one of the parties. Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142 and Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 are both consistent with the Gough test.

Peter Duffy Q.C., Owen Davies and David Scorey for Amnesty International. There are many differences between Amnesty International and Amnesty International Charity Ltd.: see McGovern v. Attorney-General [1982] Ch. 321. For the sum total of Amnesty International's activities which are charitable see Reg. v. Radio Authority, Ex parte Bull [1998] Q.B.294.

Amnesty International supports the position of challenging trials vitiated by bias. The issue is: what constitutes bias? It is in the public benefit for judges to be involved with charities. It cannot be that if a judge is involved with a charity which is concerned with grave human rights violations he is thereby excluded from sitting in a case in which human rights issues arise. The issue of disclosure only arises if there is an issue which needs to be disclosed. Is it necessary or desirable that a ritual should be gone through whereby judges disclose their connections with every human rights body? Charitable objectives are by definition nonpolitical and in the public interest. A judges relationship with a charity and support for its objectives should not be investigated or under suspicion.

Montgomery Q.C. in reply. The whole argument about waiver or election is based on the false premise that the Secretary of State is an alternative remedy to petitioning the House. They are in fact parallel remedies involving different standards and tests.

The provision of an impartial tribunal is a duty and cannot therefore be waived. Rights can be waived not duties: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

The House has indulged in no investigation of the background facts. The House cannot therefore declare on what actually occurred and has to deal only with the appearance of what occurred. A judge must not hear a case involving a matter which a charity of which he is a director is sworn to abolish in circumstances where a company closely related to that charity is an intervener in the case.

The duty of disclosure is established by practice. It is not just one of the incidents of a fair trial but lies at the heart of the matter: see

Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73. The test must be that information should be disclosed which would give rise to the apprehension of bias on the part of a reasonable man in the shoes of one

of the parties. That is a free standing ground on which relief should be granted. Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R.1041 show that a failure to disclose relevant information can undermine a decision.

There is an important distinction between the appearance of bias (the actuality) and the apprehension of bias (the subjective view). Reg. v. Gough [1993] A.C. 646 has plainly been misunderstood as it is taken to mean that the relevant issue is only the actuality rather than the appearance. However, it is the appearance of bias to the public and the party concerned which is relevant. If that fear of bias is justified, even if knowledge of the facts would vitiate that fear, then the test of bias has been satisfied. In the instant case the judge was identified or apparently identified with the policy objectives of one side's case: see Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193, 227. That appearance of bias cannot stand.

Their Lordships took time for consideration.

17 December 1998. Their Lordships granted the application for reasons to be given later.

15 January 1999. Lord Browne-Wilkinson. My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("A.I.") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the head of state of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 metropolitan stipendiary magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the

warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of the

Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House [2000] 1 A.C. 61 on the question certified by the Divisional Court as to "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."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a past head of state in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service ("C.P.S.") (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign head of state would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be head of state his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was head of state. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was head of state persists even after he has ceased to be head of state. The position therefore is that if the view of the C.P.S. (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("A.I."), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made A.I. accordingly became an intervener in the appeal. At the hearing of the

appeal A.I. not only put in written submissions but was also represented by counsel, Professor Brownlie, Michael Fordham, Owen Davies and

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Frances Webber. Professor Brownlie addressed the committee on behalf of A.I. supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedented degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and A.I.

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and A.I. until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with A.I. in some way. During the

Newsnight programme on television on 25 November, an allegation to

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that effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias. It then read:

"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for A.I. written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their international secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of programme assistant to the director of the media and audio visual programme when this position was established in 1994. Lady Hoffmann provides administrative support to the programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for A.I. dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you. Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ('A.I.C.L.'), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Ltd. ('A.I.L.') which are charitable under U.K. law. A.I.C.L. files reports with Companies House and the Charity Commissioners as required by U.K. law. A.I.C.L. funds a proportion of the charitable activities undertaken independently by

A.I.L. A.I.L.'s board is composed of Amnesty International's Secretary General and two Deputy Secretaries General. Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two directors of A.I.C.L. They are neither employed nor remunerated by either A.I.C.L. or A.I.L. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International. In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International U.K. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed £1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International U.K."

Further information relating to A.I.C.L. and its relationship with Lord Hoffmann and A.I. is given below. Mr. Alun Jones for the C.P.S. does not contend that either Senator Pinochet or his legal advisers had any knowledge of Lord Hoffmann's position as a director of A.I.C.L. until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the authority to proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with A.I. were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done. There is no allegation that any other member of the committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of A.I. and its subsidiary and constituent bodies. Most of the information which follows is derived from the directors' reports and notes to the accounts of A.I.C.L. which have been put in evidence.

A.I. itself is an unincorporated, non-profit-making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the statute of Amnesty International. A.I. consists of sections in different countries throughout the world and its international headquarters in London. Delegates of the sections meet periodically at the international council meetings to coordinate their activities and to elect an international

executive committee to implement the council's decisions. The international headquarters in London is responsible to the international executive committee. It is funded principally by the sections for the purpose of furthering the work of A.I. on a worldwide basis and to assist the work of sections in specific countries as necessary. The work of the international headquarters is undertaken through two United Kingdom registered companies, Amnesty International Ltd. ("A.I.L.") and Amnesty International Charity Ltd. ("A.I.C.L.").

A.I.L. is an English limited company incorporated to assist in furthering the objectives of A.I. and to carry out the aspects of the work of the international headquarters which are not charitable.

A.I.C.L. is a company limited by guarantee and also a registered charity. In McGovern v. Attorney-General [1982] Ch. 321, Slade J. held that a trust established by A.I. to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that A.I.C.L. was incorporated on 7 April 1986 to carry out such of the purposes of A.I. as were charitable. Clause3 of the memorandum of association of A.I.C.L. provides:

"Having regard to the statute for the time being of Amnesty International, the objects for which the company is established are: (a) To promote research into the maintenance and observance of human rights and to publish the results of such research. (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance. (c) To procure the abolition of torture, extra-judicial execution and disappearance ..."

Under article 3(a) of A.I.C.L. the members of the company are all the elected members for the time being of the international executive committee of Amnesty International and nobody else. The directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy have been the sole directors, Lord Hoffmann at some stage becoming the chairperson.

There are complicated arrangements between the international headquarters of A.I., A.I.C.L. and A.I.L. as to the discharge of their respective functions. From the reports of the directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The international headquarters of A.I. are in London and the premises are, at least in part, shared with A.I.C.L. and A.I.L. The conduct of A.I.'s international headquarters is (subject to the direction of the international executive committee) in the hands of A.I.L. A.I.C.L. commissions A.I.L. to undertake charitable activities of the kind which fall within the objects of A.I. The directors of A.I.C.L. then resolve to expend the sums that they have received from A.I. sections or elsewhere in funding such charitable work as A.I.L. performs. A.I.L. then reports retrospectively to A.I.C.L. as to the moneys expended and A.I.C.L. votes sums to A.I.L. for such part of A.I.L.'s work as can properly be regarded as charitable. It was confirmed

in the course of argument that certain work done by A.I.L. would therefore be treated as in part done by A.I.L. on its own behalf and in part on behalf of A.I.C.L.

I can give one example of the close interaction between the functions of A.I.C.L. and A.I. The report of the directors of A.I.C.L. for the year ended 31 December 1993 records that A.I.C.L. commissioned A.I.L. to carry out charitable activities on its behalf and records as being included in the work of A.I.C.L. certain research publications. One such publication related to Chile and referred to a report issued as an A.I. report in 1993. Such 1993 report covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore A.I.C.L. was involved in the reports of A.I. urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The directors of A.I.C.L. do not receive any remuneration. Nor do they take any part in the policy-making activities of A.I. Lord Hoffmann is not a member of A.I. or of any other body connected with A.I.

In addition to the A.I. related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with A.I. and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery in her very persuasive submissions on behalf of Senator Pinochet contended (1) that, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety; (2) that (applying the test in Reg. v. Gough [1993] A.C. 646) the links between Lord Hoffmann and A.I. were such that there was a real danger that Lord Hoffmann was biased in favour of A.I. or alternatively (applying the test in Webb v. The Queen (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

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On the other side, Mr. Alun Jones accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in Reg. v. Gough and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy for A.I. (but not for A.I.C.L.) supported the case put forward by Mr. Alun Jones.

Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Broome v. Cassell & Co. Ltd. (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second

application of the principle is where a judge is

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not a party to the suit
and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial (1976), p. 303; De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised, at p. 786, that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." (Emphasis added.)

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough [1993] A.C. 646, 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither A.I., nor A.I.C.L., have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to

anyone. The interest of A.I. in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice A.I. became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of A.I. and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, A.I. One of the constituent parts of that unincorporated association is A.I.C.L. A.I.C.L. was established, for tax purposes, to carry out part of the functions of A.I. those parts which were charitable which had previously been carried on either by A.I. itself or by A.I.L. Lord Hoffmann is a director and chairman of A.I.C.L., which is wholly controlled by A.I., since its members (who ultimately control it) are all the members of the international executive committee of A.I. A large part of the work of A.I. is, as a matter of strict law, carried on by A.I.C.L. which instructs A.I.L. to do the work on its behalf. In reality, A.I., A.I.C.L. and A.I.L. are a close-knit group carrying on the work of A.I.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to A.I. but he is not in fact A.I. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running A.I. Lord Hoffmann, A.I.C.L. and the executive committee of A.I. are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing A.I. to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, A.I., shares with the government of Spain and the C.P.S., not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial a non-pecuniary interest. So far as A.I.C.L. is concerned, clause 3(c) of its memorandum provides that one

of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance." A.I. has, amongst other objects, the same objects. Although A.I.C.L., as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, A.I.C.L. plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

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That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:" see Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259.

Since, in my judgment, the relationship between A.I., A.I.C.L. and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of A.I. and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification

is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough [1993] A.C. 646 ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fairminded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in Webb v. The Queen, 181 C.L.R. 41. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart C.J.'s dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 152a-b. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with A.I., such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, waiver, abuse of process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home

Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

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Lord Browne-Wilkinson

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts - election, waiver and abuse of process - require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord Hoffmann's position as a director and chairman of A.I.C.L. Even then they did not know anything about A.I.C.L. and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from A.I.'s solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend, Lord Goff of Chieveley, that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a rehearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue.

Lord Goff of Chieveley. My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so, having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa: see Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759, 793, per Lord Campbell. As stated by Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous Dimes case itself. In that case the then Lord Chancellor, Lord Cottenham,

affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified,

by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("A.I.") was given leave to intervene in the proceedings; and, whether or not A.I. thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ("A.I.C.L."). A.I.C.L. and Amnesty International Ltd. ("A.I.L.") are United Kingdom companies through which the work of the International Headquarters of A.I. in London is undertaken, A.I.C.L. having been incorporated to carry out those purposes of A.I. which are charitable under U.K. law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord Hoffmann and A.I. until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between A.I.C.L., A.I.L. and A.I., both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was A.I.C.L. deeply involved in the work of A.I., commissioning activities falling within the objects of A.I. which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the

charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has an

interest," in the words of Lord Campbell in the Dimes case, at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed in Shetreet, Judges on Trial (1976), p. 310, where he states that "[a] judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit," giving as an example the chairman or member of the board of a charitable organisation.

Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of A.I., which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, A.I.C.L., which is not a party. However, on the evidence, it is plain that there is a close relationship between A.I., A.I.L. and A.I.C.L. A.I.C.L. was formed following the decision in McGovern v. Attorney-General [1982] Ch. 321, to carry out the purposes of A.I. which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between A.I.L. and A.I.C.L. was that the latter was to carry out those aspects of the work of the international headquarters of A.I. which were charitable, leaving it to A.I.L. to carry out the remainder, that division being made for fiscal reasons. It follows that A.I., A.I.L. and A.I.C.L. can together be described as being, in practical terms, one organisation, of which A.I.C.L. forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in A.I.C.L.; the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party.

Lord Nolan. My Lords, I agree with the views expressed by noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be

set aside for the reasons which they give. I would only add that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.

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Lord Hope of Craighead. My Lords, I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19 the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to the Dimes and Lindsay cases, gave this explanation of the rule, at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend, Lord Goff of Chieveley, said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice

requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in

judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of impartiality. This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery in the course of her argument to Bradford v. McLeod, 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan, 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality.

The test which must be applied by the appellate courts of criminal

jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] A.C. 646 is whether

there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod, 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 289:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's impartiality. Just as Eve J. may be thought to have been seeking to explain to members of the council of the chartered institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion

is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issues

concerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd. he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

Lord Hutton. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1996. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently

discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, but

because of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said, at pp. 793-794:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In his judgment in Reg. v. Gough [1993] A.C. 646, 659 my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

"In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"

Then referring to the Dimes case, he said, at p. 661:

" ... I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.' The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v.

Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then

proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793: 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.' In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

Later in his judgment Lord Goff said, at p. 664f, agreeing with the view of Lord Woolf, at p. 673f, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549, 552:

"There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in Webb v. The Queen, 181 C.L.R. 41, 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment ... The third category is disqualification by association. It will often overlap the first and

consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons

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interested in, or otherwise involved in, the proceedings." (My emphasis.)

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser's case as one:

"where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: 'the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?' Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice."

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.

Petition granted.

Solicitors: Kingsley Napley; Crown Prosecution Service, Headquarters; Bindman Partners.

B. L. S.

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[HOUSE OF LORDS]

REGINA v. BOW STREET METROPOLITAN STIPENDIARY

MAGISTRATE and Others, Ex parte PINOCHET UGARTE (No. 3)

1999 Jan. 18, 19, 20, 21,

25, 26, 27, 28;

Feb. 1, 2, 3, 4;

March 24

Lord Browne Wilkinson, Lord Goff of Chieveley,

Lord Hope of Craighead, Lord Hutton,

Lord Saville of Newdigate, Lord Millett and

Lord Phillips of Worth Matravers

Extradition - Extradition crime - Double criminality - Torture committed outside jurisdiction of both requesting state and England - Alleged offences committed before extraterritorial torture punishable in England - Extradition requested after offence made punishable under English law - Whether relevant time for consideration of criminality date of offence or date of request - Whether offence extraditable - Extradition Act 1989 (c. 33), s. 2

International Law - State immunity - Former head of state - Request for extradition in respect of crimes of torture and conspiracy to torture relating to period when applicant head of state - Whether immunity in respect of acts performed in exercise of functions as head of state - Whether governmental acts of torture attributable to functions of head of state - Whether former head of state entitled to immunity ratione materiae in relation to acts of torture - Diplomatic Privileges Act 1964 (c. 81), s. 2(1), Sch. 1, arts. 29, 31, 39 - State Immunity Act 1978 (c. 33), s. 20(1) - Criminal Justice Act 1988 (c. 33), s. 134(1)

The applicant, a former head of state of Chile who was on a visit to London, was arrested under a provisional warrant issued by a metropolitan stipendiary magistrate pursuant to section 8(1) of the Extradition Act 19891 following the issue of an international warrant of arrest issued by the Central Court of Criminal Proceedings No. 5, Madrid. Six days later a second section 8(1) warrant was issued by a magistrate upon receipt of a second international warrant of arrest issued by the Spanish court alleging, inter alia, that the applicant, during his period of office between 1973 and 1990, had ordered his officials to commit acts of torture falling within section 134(1) of the Criminal Justice Act 19882 and acts of hostage-taking within section 1 of the Taking of Hostages Act 1982.3 The applicant issued proceedings in the Divisional Court for orders of certiorari to quash the first provisional warrant as disclosing no act amounting to an extradition crime, as defined by section 2 of the Act of 1989, and both warrants as relating to acts performed by the applicant in exercise of his functions as head of state and in respect of which he was entitled to immunity under customary international law and the provisions of section 20(1) of Part III of the State Immunity Act 1978,4 read with section 2 of, and articles 29, 31, and 39 of Schedule 1 to, the

Diplomatic Privileges Act 1964.5 The Divisional Court, having found that the first warrant was bad as falling outside section 2 of the Act of 1989, held with respect to both warrants that the applicant, as a former head of state, was

1 Extradition Act 1989, s. 2: see post, pp. 193G-194C.

2 Criminal Justice Act 1988, s. 134(1): see post, p. 231D-E.

3 Taking of Hostages Act 1982, s. 1(1): see post, p. 230E-F.

4 State Immunity Act 1978, s. 20(1): see post, p. 203A.

5 Diplomatic Privileges Act 1964, Sch. 1, art. 39: see post, p. 209F-G.

entitled to immunity from civil and criminal process in the English courts in respect of acts committed in the exercise of sovereign power. The court quashed both warrants. On appeal by the Commissioner of Police of the Metropolis and the Government of Spain the House of Lords allowed the appeal by a majority of three to two. The applicant challenged that decision on the ground that the Appellate Committee was improperly constituted. The House of Lords set aside the decision and ordered that the appeal be reheard before a differently constituted committee. By the time the case came on for rehearing the Spanish authorities had particularised further charges against the applicant, including charges of torture and conspiracy to torture, conspiracy to murder, attempted murder and murder. Most offences were alleged to have occurred in Chile but some were said to have occurred variously in Spain, Italy, France and Portugal and some offences were said to have taken place as early as 1 January 1972. As a result of the widening of the case against the applicant he took the additional point that he could not be extradited to face most of the charges as they did not amount to "extradition crimes" within the meaning of section 2 of the Act of 1989.

On the rehearing of the appeal:-

Held, (1) that the requirement in section 2 of the Act of 1989 that the alleged conduct which was the subject of the extradition request be a crime under United Kingdom law as well as the law of the requesting state was a requirement that the conduct be a crime in the United Kingdom at the time when the alleged offence was committed; that (Lord Millett dissenting) extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect on 29 September 1988; and that, accordingly, all the alleged offences of torture and conspiracy to torture before that date and all the alleged offences of murder and conspiracy to murder which did not occur in Spain were crimes for which the applicant could not be extradited (post, pp. 195B-196B, 196C-197B, 208D-F, 229H-230C, 237E-F, 249C-E, 265C-D, 268A-B, 279E-F).

(2) Allowing the appeal in part (Lord Goff dissenting), that, a former head of state had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of state pursuant

to section 20 of the State Immunity Act 1978 when read with article 39(2) of Schedule 1 to the Diplomatic Privileges Act 1964; but that torture was an international crime against humanity and jus cogens and after the coming into effect of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 there had been a universal jurisdiction in all the Convention state parties to either extradite or punish a public official who committed torture; that in the light of that universal jurisdiction the state parties could not have intended that an immunity for ex-heads of state for official acts of torture (per Lord Hope of Craighead, for systematic and widespread acts of official torture) would survive their ratification of the Convention; that (per Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Saville of Newdigate) since Chile, Spain and the United Kingdom had all ratified the Convention by 8 December 1988 the applicant could have no immunity for crimes of torture or conspiracy to torture after that date; that (per Lord Hutton) the relevant date when the immunity was lost was 29 September 1988 when section 134 of the Act of 1988 came into effect; that (per Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton and Lord Saville of Newdigate) there was nothing to show that states had agreed to remove the immunity for charges of murder which immunity

accordingly remained effective; that, on the facts alleged, no offence of hostage-taking within the meaning of section 1(1) of the Act of 1982 arose; and that, accordingly, the applicant had no immunity from extradition for offences of torture or conspiracy to torture which were said to have occurred after 8 December 1988 and the extradition could proceed on those charges (post, pp. 198E-H, 200F-201A, 203C-F, 204F-205B, 205F-H, 231A-B, 234E-H, 240G-241C, 241E-F, 242B-C, 247E-248H, 261A-B, 262B-C, 263D-F, 265A-B, 266G-267E, 270A-D, 277C-F, 287E-288A, 289E-290C, 292E-F).

Per Lord Millett and Lord Phillips of Worth Matravers. The systematic use of torture was an international crime for which there could be no immunity even before the Convention came into effect and consequently there is no immunity under customary international law for the offences relating to torture alleged against the applicant. Nor is there immunity for the offence of conspiracy to murder in Spain (post, pp. 275C-F, 276D-E, 277B, 279B-C, 290A-C, 292E-F).

Decision of the Divisional Court of the Queen's Bench Division reversed in part.

The following cases are referred to in their Lordships' opinions:

Al-Adsani v. Government of Kuwait (1996) 107 I.L.R. 536, C.A.

Alcom Ltd. v. Republic of Colombia [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)

Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683

Brunswick (Duke of) v. King of Hanover (1848) 2 H.L.Cas. 1, H.L.(E.)

Buck v. Attorney-General [1965] Ch. 745; [1965] 2 W.L.R. 1033; [1965] 1 All E.R. 882, C.A.

Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)

Demjanjuk v. Petrovsky (1985) 603 F.Supp. 1468; 776 F.2d 571

Farouk of Egypt (Ex-King) v. Christian Dior (1957) 24 I.L.R. 228

Hatch v. Baez (1876) 7 Hun 596

Ireland v. United Kingdom (1978) 2 E.H.R.R. 25

Israel (Attorney-General of) v. Eichmann (1962) 36 I.L.R. 5

Jaffe v. Miller (1993) 13 O.R.(3d) 745

Jean Dessès (Société) v. Prince Farouk (1963) 65 I.L.R. 37

Jimenez v. Aristeguieta (1962) 311 F.2d 547

Lafontant v. Aristide (1994) 844 F.Supp. 128

Liangsiriprasert (Somchai) v. Government of the United States of America [1991] 1 A.C. 225; [1990] 3 W.L.R. 606; [1990] 2 All E.R. 866, P.C.

Lotus S.S., The Case of, Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10

Marcos and Marcos v. Federal Department of Police (1989) 102 I.L.R. 198

Persinger v. Islamic Republic of Iran (1984) 729 F.2d 835

Piracy Jure Gentium, In re [1934] A.C. 586, P.C.

Princz v. Federal Republic of Germany (1994) 26 F.3d 1166

Prosecutor v. Furundzija (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10

Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [2000] 1 A.C. 61; [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897, H.L.(E.)

Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2) [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; [1999] 1 All E.R. 577, H.L.(E.)

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

Reg. v. Sansom [1991] 2 Q.B. 130; [1991] 2 W.L.R. 366; [1991] 2 All E.R. 145, C.A.

Saltany v. Reagan (1988) 702 F.Supp. 319

Sampson v. Federal Republic of Germany (1997) 975 F.Supp. 1108

Schooner Exchange v. M'Faddon (1812) 11 U.S. (7 Cranch) 116

Siderman de Blake v. Republic of Argentina (1992) 965 F.2d 699

Smith v. Socialist People's Libyan Arab Jamahiriya (1995) 886 F.Supp. 306; (1996) 101 F.3d 239

Syrian Ambassador (Former) to the German Democratic Republic, In re (unreported), 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96

Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.

Underhill v. Hernandez (1897) 168 U.S. 250

United States of America v. Noriega (1990) 746 F.Supp. 1506; (1997) 117 F.3d 1206

The following additional cases were cited in argument:

Aksionairnoye Obschestvo A. M. Luther v. James Sagor Co. [1921] 3 K.B. 532, C.A.

Arantzazu Mendi, The [1939] A.C. 256; [1939] 1 All E.R. 719, H.L.(E.)

Azanian Peoples Organisation (A.Z.A.P.O.) v. President of the Republic of South Africa (1996) 8 B.C.L.R. 1015

Banco Nacional de Cuba v. Sabbatino (1964) 376 U.S. 398

Barcelona Traction, Light and Power Co. Ltd., In re [1970] I.C.J. Rep. 3

Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

Caire, Jean-Baptiste (Estate of) (France) v. United Mexican States (1929) 5 U.N.R.I.A.A. 516

Canada (Government of) v. Aronson [1990] 1 A.C. 579; [1989] 3 W.L.R. 436; [1989] 2 All E.R. 1025, H.L.(E.)

Carl Marks Co. Inc. v. Union of Soviet Socialist Republics (1987) 665 F.Supp. 323; (1988) 841 F.2d 26

Castioni, In re [1891] 1 Q.B. 149, D.C.

Chung Chi Cheung v. The King [1939] A.C. 160; [1938] 4 All E.R. 786, P.C.

Church of Scientology Case (1978) 65 I.L.R. 193

Compania Naviera Vascongado v. S.S. Cristina [1938] A.C. 485; [1938] 1 All E.R. 719, H.L.(E.)

Duff Development Co. Ltd. v. Government of Kelantan [1924] A.C. 797, H.L.(E.)

East Timor (Portugal v. Australia), In re [1995] I.C.J. Rep. 90

Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171, C.A.

Empson v. Smith [1966] 1 Q.B. 426; [1965] 3 W.L.R. 380; [1965] 2 All E.R. 881, C.A.

Filartiga v. Pena-Irala (1980) 630 F.2d 876; (1984) 577 F.Supp. 860

Frolova v. Union of Soviet Socialist Republics (1985) 761 F.2d 370

Goering, In re (1946) 13 I.L.R. 203

Grand Jury Proceedings, John Doe 700, In re (1987) 817 F.2d 1108

Harrison v. Tew [1990] 2 A.C. 523; [1990] 2 W.L.R. 210; [1990] 1 All E.R. 321, H.L.(E.)

Herbage v. Meese (1990) 747 F.Supp. 60

Hilao v. Estate of Marcos (1994) 25 F.3d 1467

Holland v. Lampen-Wolfe [1999] 1 W.L.R. 188, C.A.

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

Honecker, In re (1984) 80 I.L.R. 365

Iran (Empire of), Claim against (1963) 45 I.L.R. 57

Jacobus v. Colgate (1916) 217 N.Y. 235

Kadic v. Karadzic (1995) 70 F.3d 232

Kendall v. Kingdom of Saudi Arabia (1965) 65 Adm. 885

Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701

Kuwait Airways Corporation v. Iraqi Airways Co. [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694, H.L.(E.)

Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998, Mance J.

Letelier v. Republic of Chile (1980) 63 I.L.R. 378; 488 F.Supp. 665

Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82; [1994] 4 All E.R. 203, C.A.

Liu v. Republic of China (1989) 892 F.2d 1419

L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [1994] 1 A.C. 486; [1994] 2 W.L.R. 39; [1994] 1 All E.R. 20, H.L.(E)

Maal Case, The (1903) 10 U.N.R.I.A.A. 730

Monetary Gold, The [1954] I.C.J. Rep. 19

Naghdi, In re [1990] 1 W.L.R. 317; [1990] 1 All E.R. 257, D.C.

Nelson v. Saudi Arabia (1991) 88 I.L.R. 189

Nielsen, In re; [1984] A.C. 606; [1984] 2 W.L.R. 737; [1984] 2 All E.R. 81; 79 Cr.App.R. 1, H.L.(E.)

North Sea Continental Shelf, [1969] I.C.J. Rep. 3

Oetjen v. Central Leather Co. (1918) 246 U.S. 297

Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.)

Paul v. Avril (1993) 812 F.Supp. 207

Philippines (Republic of) v. Marcos (1986) 806 F.2d 344

Polyukhovich v. Commonwealth of Australia (1991) 91 I.L.R. 1

Propend Finance Pty. Ltd. v. Sing, The Times, 2 May 1997; Court of Appeal (Civil Division) Transcript No. 572 of 1997, C.A.

Prosecutor v. Blaskic (Subpoenae) (1997) 110 I.L.R. 607

Prosecutor v. Tadic (unreported), 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T

Reg. v. Doot [1973] A.C. 807; [1973] 2 W.L.R. 532; [1973] 1 All E.R. 940, H.L.(E.)

Reg. v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556; [1962] 3 W.L.R. 1013; [1962] 3 All E.R. 529, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Cheng [1973] A.C. 931; [1973] 2 W.L.R. 746; [1973] 2 All E.R. 204, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3) [1990] 1 W.L.R. 878; [1990] 1 All E.R. 999, D.C.

Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 504; [1974] 1 All E.R. 692, D.C. and H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886; [1998] 3 W.L.R. 1011; [1997] 2 All E.R. 638, D.C.

Roncarelli v. Duplessis [1959] S.C.R. 121

Société Levant Express Transport v. Chemins de fer du gouvernement iranien (1969) in Grands Arrêts 3rd ed.

(1988), p. 372

United Kingdom v. France, Permanent Court of International Justice, Advisory Opinion No. 4 of 7 February 1923

United States Diplomatic and Consular Staff in Tehran, In re [1980] I.C.J. Rep. 3; 61 I.L.R. 504

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

United States of America v. Allard [1991] 1 S.C.R. 861

United States of America and Republic of France v. Dollfus Mieg et Cie. S.A. and Bank of England [1949] Ch. 369; [1949] 1 All E.R. 946; [1950] Ch. 333; [1950] 1 All E.R. 747, C.A.; [1952] A.C. 582; [1952] 1 All E.R. 572, H.L.(E.).

Velásquez Rodríguez Case (1989) 95 I.L.R. 232

Youmans (Thomas H.) (U.S.A.) v. United Mexican States (1926) 4 U.N.R.I.A.A. 110

Zoernsch v. Waldock [1964] 1 W.L.R. 675; [1964] 2 All E.R. 256, C.A.

Appeal from the Divisional Court of the Queen's Bench Division.

This was the rehearing of an appeal by the Commissioner of Police of the Metropolis and the Government of Spain from a decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) of 28 October 1998 granting orders of certiorari to quash warrants issued pursuant to section 8(1) of the Extradition Act 1989, at the request of the Central Court of Criminal Proceedings No. 5, Madrid, for the provisional arrest of the applicant, Senator Augusto Pinochet Ugarte, a former head of state of the Republic of Chile, (i) dated 16 October 1998, by Nicholas Evans, Bow Street Metropolitan Stipendiary Magistrate, and (ii) dated 22 October 1998, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate.

Leave to appeal was granted by the Divisional Court which, in accordance with section 1(2) of the Administration of Justice Act 1960, certified that a point of law of general public importance was involved in its 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."

The appeal was originally heard by the House in November 1998 and allowed by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting). That decision was set aside by the House (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton) on 15 January 1999 and a rehearing ordered before a differently constituted committee.

Leave to intervene was given to Amnesty International, the Medical Foundation for the Care of Victims of Torture, the Redress Trust, Mary Ann Beausire, Juana Francisca Beausire and Sheila Cassidy and the Association of the Relatives of the Disappeared Detainees. Additionally, an order was made permitting Human Rights Watch to intervene to the

extent of presenting written submissions.

The facts are stated in the opinions of Lord Browne-Wilkinson and Lord Hope of Craighead.

Alun Jones Q.C., Christopher Greenwood, James Lewis and Campaspe Lloyd-Jacob for the appellants. Criminal liability is personal. A state does not commit crimes. The crimes alleged are crimes against international law and three Conventions underlie the relevant English statutes: the European Convention on the Suppression of Terrorism of 27 January 1977 (1977) (Cmnd. 7031), the International Convention against the Taking of

Hostages of 18 December 1979 (1983) (Cmnd. 9100) and the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm. 1775). The Conventions provide machinery for extradition for crimes which have been recognised for decades as crimes by international law and which are recognised as crimes by the United Kingdom, Spain and Chile.

The provisional warrant, in respect of which the appeal was brought, no longer has life or effect and has been superseded by the Secretary of State's authority to proceed. The applicant is now remanded under section 9(2) of the Extradition Act 1989. Provisional arrest terminated on the issue by the Secretary of State of the authority to proceed: see Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1, 25 and Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3) [1990] 1 W.L.R. 878. The certified question can nonetheless be answered properly and finally, although the case is now more developed and complex.

If the appeal were to be decided on the basis of the limited facts alleged in the provisional warrant the result would be wholly artificial and the matter would be open to further argument. It is now alleged that complete conspiracies to commit crimes of torture, hostage taking and murder were formed before the earliest date on which the applicant became head of state. The overt acts committed in foreign countries are not merely evidence of the primary conspiracies but amount to sub-conspiracies, or, in some cases, substantive crimes, within those states. The provisional warrant did not disclose this.

It is common in extradition cases for crimes which are generally and broadly described in Civil Code countries to be represented in authorities to proceed in English proceedings as individual charges. Consequently, it is necessary to look at the conduct in the request and not at the terminology of the charge. The details of what amounts to a crime in Spain do not have to be considered. The issue is whether the acts amount to an offence under English law. The conduct alleged is a concluded agreement and acts done in furtherance of it. Such conduct is a conspiracy under English law, although Spain calls the alleged acts terrorism. In English law a conspiracy remains a continuing offence until it is completed. Overt acts are not part of the conspiracy, merely evidence of it: see Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225. The dates of the alleged acts are not normally included in the authority to proceed: see In re Naghdi [1990] 1 W.L.R. 317.

Substantive acts of torture are particularised for August 1973 and,

therefore, the conspiracy was complete before the coup on 11 September 1973. However, the applicant did not become head of state at the time of the coup but merely the head of a military junta. He did not become head of state until 17 June 1974. Consequently, the issue of immunity does not arise for acts committed before that date. If there was a pre-existing plan to commit these offences before the applicant became head of state then there is an extraditable offence and he can have no immunity.

The State Immunity Act 1978 and the Diplomatic Privileges Act 1964 determine the immunity issue.

Section 20 of the Act of 1978 equates the position of a head of state to that of an ambassador and applies only to acts committed in the

performance of the functions of a head of state, not to acts committed previously. A former head of state only has immunity with regard to his acts as a head of state but not with regard to acts which fall outside his role as head of state. If he also had the role of head of government he enjoys no immunity for his actions in that capacity.

A former head of state cannot have immunity for acts of murder committed outside his own territory. International law recognises crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes.

A head of state's functions in a foreign country are of a diplomatic nature. The essential nature of the protection afforded by section 20 relates to the carrying out of a diplomatic function in the United Kingdom: see, Hansard (H.L. Debates, 17 January 1978, col. 58; 16 March 1978, col. 1537).

If, however, section 20 has no application to acts performed outside the United Kingdom then the matter is determined by Conventions. Parliament cannot have intended that there should be immunity outside the elaborate statutory scheme and the Conventions and there can be no fallback on the common law. The policy of Acts and Conventions of recent years is that people should take individual and personal responsibility for certain crimes, without any protection for acts done in the name of the state.

The prohibition under the Hostage Taking Convention applies to everyone regardless of his position and the duty to prosecute those who commit such offences applies to the United Kingdom. Hostage-taking is not specifically charged in the Spanish indictment but the offence is made out on the facts alleged.

The Torture Convention applies to all "public officials" irrespective of position. It is inconceivable that it was intended to exclude those who gave orders while including those who followed them. The Convention gives a state a right and an obligation to establish jurisdiction where the victim is a national of that state. Article 8(4) combined with article 5 amounts to an acknowledgment that offences of torture committed in one state can be regarded as having taken place in the state of which the victim is a national. The United Kingdom has an obligation to extradite the applicant to Spain if no prosecution is brought in the United Kingdom. Chile has not requested extradition so the applicant cannot be extradited there. Section 26(2) of

the Act of 1989, deeming the torture to have taken place in Spain, prevents Chile claiming a priority of jurisdiction as the place where the acts took place. Chile, like Spain and the United Kingdom, has ratified the Torture Convention and torture has been outlawed by the Constitution of Chile since 1925. Consequently, Chilean law reflects and embodies the same principles as the Convention and Chile cannot claim exclusive jurisdiction.

Older presumptions as to territoriality of crimes such as these have been replaced. Section 6(1) of the Act of 1989 prohibits extradition for offences of a "political character" but section 24 provides that no act to which section 1 of the Suppression of Terrorism Act 1978 applies shall be

regarded as of a political character. For an analysis of "political offence" and "political character" see In re Castioni [1891] 1 Q.B. 49; Reg. v. Governor of Pentonville Prison, Ex parte Cheng [1973] A.C. 931 and Reg. v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556. Certain crimes are deemed so odious that no reticence in involving the United Kingdom in the internal disputes of foreign states would be shown in relation to them.

Greenwood following. International law does not require the United Kingdom to accord immunity to a former head of state for acts which international law not only prohibits but for which it imposes individual criminal responsibility. Indeed, there is a positive duty under international law not to grant immunity in such circumstances.

No international agreement specifically provides for the immunities of a head of state or former head of state. However, under customary international law a state is entitled to expect that the head of state will enjoy a measure of immunity from the jurisdiction of the courts of other states. That immunity reflects the respect due to the dignity of the head of state but the extent of the immunity is uncertain: see Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, pp. 32, 36-37, 52-68 and Oppenheim's International Law, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.), pp. 1037-1038.

A head of state may be treated as the state itself and entitled to the same immunities. That is the rationale behind section 14 of the State Immunity Act 1978. In so far as proceedings are brought against the head of state in his personal capacity he enjoys the same immunities as an ambassador, immunity ratione personae, attaching to the individual on account of his office.

Of the four possible rationales advanced for former head of state immunity, the first, the dignity of the state, applies only to an existing head of state. The second, that courts will not sit in judgment on the acts of another state, is one of the principal grounds for the act of state and non-justiciability doctrines. The third, that acts of an official character performed by a head of state engage the responsibility of the state itself and not the individual, can be answered by pointing out that the state's responsibility does not automatically do away with personal responsibility. The fact that the acts of which the applicant is accused might be attributable to Chile

does not mean that the United Kingdom has to grant him immunity. The conviction of Nazi war criminals after the Second World War shows that. The fourth, that a former head of state needs immunity so that he is not hindered in the exercise of his public functions while he holds office, is a functional rationale. The last three of these could apply equally to proceedings against any official or former official.

A former head of state no longer represents the grandeur of his nation. He does not enjoy immunity for personal acts performed while he was head of state. Any requirement to accord immunity applies only in respect of acts of an official character performed in the exercise of the functions of head of state, immunity ratione materiae and does not extend to conduct criminal under international law. The absence of any authority establishing

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the right to prosecute former heads of state in common law jurisdictions arises from the lack of extraterritorial jurisdiction until recently.

In showing an international intention to prohibit an express practice, such as torture, it is not necessary that each country prohibits it in the same way, nor is it necessary that each state's law prohibits torture wherever it occurs. The various laws of states considered in the light of the fact that every recent human rights treaty has prohibited torture provide evidence that customary international law prohibited torture before the Torture Convention and that, under customary international law, torture was an international crime if committed by a public official. There was no head of state exception and states other than the state where the offence took place were entitled to exercise jurisdiction.

The Torture Convention codified existing customary law norms prohibiting torture, but added a duty to exercise the jurisdiction which existed under customary international law. No signatory to that Convention can object to the exercise of the jurisdiction by another state as being an interference with the signatory's internal affairs. Accordingly, either the Torture Convention establishes that the applicant can have no immunity from prosecution for acts of torture or alternatively the prohibition against torture has the status of jus cogens and he can be prosecuted under customary international law. The applicable law is the present law as evidenced by the Torture Convention. If it is necessary to show that torture was a crime under international law in 1973 when the acts occurred that requirement is satisfied because it was a crime under customary international law at that time. Even if torture itself was not a crime under international law then the widespread and systematic torture practised in Chile was a crime against humanity, as that concept has developed over the century.

International law recognises international crimes. The oldest is piracy: see In re Piracy Jure Gentium [1934] A.C. 586. It has long been recognised that individuals may be prosecuted for war crimes and crimes against humanity under international law. The development since the First World War of the concept of "war crimes" illuminates the point that for some international crimes there can be no immunity.

The attempt to put the Kaiser on trial before an international tribunal after the war shows that at that time there was no immunity for a head of state. The United States objected on the grounds that there should be an immunity for a head of state but no concern was expressed about a

former head of state. The failure of the attempt led to a different approach to the question of immunity at the end of the Second World War: see the London Declaration 1942; the Moscow Declaration 1943; the Charter of the International Military Tribunal, Nuremberg, adopted by the Big Four Powers (1945) and the Charter of the International Military Tribunal for the trial of major war criminals in the Far East (1946).

Under the Nuremberg Charter the vast majority of defendants were tried in the territories where the crimes occurred. Only the leaders whose crimes were not confined to a specific location were tried before the international tribunal at Nuremberg. While only one former head of state (Admiral Donitz) was tried before the international tribunal, there was no suggestion that this was necessary to overcome any immunity or that he

could not have been tried before a national court. The Big Four Powers were exercising jointly a right which each could have exercised separately: see Oppenheim's International Law, vol. II, 7th ed. (1952) (ed. Sir Hersch Lauterpacht), pp. 580-581. If ever there was a clear immunity for heads of state or former heads of state it has been eroded during the course of this century.

The definition of an international crime is a substantive question. Whether the trial should be before an international tribunal or a national court is a procedural question. Crimes against humanity are crimes not against a state but against individuals and are triable anywhere. Until recently there were almost no international tribunals so international crimes could be tried only before a national court.

Even in 1946 the concept of territoriality of jurisdiction for crimes against humanity was not really in issue. The Nuremberg Tribunal certainly felt restricted to regarding crimes against humanity as linked to war crimes or crimes against the peace but that has been broadened over the years.

The significance of the Nuremberg Charter and the approach of the tribunal is that it provided the bedrock upon which the United Nations' and the international approach to human rights has developed. The United Nations adopted the Nuremberg declaration: see the Affirmation of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (G.A. Res. 95, 1st Sess., 1144; U.N. Doc. A/236 (1946)). The absence of immunity for international crimes tried before national courts has been reaffirmed on a number of occasions: see The British Manual of Military Law, (1958) (ed. Sir Hersch Lauterpacht), paras. 632, 637; the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1954; the four Geneva Conventions on the Law of Armed Conflict of 1949 (implemented in the United Kingdom by the Geneva Conventions Act 1957); U.N.General Assembly Resolution No. 3074 on the Principles of International Co-operation on Persons Guilty of War Crimes and Crimes Against Humanity adopted in 1973; the Statute of the War Crimes Tribunal for former Yugoslavia (1993); the Statute of the War Crimes Tribunal for Rwanda (1994); the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996

The Draft Code of 1996 is the International Law Commission's view of existing international law. Article 8envisages the establishment of an international court but in its absence the jurisdiction must be

exercisable by national courts. The Code shows that crimes against humanity are crimes in international law which need not be connected with armed conflict and that state officials have no immunity.

The Appeals Tribunal for the former Yugoslavia has held that, while the tribunal's statute restricts the definition of crimes against humanity, that restriction is not a requirement of substantive law: see Prosecutor v. Tadic (unreported), 7 May 1997; International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-T. In Prosecutor v. Furundzija (unreported), 10 December 1998, International Criminal Tribunal for the

Former Yugoslavia, Case No. IT-95-17/1-T 10 the tribunal dealt with torture as a crime against humanity.

Attorney-General of Israel v. Eichman (1962) 36 I.L.R. 5 is a particularly striking example of the universality of jurisdiction for crimes against humanity as Israel did not exist at the times when the crimes were committed.

The failure of the United States to sign the Rome Statute of the International Criminal Court (adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998) is based on an objection to some parts of the statute rather than to the validity of international tribunals as such, or to the concept of trials for international crimes.

The idea that individuals benefit from the immunity of the state is based on civil cases where to make the individual liable would directly implicate the state: see Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683 and Siderman de Blake v. Republic of Argentina (1992) 965 F.2d 699. That idea cannot apply to criminal proceedings as the criminal law cannot implead the state: see Princz v. Federal Republic of Germany (1994) 26F.3d 1166.

Hatch v. Baez (1876) 7Hun 596 concerned civil, not criminal, proceedings and is therefore distinguishable. The rationale for the decision is the same as is given in many act of state cases. If that doctrine were to be applied here the provisions of the Torture Convention would be meaningless. Al-Adsani v. Government of Kuwait (1996) 107 I.L.R. 536 is also distinguishable as it concerned a statutory immunity from civil proceedings granted by section 1 of the State Immunity Act 1978. In any event the present case does not involve a statutory scheme from which the Spanish Government are trying to carve out an exception. It is highly unlikely that Parliament intended to lay down an immunity which is not recognised in international law. The Act of 1978 and other statutes should be construed in the light of the relevant rules of international law: see Alcom Ltd. v. Republic of Colombia [1984] A.C. 580, 597, 600 and Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529.

The applicant's amnesty under Chilean law is ambiguous and, in any event, does not touch on the question of immunity. The Spanish court has held that the amnesty is not relevant to their law. The issue is one for the Home Secretary to consider.

The provisions of the Torture Convention combined with section 134 of the

Criminal Justice Act 1988 are incompatible with any notion of immunity for a foreign official for acts of torture. Although under the Vienna Convention diplomat in office has total immunity, there can be no immunity after he has left office.

"Public official" naturally includes the head of state. Past agreements in international law have dealt with the head of state with a specific provision but "public official" in the Torture Convention and section 134 appears to be a general term. The lack of a specific mention of heads of state cannot mean they were excluded from the description and have immunity. The provisions are clear: there is no immunity for anyone who commits torture.

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As a matter of United Kingdom law a serving head of state has immunity, but there is no such immunity for torture under international law. Ahead of state is an "official" like any other within the terms of the Convention and of section 134.

The relevant time for assessing the criminality of an act in the United Kingdom is the time of the extradition request. Immunity is a procedural issue and has to be determined at that time, not when the acts occurred. There is no doubt that the alleged conduct was prohibited under international law throughout the period when it occurred: see Filartiga v. Pena-Irala (1980) 630 F.2d 876, 880, 888; Demjanjuk v. Petrovsky (1985) 603 F.Supp. 1468; 776 F.2d 571.

Act of state and non-justiciability have developed as two distinct doctrines in English law. Under the doctrine of act of state English courts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign: see Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1. The doctrine of non-justiciability (see Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888, 931-932, per Lord Wilberforce) prevents English courts from adjudicating upon certain transactions of foreign states in the international sphere. Neither doctrine is applicable. Under the Extradition Act 1989 it is not for the court to examine the weight of the evidence, the situation in Chile in 1973 or current relations with Chile. In the United States, where the two doctrines have not always been treated as separate (see Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701; 493 U.S. 400, 405), all cases, applying the Restatement of the Law 3rd: The Foreign Relations Law of the United States, vol. 1, (1986), p. 370, reject the notion that the act of state doctrine bars proceedings against an individual for acts of torture: see Filartiga v. Pena-Irala (1984) 577 F.Supp. 860; Hilao v. Estate of Marcos (1994) 25 F.3d 1467 and Liu v. Republic of China (1989) 892 F.2d 1419.

It has frequently been held that neither doctrine bars judicial inquiry into conduct which involves a violation of fundamental human rights: see Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998; Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171 and Letelier v. Republic of Chile (1980) 488 F.Supp. 665. Nor does the act of state doctrine apply to acts performed by one state in the territory of another.

Section 20 of the State Immunity Act and the Vienna Convention are the basis of the immunity for a former head of state. The role of head of state has to be analogous to that of a diplomat as defined in article 3 of the Convention. The acts alleged against the applicant were outside his functions as head of state. Chilean law expressly prohibits torture. This is not a case of one state foisting its standards on another but of behaviour which is universally accepted as being abhorrent and criminal.

Jones Q.C. resuming. Conspiracy is a crime in Spain, as is a conspiracy which is not carried out. The Spanish approach is to roll conspiracy up in the offence charged as a continuing or schematic offence. Pursuance of the plan is an element of the charge rather than the charge itself. That is the whole tone of the Spanish indictment.

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The allegations of pre-coup conspiracy formed in Chile to commit acts in Chile and abroad amount to an offence under English law: see Reg. v. Doot [1973] A.C. 807. Conspiracy to torture is caught by one or other part of section 2(1) of the Extradition Act 1989. Even if the acts are not deemed to have taken place in Spain, torture is an extraterritorial offence under English law by virtue of section 2(2).

The conspirators were serving military officers and therefore public officials for the purposes of section 134 of the Criminal Justice Act 1988. It was not necessary that they were acting on behalf of the state. It would be absurd if two factions during a civil disturbance committed acts of torture but only those acting under government orders could be liable under section 134.

If the applicant was not acting as a public official in plotting to take over the state and organising torture then the acts of torture after the coup make him liable under section 134 on the basis of a continuing action. As the basic conspiracy was hatched before 11 September 1973 and before the applicant was in control of the country he can claim no immunity based on his status as head of state.

Ian Brownlie Q.C., Peter Duffy Q.C., Michael Fordham, Owen Davies, Frances Webber and David Scorey for Amnesty International and others. Given the clear incorporation of the Torture Convention into English statute law, almost all the relevant international law has been brought into United Kingdom law and domesticated. That is a sufficient basis to determine the appeal. However, it is unrealistic to leave the matter at that and it is necessary to consider the wider issues.

The amnesty granted to the applicant in Chile is an issue for the Home Secretary to consider. If, however, it is unlikely that justice will be done in Chile the only matters to consider are the extradition proceedings and trial before the Spanish courts.

No immunity is provided by Part I of the State Immunity Act 1978 as it does not apply to criminal proceedings. No immunity is provided by Part III of the Act because the alleged acts cannot constitute official acts done in the exercise of the functions of a head of state. The relevant principles of international law do not recognise any immunity in respect of crimes of torture and hostage-taking, which are crimes against international law. In the absence of any basis for immunity in domestic law, as construed in the context of international law, the

applicant cannot derive any benefit from the act of state doctrine.

Neither a former head of state nor a current head of state can have immunity from criminal proceedings in respect of acts which constitute crimes under international law. There is no distinction between a head of state and a former head of state.

The immunity granted to a head of state by section 20 of the Act of 1978 is the same as the immunity accorded by the Diplomatic Privileges Act 1964 (incorporating the Vienna Convention) to an ambassador. The references to "sending state" and "receiving state" (see articles 1, 23 and 31 of the Convention) show that geographical focus is on immunity for acts performed within the United Kingdom Parliament cannot have intended that immunity to apply to conduct outside the United Kingdom. In any event, article 39(2) of the Vienna Convention, as applied by

section 20, only confers immunity in respect of acts performed in the exercise of functions which international law recognises as official functions of a head of state.

The intentions of Parliament when passing the State Immunity Act 1978 must be related to the intentions behind the Extradition Act 1989. Section 22 of the Act of 1989 makes express reference to the extradition crimes of torture and hostage taking and section 23 to genocide. With such crimes state oppression is the paradigm and the head of state is the paradigm accused. Parliament cannot have picked out such crimes for mention while intending to grant immunity for a head of state.

If there is no immunity under the statutes then it is necessary to consider whether there is immunity under the common law, a question which must be approached with caution for several reasons. First, it is appropriate to resolve any uncertainties by reference to the intentions of Parliament as articulated in legislation. Second, section 1 of the Diplomatic Privileges Act 1964 provides that its provisions shall "have effect in substitution for any previous enactment or rule of law." Third, the purpose of the State Immunity Act 1978, as stated in the long title, is "to make new provision with respect to the immunities and privileges of heads of state."

The English courts are open to the concept of consulting customary international law, as it has evolved over time, as a basis for the common law: see Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B.529, 551-554, 576-579; I Congreso del Partido [1983] 1 A.C. 244, 261 and Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82.

The common law has long since rejected absolute immunity in favour of a restricted theory which developed primarily in the context of civil proceedings and commercial matters: see the Trendtex and I Congreso cases.
Parliament has continued this restricting trend in, for example, the torts exception in section 5 of the Act of 1978 reflecting a policy against immunity in respect of death or personal injury even for the purposes of civil proceedings. Such an exception is also found in the Foreign Sovereign Immunities Act 1976 of the United States. Consequently there can be no immunity, for example, for a political assassination: see Letelier v. Republic of Chile (1980) 488 F.Supp.

665, 673; Shaw, International Law, 4th ed. (1997), p. 510-511 and J.R. Crawford "A Foreign State Immunities Act for Australia?" in The Australian Yearbook of International Law (1983), ed. D.W. Greig.

Apart from the conventions, the starting point is the Charter of the Nuremberg Tribunal (1945) which was annexed to the London Agreement. It is important to note that the London Agreement was an international agreement which was signed by 19 states in addition to the four victorious powers. It was intended from the first to be a law making exercise. The principles of the Charter were affirmed by General Assembly Resolution 95 of 11 December 1946. The victorious powers transformed themselves into the United Nations (the axis powers were not admitted until 1955) and all members signed Resolution 95. General Assembly resolutions are used for a variety of purposes and some, such as Resolution 95, are consciously law-making. Those law making powers are not to be taken lightly.

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The academic sources of customary international law tend to recognise a limited immunity enjoyed by a former head of state in respect of acts committed while acting as head of state. However, state immunity does not usually get discussed in the context of criminal liability. The only case in which a head of state claimed immunity in respect of criminal charges is Erich Honecker of East Germany: In re Honecker (1984) 80 I.L.R. 365. The opinion of jurists on criminal liability in a general context is clear that there is no immunity: see Oppenheim's International Law, vol. I, pp. 1043-1044 and footnote 3 on p. 366 and Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, pp. 52, 82-84, 88-89, 112-113. In so much as the passage in Satow's Guide to Diplomatic Practice, 5th ed. (1979), p. 10, para. 2.4 appears to disagree it is unlikely that the editors of such a specialised work would be concerned with developments in other areas of international law.

For further academic support for the proposition that immunity does not apply to crimes under international law see Manual of Military Law, Part III: The Law of War on Land, (1958) (ed. Sir Hersch Lauterpacht), pp. 179, 180, paras. 632, 637; Restatement of the Law 3rd: The Foreign Relations Law of the United States, vol. 1 (1986), p. 471, para. 464, note 14 and Brownlie's Principles of Public International Law 4th ed. (1990), p. 335.

Roncarelli v. Duplessis [1959] S.C.R.121 involved an official using his office to carry out a private and personal policy. There is no warrant for treating that case as determinative of the question whether acts would normally be described as "private" or committed "in person."

Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1 should be seen as a non-justiciability case rather than an act of state case. The act of state doctrine has no application to the applicant's case. The decision predates several major developments in international law such as the Geneva Convention of 1864, the harbinger of developments in the human rights field: see Oppenheim's International Law, vol. II, pp. 227-228. Even in 1848 the courts would not have ignored a piratical sovereign. It is important not to give an ambit to the

Duke of Brunswick decision which is unrelated to recent developments. Similarly Hatch v. Baez, 7 Hun 596 which relies heavily on the Duke of Brunswick case is of little authority.

There is no place for the act of state doctrine in the present case. It is the English policy of judicial self-restraint. The policy represents a supplementary principle but is not intended to block the effective operation of legislation. It is concerned with issues of justiciability which are not at all similar to issues of immunity which rely on the application of rules of law. Foreign acts of state may be disregarded if contrary to public policy in England: see Oppenheimer v. Cattermole [1976] A.C. 249, 278.

In so far as act of state is a principle of public international law it does not permit recognition of foreign acts of state which are contrary to international law: see Oppenheim's International Law, vol. 1, pp. 365-366 and Restatement of the Law 3rd: The Foreign Relations Law of the United States, vol. 1 (1986), p. 370, para. 443, and pp. 374-375.

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Extradition procedure is sui generis. The element of discretion has been canalised and transposed to the Home Secretary, hence the elements of the act of state doctrine are matters for him. There are grounds for the view that act of state does not apply to cases involving criminal charges against individuals. There is no English precedent to the contrary and American cases involve states for the most part and civil liability. Act of state is no more than a general principle of policy and is not a source of overriding principles.

There is no link between the creation of new principles of international law relating to crimes and the universality of jurisdiction of national courts as perceived by Lord Slynn of Hadley [2000] 1 A.C. 61, 79c-d. The existence of universal jurisdiction is a normal concomitant of universal crimes but not a requirement: see Oppenheim's International Law, vol. I, p. 468 and Shaw, International Law, p. 470. All crimes classed as international crimes attract no immunity.

There are not many criminal cases involving heads of state and examples of actual trials are very few. There are a few American cases which all involve waiver of immunity by the successor government. The low incidence of such cases is of no relevance.

The Government of Chile is not a party to these proceedings and is not impleaded. The immunity of a state itself cannot confer immunity from prosecution for international crimes. Chile is herself a party to the Torture Convention. Chile cannot confer or withdraw immunity in these circumstances. Chile does not have sole jurisdiction for the offences charged against the applicant. Issues of human rights are not part of the reserved areas of a state.

Duffy Q.C. following. The effect of section 134 of the Criminal Justice Act 1988 is that our courts are competent to deal with the crime of torture wherever it occurs and despite the official context in which the act was done (the purported performance of official duties is a constituent element of the crime). Section 134 leaves no scope for a domestic jurisdiction/invasion of sovereignty ouster or a defence based

on the act of state doctrine. Section 1(1) of the Taking of Hostages Act 1982 also provides for the personal criminal responsibility of the perpetrator regardless of his nationality or where the event occurred.

Section 134 refers without qualification to "public officials" or persons acting in an official capacity. A former head of state cannot be excluded from its ambit. The ordinary meaning of the words does not support limitation, and, as a provision giving effect to the United Kingdom's obligations under a Convention it should, where possible, be construed compatibly with those obligations. Thirdly, and decisively, the inclusion of heads of state is clear from the travaux of the Torture Convention are considered: see Burgers and Danelius, Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), pp. 41-46 and 119. Fourthly, to reject the exclusion of heads of state will put the Torture Convention in line with other international standards such as the Rome Statute of the International Criminal Court. Under customary international law heads of state are responsible internationally for grave crimes against humanity including torture.

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There is no need to consider public international law to reach the conclusions, based on the domestic statutes alone, that personal criminal responsibility exists in this country for the crimes for which the applicant's extradition is sought, that our courts are competent to rule on such crimes when committed in an official capacity, and that no scope is left for an act of state doctrine.

If personal criminal responsibility were to be tempered by state immunity the United Kingdom's obligations under the Torture Convention would be seriously compromised. To recognise a ratione materiae immunity in respect of complicity in torture would be to contradict the very scheme of the Torture Convention. In November 1998 the Committee Against Torture, the authoritative body established under article 17 of the Convention, recommended that the applicant's case should be considered by the public prosecutor with a view to initiating criminal proceedings in this country in the event that the decision is made not to extradite him. That recommendation is irreconcilable with the existence of a legitimate immunity for the applicant in this matter.

Section 20(1) of the State Immunity Act 1978, properly construed, is concerned with the international functions of a head of state. At most, it confers a ratione materiae immunity with regard to the international functions of a former head of state. The applicant cannot make out any immunity claim based on the Act. For the relationship between the common law and statute see Bennion on Statutory Interpretation, 3rd ed. (1997), pp. 133-135. Where statute is silent on whether the common law is to be abolished or modified the approach to be taken is that outlined in Harrison v. Tew [1990] 2 A.C. 523. Applying that test of inconsistency it is clear that the immunity claimed is inconsistent with the statutory schemes to be found in the various Acts concerning hostage-taking and torture.

To give effect to the will of the legislature any common law criminal immunity of a former head of state which may have existed prior to these enactments was modified by them so that the overriding effect of the statutory provisions for criminal jurisdiction can have effect.

Consideration of the relationship between the common law and public

international law produces the same result. The common law, absent statutory adjustment, is to be read consistently with public international law. The residual ratione materiae immunity enjoyed by a former head of state does not encompass that individual's conduct when it constitutes behaviour which is contrary to international criminal standards that states have engaged to enforce before their courts or by way of extradition.

[Reference was made to the Amnesty International document "United Kingdom: The Pinochet case - Universal jurisdiction and the absence of immunity for crimes against humanity" (January 1999) and the U.N.Security Council Resolution of 27 February 1995 on the arrest of persons responsible for acts within the jurisdiction of the Rwanda Tribunal.]

Instruments such as the Torture Convention mean that any customary international immunity of a serving head of state should be modified so as to make these fundamental norms effective against all who exercise any state power or function.

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At the heart of Chile's case is the claim that Chile has sole jurisdiction and the subject matter of this dispute concerns Chile's internal affairs. However, in Advisory Opinion No. 4 of 7 February 1923 (United Kingdom v. France) the Permanent Court of International Justice ruled that there was no automatic reserved internal affairs domain.

To regard the rule against torture as jus cogens and erga omnes underlines its fundamental place in the public policy of international law. Chile's assertion that jus cogens is not a principle which justifies supplanting pre-existing international law but is confined to treaties is unacceptable: see In re Barcelona Traction, Light and Power Co. Ltd. [1970] I.C.J. Rep. 3.

The effect of Chile's signature and ratification of the Torture Convention means that Chile has accepted the Convention's scheme that an alleged torturer is to be tried in the country in which he is found unless he is extradited for trial elsewhere. By its ratification of the treaty Chile has accepted this scheme by the most formal manner known to international law, and should be taken to have consented in principle to the exercises of the jurisdiction which its treaty obligations envisage.

Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B. Knowles for the applicant.

Montgomery Q.C. States and organs of states, including heads of state and former heads of state, are entitled to absolute immunity from criminal proceedings before national courts just as a state is entitled to immunity in respect of sovereign government acts. Far from being an anomalous relic, immunity from foreign courts ensures that competent jurisdiction is allocated to the state concerned. It is a doctrine of competence not impunity.

There are four hurdles which the appellants have to overcome to establish that immunity has been overridden in the instant case. (1) They must show that there exists a body of international criminal law overriding immunity for the alleged crimes. There is not the hint of a

suggestion that immunity in front of a foreign national court has been done away with. (2) They must prove that the international crime existed at the time the conduct complained of occurred or that when the international crime was created it was intended to have retrospective effect. (3) They must establish a universal jurisdiction in respect of the international crime so that Spain may assert it is prosecuting a crime in international law rather than asserting a permissive national jurisdiction over a non-international crime. The parties to the Convention on the Prevention and Suppression of the Crime of Genocide (1948) agreed on the establishment of an international crime to be tried before an international court or the home court of the perpetrators. If Israel prosecutes for genocide it is doing so on the basis of a permissive national jurisdiction not under that Convention. (4) They must establish that there is no conflict between rules of immunity and the principles which govern international crime. Rules of international law deal with liability, not jurisdiction. The recognition of a human right is quite different from conferring jurisdiction to try those who infringe it.

At the turn of the century there was an internationally accepted doctrine of absolute immunity in respect of all civil and criminal jurisdiction: see Chung Chi Cheung v. The King [1939] A.C. 160 and

Compania Naviera Vascongado v. S.S. Cristina [1938] A.C. 485. If that doctrine is to be limited there must be some developed competing rule of international law, created during the course of the century, limiting immunity in respect of identifiable international crimes and evidenced by a consistent and general state practice engendered by the belief that the practice is obligatory. Under the Torture and Hostage Taking Conventions or customary international law there must be an absolute duty to exert criminal process by extradition or before domestic courts without exception or scope for derogation of any sort for either the state or purposes of diplomatic immunity. If there is any derogation there is no reason in principle for saying a derogation cannot apply to a head of state. Any scope for the exercise of a discretion will militate against an absolute rule.

Under the Nuremberg trials process the vast majority of people were tried before the national courts of their own states. All the crimes criminalised under the Rome Statute of the International Criminal Court will be identified as ordinary national crimes. Most cases will be tried on home territory. There is no universal jurisdiction for such crimes. That is the position under international law.

The Conventions relied on by the appellants do not establish the rule for which they contend. Article 1of the Torture Convention defines torture as the intentional infliction of pain by "public officials" or those acting in an official capacity. Article 4refers to "all" torture and refers to all "forms" rather than "wherever occurring." There is nothing to alter the immunities under the Vienna Convention or any other immunities.

The term "public officials" does not include heads of state. The Nuremberg Charter, the Convention on the Prevention and Suppression of the Crime of Genocide (1948), the Yugoslav and Rwanda Charters and the Rome Statute all refer specifically to heads of state as well as public officials. It is therefore inconceivable that the framers of the Torture Convention intended to include heads of state within the

definition of public officials. The Criminal Justice Act 1988 is equally silent on the position of heads of state and Parliament must also have intended to exclude heads of state as Lord Slynn of Hadley concluded [2000] 1 A.C. 84a-b. The Hostages Convention and the Taking of Hostages Act 1982 are equally silent. [Reference was also made to Crawford, "The I.L.C. Adopts a Statute for an International Criminal Court" (1995) 89 A.J.I.L. 404 and Shubber "The International Convention Against the Taking of Hostages," British Yearbook of International Law 1982.]

The primary jurisdiction under the Torture Convention and the other Conventions is given to the state the offender comes from or where the offence took place and the obligation is to extradite a person to that state. Article 4 of the Torture Convention requires criminalisation of torture but is not concerned with jurisdiction. Article 5 does not require that the United Kingdom claims jurisdiction for all cases of torture wherever occurring. The Convention does not require that the United Kingdom try a Chilean for torture occurring in Chile if Chile refuses to exercise the jurisdiction. Either state has complete freedom whether or not to act.

Even though the Chilean Constitution outlawed torture it can still be described as a sovereign act if it is performed by a person as part of his

official functions. State immunity covers all people performing an official role. Acts done in connection with foreign relations, by the military or the police, are acts which are a manifestation of public and governmental power: see Propend Finance Pty. Ltd. v. Sing, The Times, 2 May 1997; Court of Appeal (Civil Division) Transcript No. 572 of 1997. The perpetrator is liable but it is his home state which can assert jurisdiction over him or waive immunity.

Although by ratifying the Torture Convention Chile has accepted Spain's right to try Chileans for torturing Spaniards in Chile, the Convention has no retrospective effect and the crux of this case is that it does not deal with Spanish victims but with Chilean victims. The Convention is not about immunity but about liability. The whole basis of diplomatic immunity would be undermined if the Convention gave jurisdiction for all acts of torture. The signatories were not intending that effect. It is because of the possibility of waiver of immunity by a home state that the Torture Convention allocates a right to any state to try anybody, although jurisdiction over torture will rarely raise issues of immunity.

Waiver of immunity must be either explicit or, if implicit, clear. Customary international law does not seem to recognise implied waiver. The only enactment which does is the American Foreign Sovereign Immunities Act 1976. Waiver is not an issue when an international tribunal asserts a jurisdiction over a state. The issue of waiver only arises when national courts are trying to assert jurisdiction. If the Torture Convention has to be seen as a waiver of immunity by all signatories it does not override the immunities under the Vienna Convention: see Frolova v. Union of Soviet Socialist Republics (1985) 761 F.2d 370, 376; Sampson v. Federal Republic of Germany (1997) 975 F.Supp. 1108 and Smith v. Socialist People's Libyan Arab Jamahiriya (1995) 886 F.Supp. 306. It is one thing for a state to assert a principle of international law by signing a Convention, quite another to relinquish

jurisdiction: see East Timor (Portugal v. Australia), Judgment [1995] I.C.J. Rep. 90. It is necessary for the appellants to show there was no immunity at the time the alleged acts occurred see: Princz v. Federal Republic of Germany, 26 F.3d 1166. The international Conventions concerned here were simply not dealing with immunity: see Reimann, "A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz" (1995) 16:403 M.J.I.L. 403.

The Torture Convention is the high point of the appellants' case but there is still a distinction between acts of state and assertion of jurisdiction. It takes more than one Convention to overturn hundreds of years of practice in the area.

Even if the Torture Convention has removed the head-of-state immunity it has not overriden previous rules which were relevant at the time the acts occurred. The language of the Convention is prospective and, in any event, the principle of non-retroactivity should not be broken without clear words. Nor did Parliament in enacting its provisions intend the Convention to have retrospective effect: see Hansard, H.L. 6th Series vol. 135 (1987-1988), 13-24 June. The Criminal Justice Act 1988 itself provided that section 134 should apply to offences two months after it

came into effect. Even if Chile has accepted third-party jurisdiction by ratifying the Torture Convention it still has a vested right to assert immunity up to the point when the Convention came into effect: see Carl Marks Co. Inc. v. Union of Soviet Socialist Republics (1987) 665 F.Supp. 323; (1988) 841 F.2d 26 and Jacobus v. Colgate (1916) 217 N.Y. 235.

The State Immunity Act 1978 applies to civil proceedings alone and the absolute immunity for states in criminal matters is left unaffected: see the Lord Chancellor's statement, Hansard, H.L.Debates, 17 January 1978, cols. 51-52. The problem section 20 of the Act was intended to address is the one identified by Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, pp. 53-58. The avowed purpose of section 20 was the private capacity protection but it is wider than that as the immunity covers both public and private acts: see also The British Yearbook of International Law 1980, pp. 429-436. Section 20 in clear and unequivocal terms confers the privileges contained in the Diplomatic Privileges Act 1964 on a head of state, whether or not he is in the United Kingdom. The intended effect of the amendment was to extend immunity to heads of state by mirroring customary international law. The Act and the Vienna Convention, article 31, confer on a former head of state an immunity ratione materiae for acts effected in his official capacity.

Parliament intended to extend to a head of state and a former head of state the full article 39(2) protection for official acts. In In re Former Syrian Ambassador to the German Democratic Republic (unreported), 10June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96 the court concluded that article 39 protection will stand even in the face of war crimes.

If the position is not governed by section 20 the customary international law position and test are exactly the same in that a former head of

state has immunity for acts effected in his official capacity: see Watts at p. 66. See also Satow's Guide to Diplomatic Practice, pp. 8-10; Oppenheim's International Law, vol. I, para. 456; The American Law Institute Restatement of the Law 3d: Foreign Relations Law of the United States (1986) vol. 1, p. 471, section 464; Lewis, State and Diplomatic Immunity, 3rd ed. (1999), pp. 125-126. The analyses of these writers are reflected in case law: see Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1. That was applied in Hatch v. Baez, 7 Hun 596 and followed in the United States in Underhill v. Hernandez (1897) 168 U.S. 250

In determining whether an act is sovereign, public or governmental and whether it is an official act for which a common law immunity subsists, assistance can be gained from the analysis which has been undertaken in identifying the bounds of the restrictive doctrine of state immunity in the context of distinguishing private commercial and trading transactions from transactions of state: see I Congreso del Partido [1983] 1 A.C. 244 and Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529. There is nothing to indicate that those restrictions on immunity which relate to certain civil proceedings are also intended to apply to criminal proceedings.

If Sucharitkul, "State Immunities and trading Activities in International Law" (1959) is correct in eliding civil and criminal proceedings then United Kingdom law is wider than international law and it is necessary to look at the issues considered in I Congreso del Partido and to decide on which side of the state/personal activity line the acts concerned here fall.

The American cases are distinguishable. They all involve either a waiver, private acts which cannot sensibly be said to have been done under the colour of state authority, or specific exceptions to immunity under the Foreign Sovereign Immunities Act 1976: see Jimenez v. Aristeguieta (1962) 311 F.2d 547; United States of America v. Noriega (1990) 746 F.Supp. 1506; (1997) 117 F.3d 1206; Hilao v. Estate of Marcos, 25 F.3d 1467; Lafontant v. Aristide (1994) 844 F.Supp. 128; Nelson v. Saudi Arabia (1991) 88 I.L.R. 189; Siderman de Blake v. Republic of Argentina, 965 F.2d 699; Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683; Al-Adsani v. Government of Kuwait, 107 I.L.R. 536 and Princz v. Federal Republic of Germany, 26 F.3d 1166.

The approach of the courts of other countries has been the same: see In re Honecker, 80 I.L.R. 365 and Marcos and Marcos v. Federal Department of Police (1989) 102 I.L.R. 198. The established practice is for states not to try foreign heads of state.

The United States and other countries have enacted specific exceptions to immunity but not one has enacted a human rights exception. Given the importance of establishing state practice that is significant. There is state practice condemning torture but none which denies immunity or vests jurisdiction. The American courts have taken the approach that they have claimed jurisdiction but do not intend to overrule immunity.

State practice has to be extensive and uniform over a significant period of time before any principle of jus cogens can arise: see North Sea Continental Shelf Case, Judgment [1969] I.C.J. Rep. 3. Even a convention or United Nations General Assembly Resolution does not become part of international law without state practice. The practice emerges when all the aspirations expressed in the convention or resolution are accepted by states and acted upon. When a high ideal, e.g. to prosecute crimes against humanity, is expressed, the practice is often the opposite - to give complete immunity to certain categories of people without carving out a human rights exception. In the face of such contrary practice it is impossible to say that immunity is overridden: see Saltany v. Reagan (1988) 702 F.Supp. 319 and Persinger v. Islamic Republic of Iran, 729 F.2d 835

State practice shows that there is immunity except for international crimes, namely genocide, war crimes and crimes against humanity. The definition of those crimes requires that they take place in the context of an armed conflict, even if it is only an internal conflict. They are crimes which threaten the peace or the world order. Torture does not and is not an international crime: see Higgins, Problems and Process: International Law and How We Use It (1994), pp. 87-89. The mere existence of a treaty to cover the conduct concerned does not make it an international crime. There are numerous treaties covering controlled drugs but possession of cannabis is not an international crime.

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

The precursor agreements to the Torture Convention do not support the appellants' case that it establishes customary rules. The General Assembly Resolution of 1973 and the Draft Agreement of 1975 demonstrate that torture was condemned in terms of aspiration only and that nothing was done to encourage third state jurisdiction. The most powerful argument against the Torture Convention as evidence of a customary international law practice is that it took until 1987 for the Convention to come into effect.

The appellants' argument that in any event the crimes alleged are crimes against humanity and have been since Nuremberg also fails. Crimes against humanity are always associated with armed conflict: see the Yugoslav Tribunal Statute and the Draft Code of Crimes Against the Peace and Security of Mankind (1996). The only agreement which took crimes against humanity out of an armed conflict scenario was the Draft Agreement of 1954 and the 1996 Draft reinstated the connection: see also Polyukhovich v. Commonwealth of Australia (1991) 91 I.L.R. 1.

International Law Commission Drafts have little weight as evidence of existing customary international law. If anything they are evidence of a lack of universal practice. The law on immunity is clearer as there is evidence of universal practice: see Higgins Problems and Process: International Law and How We Use It, pp. 87-89 and Brownlie, "Contemporary problems concerning the jurisdictional immunity of states," Institute of International Law Yearbook 1987, vol. 62, part 1. p. 13.

There was no conflict in Chile except on the day of the coup. The allegations against the applicant do not fall within the definition of crimes against humanity. The Spanish allegations are of torture, murder and conspiracy, not crimes against humanity.

In relation to pre-coup conduct, any conduct complained of before 11September 1973 is covered by either immunity or the act of state doctrine. Acts done pursuant to the planning and execution of a coup are, if the coup is successful, the acts of the state and protected: see Underhill v. Hernandez, 168 U.S. 250 and Oetjen v. Central Leather Co. (1918) 246 U.S. 297. Once there is the nucleus of a government the act of state doctrine applies from the start of the revolution, not from the formation of the new government: see Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888 and article 15 of the International Law Commission Draft Articles on State Responsibility.

Pre-coup conduct in 1973 was not an offence under English law and does not satisfy the extradition requirement of double criminality as at that time the statutes which could make the conduct a crime under English law had not been enacted. They have to rely on Lord Bingham of Cornhill C.J.'s formulation of the test and Lord Lloyd of Berwick [2000] 1 A.C. 61, 88d-e. Consideration has to be given to the time when the action occurred but the point goes further as consideration of the principle of double criminality under the Extradition Act 1989 shows.

The Extradition Act 1989 consolidated procedures for extradition to foreign states and Commonwealth countries and provided for new arrangements under the European Convention on Extradition (1957). The principle of double criminality must be the same for all circumstances. The

definition of an extradition crime for Schedule 1cases in paragraph 20 requires one to look back to the Extradition Act 1870 (33 34 Vict. c. 52). Section 26 of that Act defines an extradition crime and Schedule 1specifies the relevant date as the date of the alleged crime. [Reference was also made to United States of America v. Allard [1991] 1 S.C.R. 861; the Interdepartmental Working Party Report, "A Review of the Law and Practice of Extradition in the United Kingdom," (1982); the Green Paper, "Extradition" 1985 (Cmnd. 9421) and the White Paper "Criminal Justice Plans for Legislation," 1986 (Cmnd. 9658).]

The magistrate must exercise the extradition jurisdiction in the same way as the domestic criminal jurisdiction: see The Law Commission and The Scottish Law Commission "Report on the Consolidation of Legislation Relating to Extradition" 1989 (Law Com. No. 182; Scottish Law Com. 119). He must apply the law which existed at the time of the offence. The objective is to give the defendant the same rights as a defendant under English law: see Bassiouni, International Extradition: United States Law and Practice, 3rd ed. (1996), pp. 497-500, 596-598 and Shearer, Extradition in International Law (1971), pp. 136-139.

In the light of these authorities which were not before the Divisional Court or the previous Appellate Committee, the applicant cannot be extradited to Spain to stand trial in respect of acts which would not have been contrary to United Kingdom law at the time they were done because the provisions of the Torture Convention had not been brought into effect. "Conduct" in section 2 of the Act of 1989 is not just any activity taken out of its element and time but conduct which is punishable under United Kingdom law at the time when it takes place. The relevant time for determining double criminality is thus the date of the

alleged crime.

Nicholls Q.C. following. Even if "conduct" in section 2 of the Extradition Act 1989 contains no temporal element the pre-coup conduct is not an extradition crime because it is not the conduct with which the applicant is charged in Spain. For there to be liability to extradition under section 1 there must be a link between the offence with which a defendant is accused in the foreign state and the offences alleged in the extradition proceedings. It is not permissible for the Crown Prosecution Service to draft charges about the pre-coup period as that is not conduct complained about by Spain. It has been raised solely to avoid the immunity issue. The requesting state must specify the conduct complained about so the requested state can draft its own matching charges. It is incumbent on the magistrate to have regard to the crime with which the defendant is accused in the foreign state: see In re Nielsen [1984] A.C. 606.

All the Spanish charges relate to repression after the coup, not to conspiracies and plots. The applicant is not charged with a pre-coup conspiracy. Although the House can look at all the documentation now produced by the appellants, the first provisional warrant is definitive because it fixes the starting point. In so far as a plan is mentioned it is merely as factual background. All the substantive allegations relate to post-coup activities.

Applying the non retrospectivity principle and considering the current charges on the basis that section 134 came into force on 29 September

1988 very few survive. Hostage taking is not made out and conspiracy before the acts became criminal falls away.

Lawrence Collins Q.C. for the Government of Chile. Chile is intervening to defend its national sovereignty, to assert its interest in having the matters at issue dealt with in Chile, maintain the rule of law in Chile and to protect the national jurisdiction from outside interference contrary to international law, but not to defend the applicant's acts as head of state. The Government of Chile deplores the fact that the government at the time violated human rights and reaffirms its commitment to human rights. Chile's assertion of its own immunity is not intended as a personal shield for the applicant nor to grant him immunity from prosecution in Chile or impunity.

The sole questions for present purposes are whether a person is immune under section 1 of the Extradition Act 1989 in relation to conduct defined in section 2 and whether that conduct is immune under section 20 of the State Immunity Act 1978. Whether conduct amounts to an offence under English law is irrelevant. Section 1(1) of the Act of 1989 is general in its terms but it is natural to read it as subject to the normal immunities applicable to diplomats and heads of state. Such immunities are to be found only in the Act of 1978 and customary international law. Section 134 of the Criminal Justice Act does not provide an implied escape from immunity. The United Nations Committee Against Torture [1990] II, No. 1-2 H.R.L.J. 14 has decided that the Torture Convention does not have retrospective effect.

The Republic of Chile claims immunity from the courts of the United Kingdom for acts alleged to have been carried out by its former head of state, over which Chile and its national courts have sole jurisdiction.

The sovereign equality of states and the maintenance of international relations require that the courts of one state should not adjudicate on the governmental acts of another,or intervene in its internal affairs. Head of state immunity is an aspect of state immunity, which applies equally to criminal and civil proceedings and includes immunity for agents of the state acting in exercise of sovereign authority: see Yearbook of the International Law Commission 1980, vol. II (Part2), "Jurisdictional Immunities of States and their Property, Second Report," pp. 14-15, 18-19, 207-210; Zoernsch v. Waldock [1964] 1 W.L.R. 675; Propend Finance Pty. Ltd. v. Sing, The Times, 2 May 1997; Church of Scientology Case (1978) 65 I.L.R. 193 and Herbage v. Meese (1990) 747 F.Supp. 60. The immunity is for the benefit of the state, not the individual, and only the state may choose whether to waive it: see Jaffe v. Miller (1993) 13 O.R.(3d) 745. Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82 and Holland v. Lampen Wolfe [1999] 1 W.L.R. 188, C.A. show the parallel immunities of the individual and the state. If immunity, or absence of immunity, depends on questions of fact, then a party asserting immunity, or its absence, must show that there is a serious issue to be tried.

The rules of comity require that the United Kingdom does not assert or assist in the assertion of jurisdiction over the internal acts of a foreign state: see I Congreso del Partido [1983] 1 A.C. 244; Buck v. Attorney-General [1965] Ch. 745 and Institut de Droit International Annuaire,

vol. 64-II (1991), p. 389 "Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement." The Spanish charges are substantially based on the Report of the Chilean National Commission on Truth and Reconciliation (1991). As required by Presidential Decree No. 355 of 25 April 1990 the commission passed on relevant evidence to the Chilean courts and made proposals for action. These are not matters for foreign courts: see Azanian Peoples Organisation (A.Z.A.P.O.) v. President of the Republic of South Africa (1996) 8 B.C.L.R. 1015, a decision of the South African Court of Appeal on the status and constitutionality of amnesties granted by the South African Truth and Reconciliation Commission.

The immunity of an existing head of state for acts performed in his governmental capacity is well recognised. A similar immunity applies to a former head of state: see Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, p. 89; Hatch v. Baez, 7 Hun 596 and Marcos and Marcos v. Federal Department of Police, 102 I.L.R. 198.

In some cases state immunity has been denied to an individual claiming it. They involved circumstances where the acts concerned were the personal and private acts of the head of state (Ex-King Farouk of Egypt v. Christian Dior (1957) 24 I.L.R. 228 and Société Jean Desses v. Prince Farouk (1963) 65 I.L.R. 37), where the foreign state either did not claim or waived immunity (In re Grand Jury Proceedings, John Doe 700 (1987) 817 F.2d 1108; Republic of Philippines v. Marcos (1986) 806 F.2d 344; Hilao v. Estate of Marcos, 25 F.3d 1467

and Paul v. Avril (1993) 812 F.Supp. 207), where the defendant was not recognised as head of state (United States of America v. Noriega, 746 F.Supp. 1506; (1997) 117 F.3d 1206), or where the state had ceased to exist (In re Honecker, 80 I.L.R. 365).

Both international law and the State Immunity Act 1978 recognise a clear parallel between former head of state immunity and the immunity of former diplomatic agents now codified in article 39(2) of the Vienna Convention on Diplomatic Relations: see, Denza, Diplomatic Law, 2nd ed. (1998), pp. 357-363; Yearbook of the International Law Commission 1991, vol. II (Part 2) "Jurisdictional Immunities of States and their Property," p. 18; Mann, Studies in International Law (1973), pp. 422-433; Marcos and Marcos v. Federal Department of Police (1989) 102 I.L.R. 198 and Zoernsch v. Waldock [1964] 1 W.L.R. 675. In re Former Syrian Ambassador to the German Democratic Republic, 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96 stands alone in saying there is a major difference between diplomatic immunity and state immunity.

The test for immunity is whether the act is a governmental act or sovereign act: see I Congreso del Partido [1983] 1 A.C. 244. The applicant is not charged with private acts. The term "official acts" which so influenced the panel on the previous hearing [2000] 1 A.C. 61 finds no place in article 39(2). "Official" is misleading as it carries connotations of legality. The French use the expression "an act of public power:" Société Levant Express Transport v. Chemins de fer du gouvernement iranien (1969) in Grands Arrêts 3rd ed. (1998), p. 372. The paradigm case of the exercise

of sovereign power is military and police action: see Claim against Empire of Iran (1963) 45 I.L.R. 57; Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1; Nelson v. Saudi Arabia, 88 I.L.R. 189; Kendall v. Kingdom of Saudi Arabia (1965) 65 Adm. 885.

The only issue in the instant case is the jurisdiction of the foreign courts, not the legitimacy of the applicant's acts. Immunity subsists irrespective of whether the acts are illegal or unauthorised according to internal law or contrary to international law, since the whole purpose of state immunity is to prevent such issues being litigated in a foreign national court unless the state consents by treaty or otherwise. Chile is merely concerned to assert its national immunity and sole jurisdiction over the illegal acts. Wholly illegal acts can still be public acts: see Velasquez Rodriguez Case (1989) 95 I.L.R. 232.

There are two strands to the cases in international law on the imputed responsibility of the state for acts against aliens. For example, either the state is liable directly for the acts of its soldiers or is liable in a form of negligence for allowing a mob to take over: see In re United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rep. 3; 61 I.L.R. 504. These are not cases of vicarious liability but of state responsibility because the state is regarded as having done the deed.

Although there is no necessary correlation between state responsibility and state immunity the former offers the best guide as to where the immunity starts: see Brownlie's Principles of Public International Law, 5th ed. (1998), pp. 450, 454; Thomas H.Youmans (U.S.A.) v. United Mexican States (1926) 4 U.N.R.I.A.A. 110; The Maal Case (1903) 10 U.N.R.I.A.A. 730; Estate of Jean-Baptiste Caire (France) v. United Mexican States (1929) 5 U.N.R.I.A.A. 516.

The State Immunity Act 1978 does not cover the whole issue of immunity. In so far as section 20 and customary international law are not co-extensive customary international law is decisive.

The prohibition of torture by international law has the character of jus cogens or obligation erga omnes. The limits and application of jus cogens, a mandatory rule from which states cannot by agreement derogate, are controversial: see Brownlie's Principles of Public International Law, 5th ed. (1998), pp. 516-517 and Sinclair, The Vienna Convention on the Law of Treaties, 2nd ed. (1984), p. 209. It is not a rule of jurisdiction and does not supplant pre-existing customary international law. The concept of obligation erga omnes is used to widen the power of states to complain about the infringement of an obligation in international law but does not confer jurisdiction on international or national tribunals where it does not otherwise exist: see East Timor (Portugal v. Australia), In re [1995] I.C.J. Rep. 90, 122, para. 29; United States of America and Republic of France v. Dollfus Mieg et Cie. S.A.and Bank of England [1949] Ch. 369; [1950] Ch. 333, C.A.; [1952] A.C. 582 and The Monetary Gold [1954] I.C.J. Rep. 19.

Jus cogens and erga omnes do not impose on questions of immunity, nor is there any connection between those concepts and the personal responsibility of heads of state before international tribunals. The jurisdiction of an international court depends on the will of the parties. The statutes of international tribunals draw a distinction between heads of

state and government officials and the international conventions dealing with jurisdiction of national courts do not affect head of state immunity because they do not expressly override it.

The use of national courts for the trial of war crimes depends on the laws of war. The fact that heads of state or former heads of state can be liable before international tribunals leaves unaffected state immunity before a national court. State immunity is unaffected by the jurisdictional provisions of a treaty unless it is expressly waived. Consequently the Torture Convention and the Hostages Convention leave head of state immunity intact. There is no rule of international law that immunity ceases to be available in cases of violations of peremptory norms.

The law of war crimes is such that no conclusions can be derived from it which are applicable to other emerging international crimes. The basis of the jurisdiction is the right of a belligerent to punish war criminals who fall into its hands: see Oppenheim's International Law, vol. II, (1952), pp. 581, 587. The tribunals set up after the Second World War were established by the victors as

belligerent or occupying powers assuming the sovereignty of the defeated country: see Manual of Military Law, (1958), Part III "The Law of War on Land," ed. Sir Hersch Lauterpacht, pp. 173-184 and Lord Wright "War Crimes under International Law" (1946) L.Q.R. 45.

Article 7 of the Nuremberg Charter under which heads of state could be held liable before the tribunal was preceded by four years of intense discussion: see Stone, Legal Controls of International Conflict (1959), p. 357 and McDougal and Feliciano, The International Law of War: Transnational Coercion and World Public Order, (1994), p. 707. It is the formula which has been followed only in setting up subsequent war crimes tribunals: see article 7(2) of the Yugoslav Statute, article 6(2) of the Rwanda Statute. The only exception is article 27(1) of the Rome Statute of the International Criminal Court which is unexceptionable as any jurisdiction is based on the consent of the signatories. The powers over an existing or former head of state are exactly the same as they were in 1946: see the International Draft Code of Offences Against the Peace and Security of Mankind 1954 and General Assembly Resolution 3074 (XXVIII) of 3 December 1973. The International Law Commission Draft Code of Crimes 1996 is intended to be a recommendation for the future and is not a statement of present law as it contains almost no citation of state practice. It is prospective in nature and has provision for non-retroactivity.

The Rome Statute of the International Criminal Court is little evidence of customary international law and is mainly a political statement. In any event it has been signed but not ratified. However, it contains in article 98a clear affirmation of state immunity in national courts, although in the vast majority of cases an accused will be tried before the courts of his own country so immunity will not arise. This is the closest one gets to an international statute dealing with international crimes and it reasserts state and diplomatic immunity.

Chile ratified the Torture Convention on 30 September 1988 and it came into force in October 1988 but has no retrospective effect: see U.N.Committee Against Torture [1990] II, No. 1-2 H.R.L.J. 134. Under the Convention, however, no other state can try a torturer if his home

state claims immunity for him. There is no trace of discussion of immunity being waived before the Convention was opened for signature. Waiver of immunity by treaty must be express: see Yearbook of the International Law Commission 1991, vol. II (Part 2), p. 27; Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683 and the discussion in Oppenheim's International Law, vol. I, p. 351. A term can only be implied into a treaty for necessity, not to give the treaty maximum effect: see Oppenheim's International Law, vol. I, p. 1271. There is no obligation in the Torture Convention to which one can attach the implied waiver. Waiver cannot be implied on the basis that certain provisions of the treaty will not work without it. All the states which are signatories to the convention cannot be taken to have waived jurisdiction over public officials without express words. If that was thought to have been the effect of the Convention it would have been expressly stated.

The scheme of the Convention does encroach on territoriality but extended jurisdiction does not entail a waiver of immunity. The Convention is primarily concerned with the country where the torture took place and issues of third party jurisdiction are marginal to its

overall thrust. To have waived immunity in such a marginal area would have been a major step for the parties.

The immunity is the immunity of the state and has to be claimed by the state. This will only occur in exceptional circumstances. The normal procedure will be for the country where the torture occurred to request the return of the alleged torturer or repudiate him, but not to claim immunity. In any event, although the articles concerning criminal responsibility apply to heads of state the provisions do not abrogate head of state immunity.

An application by Spain to extradite a non-Spanish national for acts done outside Spain is not within the Torture Convention. Chile has not requested the extradition of the applicant as he is not a fugitive from Chile - his wish is to return to Chile.

The submissions apply equally to the Hostages Convention. There can have been no implied waiver because the Convention, although applicable to public officials, was not designed to deal with hostages taken by a state: see In re United States Diplomatic and Consular Staff in Tehran, Judgment, [1980] I.C.J. Rep. 3; 61 I.L.R. 504, 555.

To accept that torture has been prohibited since the 1970s is not to agree that it was also an international crime. It means that there is an obligation on states to ensure that no torture takes place within their territories. It is likely that, today, systematic and state planned torture would be regarded as a crime against humanity resulting in the personal responsibility of the actor and universal jurisdiction in regard to him. There is a growing consensus that crimes against humanity do not necessarily have to be allied to armed conflict. That, however, says nothing about immunity. There is no possible conflict between immunity and universal jurisdiction. There is no rule of customary international law requiring an exception to state immunity for breach of international law. On the contrary, state practice shows that in the United States and the United Kingdom state immunity legislation is subject to no such exception. The most important modern pronouncement of the International Court of Justice on the development of a customary rule is

to be found in the North Sea Continental Shelf Case, Judgment [1969] I.C.J. Rep. 3, 44.

It is clear from the decision in Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683 and McDowell, "Contemporary Practise of the United States Relating to International Law" (1976) 70 A.J.I.L. 817 that the American Foreign Sovereign Immunities Act 1976 was passed with international law well in mind and that the Departments of State and Justice were involved in drafting the legislation. Consequently the Act can be regarded as declaratory of international law: see also Siderman de Blake v. Republic of Argentina, 965 F.2d 699 and Al-Adsani v. Government of Kuwait, 107 I.L.R. 536.

The approach in these cases is equally applicable to claims against agents of the state as it is to the claims against the state itself. There is no rule of customary international law which requires a further exception to the accepted principles of state immunity from foreign national courts for breach of international law: see, Schreuer

"State Immunity: Some Recent Developments," Hersch Lauterpacht Memorial Lectures (1988), p. 60.

David Lloyd Jones as amicus curiae. It is still a live issue whether the applicant was head of state from 11 September 1973. In the past such questions have usually been resolved by executive certificate. In the absence of one it is permissible to consider evidence of fact and Chilean law: see Duff Development Co. Ltd. v. Government of Kelantan [1924] A.C. 797, 824. Although that passage was criticised in The Arantzazu Mendi [1939] A.C. 256, 264, no objection can be taken to admitting secondary evidence in the circumstances of the present case.

The United Kingdom recognised the new Government of Chile in September 1973. In English law that recognition was retroactive to the date when the government took control: see Aksionairnoye Obschestvo A.M. Luther v. James Sagor Co. [1921] 3 K.B. 532.

There is general consensus that there is a measure of continuing immunity ratione materiae for a former head of state in respect of his acts as head of state: see Satow's Guide to Diplomatic Practice, pp. 8-10; Oppenheim's International Law, vol. 1, para. 456; Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, pp. 52-58; Mann, Studies in International Law (1973), pp. 422-433; Hatch v. Baez, 7 Hun 596 and Marcos and Marcos v. Federal Department of Police, 102 I.L.R. 198. The rationale of the continuing immunity is that for a national court to exercise jurisdiction over the official acts of a former head of a foreign state would be to exercise jurisdiction over the state itself. The same rationale applies to the immunity granted to diplomats and other state officials. National principles reflect to varying degrees the principle of non-intervention in the internal affairs of other states: see Oppenheim's International Law vol. I, pp. 365-370; Zoernsch v. Waldock [1964] 1 W.L.R. 675, 692. Dinstein, "Diplomatic Immunity from Jurisdiction Ratione Materiae" (1966) 15 I.C.L.Q. 76, 81, 83, 86, 87 supports the view that not every act of state commands immunity from jurisdiction. In English law immunity ratione materiae and act of state non-justiciability are separate doctrines, but they share the same rationale.

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

The effect of section 20(1) of the State Immunity Act 1978 and the Vienna Convention on Diplomatic Relations is that a former head of state enjoys immunity from criminal proceedings in the United Kingdom in respect of his official acts performed in the exercise of his functions as head of state. This coincides exactly with the position in customary international law. If section 20 does not apply to the acts of a head of state while not in the United Kingdom and there is no statutory rule covering that situation it becomes easier to argue that any immunity granted by the common law is overridden by the Torture Convention. Section 20 should be interpreted in the light of the international law background and consistently with international law obligations unless the language of the statute compels the opposite conclusion: see Alcom Ltd. v. Republic of Colombia [1984] A.C. 580, 597. The statute applies the rules applicable to the head of a diplomatic mission by analogy to the head of state. There is a clear analogy between the two. For this purpose there is no significance in the fact that a

diplomat is "received" by the state. Section 20 provides a comprehensive code as to the way a head of state is to be treated by the United Kingdom. Of the possible restrictions, it would be strange if the section 20 immunity only applied to the foreign head of state's acts in the United Kingdom as hardly any of them are performed here. The provision does not say it is intended only to cover a visiting head of state in his official functions as a dignitary: see Hansard (H.L. Debates), 16 March 1978, col. 1536-1537; Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, p. 66 and Lewis, State and Diplomatic Immunity, 3rd ed. (1999), pp. 87, 89. Alimitation to matters arising in the United Kingdom from the private acts of a visiting head of state is not warranted by the wording of the statute or the rules of customary international law. There is no justification for confining the immunity to the representative functions of a head of state. Section 20 imports the whole body of international privileges and immunities.

Section 20 should be read in conjunction with articles 31 and 39(2) of the Vienna Convention on Diplomatic Relations as creating a rule of general application on immunities for heads of state. A former head of state enjoys immunity from the criminal jurisdiction of the United Kingdom in respect of his official acts performed in the exercise of his functions as head of state. This does not connote a requirement of legality in the municipal law of the head of state. That law cannot be decisive of the scope of the immunity ratione materiae of a former head of state. Article 3 of the Vienna Convention was not incorporated into English law, but the immunities of a head of state under international law still apply. The difference in position between a head of state and a head of government can be met by supplementing the head of government's immunity. If section 20 does not apply to a former head of state, then under the common law reflecting international law he enjoys immunity ratione materiae to the same extent as under the proposed reading of section 20.

The starting point in considering whether the applicable rule of immunity is that at the date of the extradition request or the date of the conduct is that immunity is a procedural exception to jurisdiction and in

general current law applies: see Denza, Diplomatic Law, pp. 256-257 and Empson v. Smith [1966] 1Q.B.426. However, different considerations may apply where the applicable rule of immunity depends on the legality of the conduct itself. That question should be answered by reference to the law in force at the date of the conduct: see per Lord Slynn of Hadley [2000] 1 A.C. 61, 81g-82a; cf.per Lord Steyn, at p. 117e-f.

If torture by a head of state is now outlawed under international law and therefore justiciable before foreign courts it is necessary for that point to have been reached at the time of the conduct. It is not enough to say that the conduct is illegal today. On the inter-temporal law see Jennings, The Acquisition of Territory in International Law, (1963), pp. 28-31 and article 28 of the Vienna Convention on the Law of Treaties.

There is no absolute rule that waiver of immunity must be express: see Frolova v. Union of Soviet Socialist Republics (1985) 761

F.2d 370. When parties enter into a later conflicting treaty it may expressly or impliedly vary its predecessor: article 59of the Vienna Convention on the Law of Treaties. The parties to the Torture Convention may be taken to have restricted immunity ratione materiae with prospective effect.

When considering the scope of the official acts of a head of state the legality of the conduct in question under the law of that state or the scope of his actual authority under that law cannot be the governing considerations. An act may be ultra vires but nevertheless be official for the purpose of immunity if performed in ostensible exercise of the actor's public authority: see Republic of Philippines v. Marcos, 806 F.2d 344; Jaffe v. Miller (1993) 13 O.R.(3d) 745. [Reference was made to Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, pp., 56-57; Jimenez v. Aristeguieta (1962) 311 F.2d 547 and Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1.] If legality under the law of the state concerned were determinative, the more repugnant its laws the greater would be the extent of the immunity to which the former head of state would be entitled. An act may be attributed to the state for purposes of state responsibility but is not necessarily regarded as an act of state: contrast Thomas H. Youmans (U.S.A.) v. United Mexican States (1926) 4 U.N.R.I.A.A. 110 and United States of America v. Noriega (1990) 746 F.Supp. 1506. As to a possible exception to the act of state doctrine in relation to illegality in international law see Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998. When considering whether the acts of a head of state are public or private it is necessary to look at the purpose and motive of the action. The United States authorities support the proposition that official acts are those taken on behalf of the state and do not include private acts of the actor himself and also the proposition that the fact that a head of state is alleged to have utilised his official position to engage in criminal activity does not necessarily make that activity a public act: see United States of America v. Noriega (1990) 746 F.Supp. 1506; Underhill v. Hernandez, 168 U.S. 250 and Jimenez v. Aristeguieta (1962) 311 F.2d 547.

In considering the offences alleged to have taken place outside Chile, a literal approach to the statutory provisions and a purposive approach based on the rationale for the immunity produce different results. On the

literal approach the acts done abroad are none the less official: see Kuwait Airways Corporation v. Iraqi Airways Co. [1995] 1 W.L.R. 1147, 1163a. On the purposive approach the rationale for the immunity, non-interference in the internal affairs of another state, no longer applies. Accordingly, although in one sense acts outside Chile can be regarded as official acts, the rule does not extend to grant immunity as acts which are not within the proper jurisdiction of the state cannot attract immunity: see Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1; Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171; Underhill v. Hernandez, 168 U.S. 250 and Liu v. Republic of China, 892 F.2d 1419.

There is a growing body of authority supporting the proposition that the

act of state doctrine does not legitimately exempt every sovereign act from jurisdiction: see, Dinstein "Diplomatic Immunity from Jurisdiction Ratione Materiae" (1966) 15 I.C.L.Q., 87; In re Goering (1946) 13 I.L.R. 203; Attorney-General of Israel v. Eichmann, 36 I.L.R. 5; Prosecutor v. Blaskic (Subpoenae) (1997) 110 I.L.R. 607.

In the United States the domestic act of state doctrine, at least in its initial form, reflected notions of the independence of sovereign states: Underhill v. Hernandez (1897) 168 U.S. 250; Banco Nacional de Cuba v. Sabbatino (1964) 376 U.S. 398; Kirkpatrick Co. Inc. v. Environmental Tectonics Corporation International, 110 S.Ct. 701; Kadic v. Karadzic (1995) 70 F.3d 232 and The Restatement of the Law 3rd: Foreign Relations Law of the United States, vol. 1, (1986), sections 443-444, pp. 366-389. The Antiterrorism and Effective Death Penalty Act 1996 creates a further exception to the statutory immunity of a foreign state and is in effect a human rights exception to the immunity. The Foreign Sovereign Immunities Act 1976 is not concerned with criminal jurisdiction.

The United Kingdom act of state non-justiciability doctrine may also admit of exceptions in the case of conduct contrary to public international law: Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998 and Kuwait Airways Corporation v. Iraqi Airways Co. [1995] 1 W.L.R. 1147; cf. Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888, 926, 937, 938. If the applicant enjoys immunity pursuant to section 20(1) of the State Immunity Act 1978 it is not necessary to consider whether, in addition, the issues raised fall within an independent rule of non-justiciability. If however, he is not entitled to the statutory immunity because the conduct in question was not official conduct performed in the exercise of his functions as a head of state or was outside his proper jurisdiction as head of state, the principle of non-justiciability can have no application.

The Torture Convention creates an offence which can only be committed by an official or a person acting in a public capacity. The Hostages Convention creates an offence which can be committed by an official. The contracting states are required to establish jurisdiction and exercise it in very wide circumstances. They have accepted that courts of other contracting states will exercise jurisdiction over such official acts: articles 5 and 7 of the Torture Convention. The treaties have widespread support and have almost certainly become customary international law. Their provisions have been incorporated into United Kingdom law by

section 134 of the Criminal Justice Act 1988 and section 1(1) of the Taking of Hostages Act 1982. Consequently allegations of torture and, probably, hostage taking by an official of a foreign state in the purported performance of his official duties are justiciable before the English courts. This might suggest that the proposed rationale for the subsisting immunity of a former head of state is absent in each case.

The argument that the Torture Convention has an overriding effect which removes all immunities goes further than the appellants need to go and perhaps goes too far. The Convention is concerned primarily with criminal offences in municipal law and the exercise of jurisdiction. It does not deal directly with immunity. There is no clear indication that

it intends to override or carve out exceptions to the immunities of currently serving diplomats or heads of state. The Convention would not be unworkable if those immunities remained, i.e., if it affected immunity ratione materiae but not ratione personae.

Although Chile is not impleaded in these proceedings the right of immunity the applicant asserts is indeed the right of Chile.

On their new case alleging pre-coup conspiracy the appellants have to show that the offences alleged are contrary to the law of Spain, that the requirements of the Extradition Act 1989 are satisfied, that the conduct is "official" for the purposes of section 134 of the Criminal Justice Act 1988 and that no principle of immunity or non-justiciability applies. Ahead of state does not have immunity ratione materiae in respect of acts performed before he became head of state although such acts may be attributable to the state for the purposes of state responsibility.

Montgomery Q.C. in reply. The argument that a purposive approach to the act of state doctrine allows for a human rights exception is flawed: Kuwait Airways Corporation v. Iraqi Airways Co., 29 July 1998. Act of state cannot be imported and grafted on to state immunity (in the English sense). Non-justiciability is relevant to act of state and not immunity: see Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82. Waiver of immunity must be express: Frolova v. Union of Soviet Socialist Republics (1985) 761 F.2d 370.

Jones Q.C. in reply. Two propositions of fundamental importance to modern extradition law and practice in relation to the definition of "extradition crime" in section 2(1) of the Extradition Act 1989 apply to all European Convention on Extradition (1957) requests falling within Part III of the Act. First, it is necessary that the conduct of which the defendant is accused would constitute, at the time when a decision-maker considers the matter in the United Kingdom proceedings, the crime specified in the authority to proceed in corresponding circumstances in the United Kingdom, whether or not the conduct constituted that crime when it had been committed. Second, it is necessary to examine, not the foreign law, but only the facts submitted by the requesting state under section 7(2) of the Act, article 12 of the European Convention on Extradition and further particulars submitted in accordance with article 13, in order to identify the conduct of which a defendant is accused within the meaning of section 1(1)(a) of the Act.

The issue whether the criminal conduct alleged amounts to an extradition crime has not previously been argued in depth by the

appellants because it was believed that it had been settled in the Divisional Court and by dicta of Lord Lloyd of Berwick [2000] 1 A.C. 88e-f. No argument was presented by the applicant on this question at the first hearing of the appeal.

The plain and literal language of section 2 of the Act of 1989 requires an examination as to whether the conduct is criminal in the United Kingdom at the time the decision maker considers the matter. An extradition crime according to section 2(1)(a) of the Act is one that "would constitute" rather than one that "would

have constituted" a crime in the United Kingdom and section 7(5) refers to crimes that "would be constituted" not "would have been constituted." The opening words of section 2 expressly state that the definition of extradition crime in Schedule 1to the Act is excluded. Accordingly the definition in Schedule 1which is expressly stated in the opening words of the Schedule to be derived from the Extradition Act 1870 cannot apply. The applicant's reliance on the Act of 1870 as an aid to construction of section 2 is misconceived.

Various other provisions of the Act make it plain that the "extradition crime" test has to be applied by reference to the current state of English law alone: see, sections 2(2), 7(5), 8(3), 9(8) (9) and 22(6). None of the requirements of section 7(1) or article 12 of the Extradition Convention is helpful in the construction of section 2(1) of the Act.

The scheme of extradition under the Act of 1989 is retrospective. A double criminality requirement for conduct to be criminal in both requesting and requested states at the time of the commission of the offence creates anomalies and arbitrary divisions into extraditable and non-extraditable conduct. A simple double criminality test applicable at the time of the extradition proceedings is both desirable and practical.

This view leads to no unfairness so long as the acts alleged are acts which are illegal in England, Spain and Chile now: see Bassiouni, International Extradition: United States Law and Practice. It is also consistent with the Act being phrased in the present tense.

It has been held in the Divisional Court that crimes committed in a foreign state before the coming into force of the Act of 1989 create a liability to be extradited although no express provision of the Act declares that it is to have retrospective effect. Crimes committed in a foreign country at a time that the foreign country was not included under the Act of 1989 create a liability to be extradited: see Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886 All conduct of which the applicant is accused was universally recognised as criminal when committed.

The Act of 1989 consolidated Acts containing contrasting approaches to double criminality all of which inform the construction of "extradition crime." The Extradition Act 1870 was rooted in a list system. The function of the magistrate was to perform a single composite test. He simply examined the conduct, including the time and place of commission and asked himself whether that conduct amounted to a listed crime when it had been committed.

The Fugitive Offenders Act 1881, applicable to rendition within Her Majesty's Dominions, provided a very different scheme which assists with

construction of the Fugitive Offenders Act 1967 and the Act of 1989. Unlike the Act of 1870 the magistrate had a two stage function. Section 9 gave a definition of crimes for which a defendant was extraditable requiring that under the law of the requesting country the crime was punishable by 12 months' imprisonment or more. A person might be extradited for conduct which was not criminal in the United Kingdom at the time it was committed or at all. The second duty of the magistrate, set out in section 5, was to commit the defendant if he found probable cause that, applying the law of the other country and English

rules of evidence, he was guilty. The Fugitive Offenders Act 1967, applicable to colonies and designated Commonwealth countries, required that the offence in the requesting and requested states be effectively identical. However it did not require that the crime was a crime in the United Kingdom at the time it was committed. The magistrate had a two stage function in contrast to the one stage function under the Act of 1870.

Section 3(1)(c) which used the words "would constitute an offence" has plainly mutated into the easier requirements of the Act of 1989 in section 2(1)(a) and (b). Section 7(5) has similarly mutated into section 9(8) of the Act of 1989.

The Australian Extradition Act 1988 provides an international precedent for the plain construction of the term "extradition crime:" see sections 7 and 19(2). The relevant time is specified to be the time when the request is made. The use of the present tense in the Act of 1989 allows the same inference to be drawn as is expressly stated in the Australian statute.

The Extradition Act 1989 was brought into effect to fulfill the United Kingdom's obligations under the Extradition Convention which the United Kingdom signed in 1957: see the European Convention on Extradition Order 1990 (S.I. 1990 No. 1507). In enacting the Act of 1989 Parliament was trying to pull together under one statute the three different things which were covered by the earlier Acts. It was easier to fit the Convention provisions into an area where the 12 month sentence rule already applied. Parliament was trying to give a looser definition of extradition crime. The result was a simple double criminality test.

Parts I and II of the Act have different tests. The date of the commission of the crime is applicable for Schedule 1 cases. For other cases the only relevant date is the date of the request.

In In re Nielsen [1984] A.C. 606, it was held that under the Act of 1870 there was no need under the definition of extradition crime for the magistrate to consult the treaty or foreign law at all to determine whether the fugitive criminal was accused of an extradition crime. By contrast the interpretation of the Fugitive Offenders Act 1967 led to the conclusion that the particulars in the foreign warrant had to be consulted independently of the evidence in the case in order to determine the "act or omission" of which the defendant was accused according to the foreign law and then to inquire whether that amounted to an English crime: see Government of Canada v. Aronson [1990] 1 A.C. 579. The two tests under that Act are two completely different tests unlike the one test of the Act of 1870.

The government papers preceding the enactment of the Act of 1989 ("A Review of the Law and Practice of Extradition in the United Kingdom: Report of the Interdepartmental Working Party" (May 1982),

the Green Paper on "Extradition" of 1985 (Cmnd. 9421) and the White Paper on "Criminal Justice: Plans for Legislation" of 1986 (Cmnd. 9658)) show that it was intended that: in order to satisfy the double criminality requirement a new simplified conduct test would be established eliminating the need to consult the foreign law and replacing the rule in the Aronson case, the list-based system of defining extraditable conduct would disappear and, in respect of states party to the European Convention on Extradition,

the prima facie case requirement would be abrogated. Nothing in those preparatory works suggest that double criminality requires an evidential finding in respect of the dates at which conduct occurred in Convention countries.

Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886 reasserts that the definition of "extradition crime" in section 2(1) calls for no examination of the foreign law but simply for an assessment of the conduct alleged.

The appellants' case pleads a course of conduct which includes murder, torture etc. There can be no possible retrospectivity argument in the light of section 1(4) of the Criminal Justice Act 1977. The allegation is that there was a conspiracy over 18 years which landed in Spain in 1975 when the applicant was in Spain for the funeral of Franco when he met those who took part in a later murder in Italy. Those facts if relating to England would confer jurisdiction on England: see Reg. v. Doot [1973] A.C. 807. It does the same for Spain when there is an international conspiracy and something is done in Spain in furtherance of the conspiracy. Spain then has jurisdiction to try the whole conspiracy.

It is impossible to say that extradition for the crimes alleged against the applicant is unfair. If a statute allowing for retrospective extradition infringes no rights, is not penal and does not impose disabilities it is difficult to see that such extradition is inherently unfair: see L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [1994] 1 A.C. 486, 525. In those cases where there may be unfairness all the safeguards, including section 11(3) of the Act and the discretion of the Secretary of State provide ample protection for the accused. The rule of double criminality is only one of the many safeguards found in the Act of 1989. Those safeguards have been present to differing extents in all the extradition statutes. The rationale behind the double criminality principle is that a country does not send a person under compulsion from its jurisdiction to be tried or punished abroad for crimes alien to its own system of law. There is no need to write into a statute a further artificial safeguard which that rationale does not call for.

Extradition is primarily an executive act. All the legislation has ever provided for is a series of procedural safeguards to ensure that certain conditions of legality and fairness are fulfilled before this executive act can take place. Extradition proceedings do not expose the applicant to either conviction or penalty. Retrospective extradition does not infringe any rights as there is no right never to be extradited, nor is it inherently unfair. The purpose of the proceedings is simply to enable another government to try a fugitive under laws in force at the time of the offence in the requesting state. Where in an individual case there is injustice or oppression, the provisions of section 11(3) of the Act of 1989 and the

unfettered discretion of the Secretary of State under sections 7(4) and 12(1) protect the defendant.

As a matter of law the disappearances alleged constitute continuing offences of torture to this day, providing thousands of torture charges since the Act of 1989 came into force.

Greenwood following. The military junta which took power in Chile on 11 September 1973 left the office of head of state open until either 26 June 1974, when the applicant was appointed Supreme Chief of the Nation and invested with the sash of office previously worn by the Presidents of Chile, or 17 December 1974 when he was appointed President. If he was already head of state it is difficult to comprehend to what he was appointed on those dates.

The question whether the United Kingdom is under a duty to Chile to accord immunity to the applicant in respect of all or any of the draft charges has to be decided by reference to the common law as, it is now accepted, section 20(1) of the State Immunity Act 1978 is not applicable.

While immunity and act of state are separate concepts it is only immunity ratione personae which is clearly and invariably distinguished from act of state. Many cases are cited in relation to both immunity ratione materiae and act of state: see, e.g. , Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1 and Underhill v. Hernandez, 168 U.S. 250. If the applicant is not immune there is no place for application of the act of state doctrine. However, the converse is true. If the act of state doctrine would not apply then there is no reason or duty to accord immunity ratione materiae.

The Torture Convention and section 134 of the Criminal Justice Act 1988 do not operate to override all immunity. Neither operates to remove the immunity ratione personae of a serving diplomat. Immunity ratione personae is a question of status. To say he cannot be prosecuted for torture is merely to say that his office shields him. A diplomat is not immune from the jurisdiction of his home state and if he were to return to the host state after leaving office he would be open to prosecution. However, once a diplomat has ceased to be accredited, he has only immunity ratione materiae for acts performed in the exercise of his functions as a diplomat. It is that immunity which cannot extend to torture.

Since section 20(1)(a) of the Act of 1978 accords immunity ratione personae to a serving head of state while he is in the United Kingdom, in practice the United Kingdom could not exercise criminal jurisdiction over a serving head of state in the absence of waiver. It is immunity ratione materiae alone which is affected by the Torture Convention and other international instruments of that kind.

The supposed immunity of all officials and former officials of one state from the criminal jurisdiction of other states is not supported by the practice of states. The very idea of a state being subject to the criminal process is almost, if not wholly theoretical. Neither In re Honecker, 80 I.L.R. 365 nor Marcos and Marcos v. Federal Department of Police, 102 I.L.R. 198 is directly in point. There have been no cases in which former heads of state have been prosecuted before the national courts of another state, but as the Permanent Court of International Justice held in

The Case of the S.S. Lotus Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10, the fact that states do not prosecute a particular category of offence or defendant does not in itself establish that they may not do so. The reaction of other states to the proceedings against the applicant, particularly the extradition requests from France and Switzerland, suggest that those countries have formed a prima facie

opinion that the applicant has no immunity.

There is a substantial body of state practice in other contexts asserting the right to exercise jurisdiction over the officials and former officials of foreign states. States have always exercised criminal jurisdiction over foreign officials and former officials in respect of crimes committed on the territory of the forum state: see In re Former Syrian Ambassador to the German Democratic Republic, 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96.

States have asserted a broad extraterritorial jurisdiction over offences which are frequently committed by officials of foreign states. Whatever misgivings might exist about the Nuremberg trial the principle that states could try officials of foreign states for war crimes was the subject of unanimous confirmation by the U.N.General assembly in 1946. Cases regarding immunity from civil jurisdiction such as Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683; Siderman de Blake v. Republic of Argentina, 965 F.2d 699 and Al-Adsani v. Government of Kuwait,) 107 I.L.R. 536 are not in point.

The thesis that the official act of a state official is an act of state in the non-technical sense and is accordingly imputable to the state, which alone can be held liable for it, confuses the idea that the act is attributable to the state so that the state can be held responsible for it with the concept of criminal responsibility. The conclusion does not follow since the criminal responsibility of the individual is in addition to, not in substitution for, the responsibility (which is civil in character and which can normally be enforced only on the international plane) of the state. The proposition is the act of state defence put forward in numerous war crimes cases and rejected.

The principle of par in parem non habet imperium is not absolute and has to be balanced against other factors, including the fact that states have accepted through agreements such as the Torture Convention that certain conduct of their officials will be the subject of adjudication in other states. The principle of non-intervention is undoubtedly important but it presupposes that the matters in question do fall within the internal affairs of a particular state. Acts of murder or torture committed by the agents of state Ain the territory of state B cannot be regarded as part of the internal affairs of state A. Moreover, during the course of the century the treatment by a state of its own citizens, at least in certain areas of fundamental importance, has ceased to be regarded as a matter of internal affairs. The violation of a norm of jus cogens certainly is not so regarded.

In In re United States Diplomatic and Consular Staff in Tehran [1980] I.C.J. Rep. 3; 61I. L.R. 504 the International Court did not exonerate Iran of all responsibility. It found that the Iranian government was not responsible for the take-over of the embassy itself but concluded that,

within days, the government was supporting the students in their continued occupation.

It is common ground that torture, hostage taking and murder were at no time part of the functions of the head of state of Chile. The Chilean

Constitution prohibited torture at all relevant times and the military government always denied that there had been any departure from this prohibition. This is to be contrasted with the attitude of the United States government to the death row phenomenon which it has always maintained does not amount to cruel and unusual punishment contrary to the Constitution.

The conduct alleged falls within the scope of an international crime whether one applies the Torture Convention or the customary law of crimes against humanity. The allegations clearly suggest widespread or systematic use of torture against a civilian population - a crime against humanity. The supposed requirement of a nexus with armed conflict, if it was ever part of international law, ceased to be so many years ago: see the International Law Commission Draft Code of 1954; Prosecutor v. Tadic (unreported), 7 May 1997, International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-T and article 3 of the Statute of the Rwanda Tribunal.

Torture under the Torture Convention can only be committed by an official and the Convention is therefore totally inconsistent with the notion of immunity for officials in respect of torture.

Nicholls Q.C. in reply. It is a fallacy to read "would constitute" in section 2(1) and 2(2) of the Act as "would have constituted." "Conduct" in section 2 means the acts alleged in the foreign state together with their associated geographical and temporal components. Section 2 requires the conduct to have been criminal at the time it was committed.

The references in section 22(4) of the Act of 1989 to offences of torture and hostage-taking and other "Convention cases" are related to their parent Conventions (which are and were intended to be prospective) and suggest that those offences are to be construed by reference to their temporal element and that extradition ought not to be allowed for such offences if committed prior to the coming into force of the Convention.

If "conduct" is devoid of any geographical and temporal components, section 9(8) leads to the principle of double criminality operating in different ways depending on whether the request is from a Convention country or a country in respect of which a prima facie case needs to be established. That produces absurd results which Parliament cannot have intended. While the applicant could, on that interpretation, be extradited to Spain he could not be extradited to Chile, the United States or any Commonwealth country. The appellants have failed to address this absurdity.

If the European Convention on Extradition had removed the evidence requirement the scheme of the Convention would have demonstrated that double criminality was irrelevant. The contrary is the case. The scheme makes clear that double criminality is to be preserved. The removal of the requirement of a prima facie case was a significant weakening of protection for the accused. The Convention would not also have removed

the other significant protection of double criminality without express words to that effect.

It is clear that it was the intention of the Convention that the

requested state consider the time at which the offence was committed in the course of deciding whether an offence was extraditable.

Although there is no need for the extradition treaty to have been in force at the date of the conduct nevertheless double criminality requires the conduct to have been criminal in the requested state at the time of its commission. For the distinction between the two principles see the Restatement of the Law 3d: The Foreign Relations Law of the United States (s. 476) and Bassiouni, International Extradition: United States Law and Practice, pp. 497, 500, 598.

Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886 was concerned with conduct prior to the coming into force of the Act enabling extradition and is therefore irrelevant to the instant issue.

The Act of 1989 was a consolidating Act. As such it is presumed not to have changed the law. It would therefore be surprising if the Act introduced a wholly new test for double criminality when both the Fugitive Offenders Act 1967 and the Extradition Act 1870 required the conduct to have been criminal in the United Kingdom at the date of its commission in the foreign state or colony. There is nothing in the legislative history of the provisions which became the Act of 1989 (which were included originally in the Criminal Justice Act 1988 but were never brought into force) to suggest that Parliament intended the Act to enact a significantly altered double criminality principle.

In any event, to allow extradition for conduct which was not criminal in the United Kingdom at the time of its commission and which could not be tried there would be unfair and would breach article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Their Lordships took time for consideration.

24 March. Lord Browne-Wilkinson. My Lords, as is well known, this case concerns an attempt by the Government of Spain to extradite Senator Pinochet from this country to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was head of state in Chile. The interaction between the various legal issues which arise is complex. I will therefore seek, first, to give a short account of the legal principles which are in play in order that my exposition of the facts will be more intelligible.

Outline of the law

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an "extradition crime" is now contained in the Extradition Act 1989. That Act defines what

constitutes an "extradition crime." For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United

Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm. 1775). The obligations placed on the United Kingdom by that Convention (and on the other 110 or more signatory states who have adopted the Convention) were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention "all" torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed. If, on the other hand, the double criminality rule only requires the conduct to be criminal under U.K. law at the date of extradition the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

In these circumstances, the first question that has to be answered is whether or not the definition of an "extradition crime" in the Act of 1989 requires the conduct to be criminal under U.K. law at the date of commission or only at the date of extradition.

This question, although raised, was not decided in the Divisional Court. At the first hearing in this House [2000] 1 A.C. 61 it was apparently conceded that all the matters charged against Senator Pinochet were extradition crimes. It was only during the hearing before your Lordships that the importance of the point became fully apparent. As will appear, in my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under U.K. law. It follows that the main question discussed at the earlier stages of this

case - is a former head of state entitled to sovereign immunity from arrest or prosecution in the U.K. for acts of torture - applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small

amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes. But first I must state shortly the relevant facts.

The facts

On 11 September 1973 a right-wing coup evicted the left-wing regime of President Allende. The coup was led by a military junta, of whom Senator (then General) Pinochet was the leader. At some stage he became head of state. The Pinochet regime remained in power until 11 March 1990 when Senator Pinochet resigned.

There is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals, all on a large scale. Although it is not alleged that Senator Pinochet himself committed any of those acts, it is alleged that they were done in pursuance of a conspiracy to which he was a party, at his instigation and with his knowledge. He denies these allegations. None of the conduct alleged was committed by or against citizens of the United Kingdom or in the United Kingdom.

In 1998 Senator Pinochet came to the United Kingdom for medical treatment. The judicial authorities in Spain sought to extradite him in order to stand trial in Spain on a large number of charges. Some of those charges had links with Spain. But most of the charges had no connection with Spain. The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the State of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasise too strongly that that is no concern of your Lordships. Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.

[2000]

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1 A.C.

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

Lord Browne-Wilkinson

On 16 October 1998 an international warrant for the arrest of Senator Pinochet was issued in Spain. On the same day, a magistrate in London issued a provisional warrant ("the first warrant") under section 8 of the Extradition Act 1989. He was arrested in a London hospital on 17 October 1998. On 18 October the Spanish authorities issued a second international warrant. A further provisional warrant

("the second warrant") was issued by the magistrate at Bow Street Magistrates' Court on 22 October 1998 accusing Senator Pinochet of:

"(1) Between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties; (2) between 1 January 1988 and 31 December 1992 being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties; (3) between 1 January 1982 and 31 January 1992 he detained other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act threatened to kill, injure or continue to detain the hostages; (4) between 1 January 1982 and 31 January 1992 conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages; (5) between January 1976 and December 1992 conspired together with persons unknown to commit murder in a Convention country."

Senator Pinochet started proceedings for habeas corpus and for leave to move for judicial review of both the first and the second provisional warrants. Those proceedings came before the Divisional Court (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) which on 28 October 1998 quashed both warrants. Nothing turns on the first warrant which was quashed since no appeal was brought to this House. The grounds on which the Divisional Court quashed the second warrant were that Senator Pinochet (as former head of state) was entitled to state immunity in respect of the acts with which he was charged. However, it had also been argued before the Divisional Court that certain of the crimes alleged in the second warrant were not "extradition crimes" within the meaning of the Act of 1989 because they were not crimes under U.K. law at the date they were committed. Whilst not determining this point directly, Lord Bingham of Cornhill C.J. held that, in order to be an extradition crime, it was not necessary that the conduct should be criminal at the date of the conduct relied upon but only at the date of request for extradition.

The Crown Prosecution Service (acting on behalf of the Government of Spain) appealed to this House with the leave of the Divisional Court. The Divisional Court certified the point of law of general importance as being "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." Before the appeal came on for hearing in this House for the first time, on 4 November 1998 the Government of Spain submitted a formal request for extradition which greatly expanded the list of crimes alleged in the second

provisional warrant so as to allege a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, such conduct taking place primarily in Chile but also elsewhere.

The appeal first came on for hearing before this House between 4 and 12

November 1998. The Committee heard submissions by counsel for the Crown Prosecution Service as appellants (on behalf of the Government of Spain), Senator Pinochet, Amnesty International as interveners and an independent amicus curiae. Written submissions were also entertained from Human Rights Watch. That Committee entertained argument based on the extended scope of the case as put forward in the request for extradition. It is not entirely clear to what extent the Committee heard submissions as to whether all or some of those charges constituted "extradition crimes." There is some suggestion in the judgments that the point was conceded. Certainly, if the matter was argued at all it played a very minor role in that first hearing. Judgment was given on 25 November 1998. The appeal was allowed [2000] 1 A.C. 61 by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) on the grounds that Senator Pinochet was not entitled to immunity in relation to crimes under international law. On 15 January 1999 that judgment of the House was set aside [2000] 1 A.C. 119 on the grounds that the Committee was not properly constituted. The appeal came on again for rehearing on 18 January 1999 before your Lordships. In the meantime the position had changed yet again. First, the Home Secretary had issued to the magistrate authority to proceed under section 7 of the Act of 1989. In deciding to permit the extradition to Spain to go ahead he relied in part on the decision of this House at the first hearing that Senator Pinochet was not entitled to immunity. He did not authorise the extradition proceedings to go ahead on the charge of genocide: accordingly no further arguments were addressed to us on the charge of genocide which has dropped out of the case.

Secondly, the Republic of Chile applied to intervene as a party. Up to this point Chile had been urging that immunity should be afforded to Senator Pinochet, but it now wished to be joined as a party. Any immunity precluding criminal charges against Senator Pinochet is the immunity not of Senator Pinochet but of the Republic of Chile. Leave to intervene was therefore given to the Republic of Chile. The same amicus, Mr. Lloyd Jones, was heard as at the first hearing as were counsel for Amnesty International. Written representations were again put in on behalf of Human Rights Watch.

Thirdly, the ambit of the charges against Senator Pinochet had widened yet again. Spain had put in further particulars of the charges which they wished to advance. In order to try to bring some order to the proceedings, Mr. Alun Jones, for the Crown Prosecution Service, prepared a schedule of the 32 U.K. criminal charges which correspond to the allegations made against Senator Pinochet under Spanish law, save that the genocide charges are omitted. The charges in that schedule are fully analysed and considered in the speech of my noble and learned friend, Lord Hope of Craighead, who summarises the charges as follows: charges

1, 2 and 5: conspiracy to torture between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990; charge 3: conspiracy to take hostages between 1 August 1973 and 1 January 1990; charge 4: conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990; charges 6 and 8: torture between 1 August 1973 and 8 August 1973 and on 11 September 1973; charges 9 and 12: conspiracy to murder in Spain between 1 January

1975 and 31 December 1976 and in Italy on 6 October 1975; Charges 10 and 11: attempted murder in Italy on 6 October 1975; charges 13-29; and 31-32: torture on various occasions between 11 September 1973 and May 1977; charge 30: torture on 24 June 1989. I turn then to consider which of those charges are extradition crimes.

Extradition crimes

As I understand the position, at the first hearing in the House of Lords the Crown Prosecution Service did not seek to rely on any conduct of Senator Pinochet occurring before 11 September 1973 (the date on which the coup occurred) or after 11 March 1990 (the date when Senator Pinochet retired as head of state). Accordingly, as the case was then presented, if Senator Pinochet was entitled to immunity such immunity covered the whole period of the alleged crimes. At the second hearing before your Lordships, however, the Crown Prosecution Service extended the period during which the crimes were said to have been committed: for example, see charges 1 and 4 where the conspiracies are said to have started on 1 January 1972, i.e. at a time before Senator Pinochet was head of state and therefore could be entitled to immunity. In consequence at the second hearing counsel for Senator Pinochet revived the submission that certain of the charges, in particular those relating to torture and conspiracy to torture, were not "extradition crimes" because at the time the acts were done the acts were not criminal under the law of the United Kingdom. Once raised, this point could not be confined simply to the period (if any) before Senator Pinochet became head of state. If the double criminality rule requires it to be shown that at the date of the conduct such conduct would have been criminal under the law of the United Kingdom, any charge based on torture or conspiracy to torture occurring before 29 September 1988 (when section 134 of the Criminal Justice Act 1988 came into force) could not be an "extradition crime" and therefore could not in any event found an extradition order against Senator Pinochet.

Under section 1(1) of the Act of 1989 a person who is accused of an "extradition crime" may be arrested and returned to the state which has requested extradition. Section 2 defines "extradition crime" so far as relevant as follows:

"(1) In this Act, except in Schedule 1, 'extradition crime' means - (a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment,

and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law; (b) an extraterritorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies - (i) the condition specified in subsection (2) below; or (ii) all the conditions specified in sub-section (3) below. (2) The condition mentioned in subsection (1)(b) (i) above is that in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of

12 months, or any greater punishment. (3) The conditions mentioned in subsection (1)(b) (ii) above are - (a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender; (b) that the conduct constituting the offence occurred outside the United Kingdom; and (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment."

The question is whether the references to conduct "which, if it occurred in the United Kingdom, would constitute an offence" in section 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition ("the request date") or the date of the actual conduct ("the conduct date"). In the Divisional Court, Lord Bingham of Cornhill C.J. held that the words required the acts to be criminal only at the request date. He said:

"I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in section 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the relevant time 'have constituted' an offence and section 2(3)(c) would have said 'would have constituted.' I therefore reject this argument."

Lord Lloyd (who was the only member of the Committee to express a view on this point at the first hearing) took the same view. He said, at p. 88:

"But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act 1989. 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."

My Lords, if the words of section 2 are construed in isolation there is room for two possible views. I agree with Lord Bingham of Cornhill C.J. and Lord Lloyd that, if read in isolation, the words "if it occurred ... would constitute" read more easily as a reference to a hypothetical event

happening now, i.e. at the request date, than to a past hypothetical event, i.e. at the conduct date. But in my judgment the right construction is not clear. The word "it" in the phrase "if it occurred ..." is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be "would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom." The answer to that question would depend upon the United Kingdom law at that date.

But of course it is not correct to construe these words in isolation and your Lordships had the advantage of submissions which strongly indicate that the relevant date is the conduct date. The starting point is that the Act of 1989 regulates at least three types of extradition.

First, extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the European Convention on Extradition. In this class of case (which is not the present one) the procedure under Part III of the Act of 1989 requires the extradition request to be accompanied by evidence sufficient to justify arrest under the Act: section 7(2)(b). The Secretary of State then issues his authority to proceed which has to specify the offences under U.K. law which "would be constituted by equivalent conduct in the United Kingdom:" section 7(5). Under section 8 the magistrate is given power to issue a warrant of arrest if he is supplied with such evidence "as would in his opinion justify the issue of a warrant for the arrest of a person accused:" section 8(3). The committal court then has to consider, amongst other things, whether "the evidence would be sufficient to warrant his trial if the extradition crime had taken place within jurisdiction of the court:" section 9(8)(a) (emphasis added). In my judgment 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 whole process of arrest and committal leads to a position where under section 9(8) the magistrate has to be satisfied that, under the law of the United Kingdom, if the conduct "had occurred" the evidence was sufficient to warrant his trial. This is a clear reference to the position at the date when the conduct in fact occurred. Moreover, it is in my judgment compelling that the evidence which the magistrate has to consider has to be sufficient "to warrant his trial." Here what is under consideration is not an abstract concept whether a hypothetical case is criminal but a hard practical matter - would this case in relation to this defendant be properly committed for trial if the conduct in question had happened in the United Kingdom? The answer to that question must be "No" unless at that date the conduct was criminal under the law of the United Kingdom.

The second class of case dealt with by the Act of 1989 is where extradition is sought by a foreign state which, like Spain, is a party to the European Extradition Convention. The requirements applicable in such a case are the same as those I have dealt with above in relation to the first class of case save that the requesting state does not have to present evidence to provide the basis on which the magistrate can make his order to commit. The requesting state merely supplies the information. But this provides no ground for distinguishing Convention cases from the first class

of case. The double criminality requirement must be the same in both classes of case.

Finally, the third class of case consists of those cases where there is an Order in Council in force under the Extradition Act 1870 (33 34 Vict. c.52). In such cases, the procedure is not regulated by Part III of the Act of 1989 but by Schedule 1 to the Act of 1989: see section 1(3). Schedule 1 contains, in effect, the relevant provisions of the Act of

1870, which subject to substantial amendments had been in force down to the passing of the Act of 1989. The scheme of the Act of 1870 was to define "extradition crime" as meaning "a crime which, if committed in England ... would be one of the crimes described in the first schedule to this Act:" section 26. The first schedule to the Act of 1870 contains a list of crimes and is headed: "The following list of crimes is to be construed according to the law existing in England ... at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act." (Emphasis added.)

It is therefore quite clear from the words I have emphasised that under the Act of 1870 the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date. Paragraph 20 of Schedule 1 to the Act of 1989 provides:

"'extradition crime,' in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order."

Therefore in this class of case regulated by Schedule 1 to the Act of 1989 the same position applies as it formerly did under the Act of 1870, i.e. the conduct has to be a crime under English law at the conduct date. It 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. But the case is stronger than that. We were taken through a trawl of the travaux préparatoires relating to the Extradition Convention and the departmental papers leading to the Act of 1989. They were singularly silent as to the relevant date. But they did disclose that there was 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 (i.e. the conduct date) by a side wind and without investigation.

The charges which allege extradition crimes

The consequences of requiring torture to be a crime under U.K. law at the date the torture was committed are considered in Lord Hope's speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which section 134 came into effect) are not extraditable, i.e. only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and

the single act of torture alleged in charge 30 are extradition crimes relating to torture.

Lord Hope also considers, and I agree, that the only charge relating to hostage-taking (charge 3) does not disclose any offence under the Taking of Hostages Act 1982. The statutory offence consists of taking and detaining a person (the hostage), so as to compel someone who is not the

hostage to do or abstain from doing some act: section 1. But the only conduct relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offence. The hostage charges therefore are bad and do not constitute extradition crimes.

Finally, Lord Hope's analysis shows that 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 are extradition crimes.

I must therefore consider whether, in relation to these two surviving categories of charge, Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939-45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Nuremberg Charter: Charter of the International Military Tribunal, adopted by the Big Four Powers (1945) in my judgment those doubts were stilled by the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (G.A. Res. 95, 1st Sess., 1144; U.N. Doc. A/236 (1946)). That affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see Oppenheim's International Law, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.), p. 996; note 6 to article 18 of the International

Law Commission Draft Code of Crimes Against the Peace and Security of Mankind; Prosecutor v. Furundzija (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for the Former Yugoslavia (article 5) and Rwanda (article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, i.e. one of those rules of international law which have a particular status. In the Furundzija case, at paragraphs 153 and 154, the tribunal said:

"Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force ... Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."

See also the cases cited in note 170 to the Furundzija case.

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution:" Demjanjuk v. Petrovsky (1985) 603 F.Supp. 1468; 776 F.2d 571.

It was suggested by Miss Montgomery, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see the Demjanjuk case; Attorney-General of Israel v. Eichmann (1962) 36 I.L.R. 5. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had

engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not

dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal - the torturer - could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say, in their Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988), p. 131, that it was "an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his acts by going to another country."

The Torture Convention

Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity."
Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and article 4 requires each state party to ensure that "all" acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in article 5(1) and to indicate whether it intends to exercise jurisdiction. Under article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in article 5(1), submit him to its authorities for the purpose of prosecution. Under article 8(1) torture is to be treated as an extraditable offence and under article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in article 5(1).

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Who is an "official" for the purposes of the Torture Convention?

The first question on the Convention is whether acts done by a head of state are done by "a public official or other person acting in an official capacity" within the meaning of article 1. The same question arises under section 134 of the Criminal Justice Act 1988. The answer to both questions must be the same. In his judgment at the first hearing Lord Slynn, at pp. 1476-1477, held that a head of state was neither a public official nor a person acting in an official capacity

within the meaning of article 1: he pointed out that there are a number of international conventions (for example the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) and the Statute of the International Criminal Tribunal for Rwanda (1994)) which refer specifically to heads of state when they intend to render them liable. Lord Lloyd apparently did not agree with Lord Slynn on this point since he thought that a head of state who was a torturer could be prosecuted in his own country, a view which could not be correct unless such head of state had conducted himself as a public official or in an official capacity.

It became clear during the argument that both the Republic of Chile and Senator Pinochet accepted that the acts alleged against Senator Pinochet, if proved, were acts done by a public official or person acting in an official capacity within the meaning of article 1. In my judgment these concessions were correctly made. Unless a head of state authorising or promoting torture is an official or acting in an official capacity within article 1, then he would not be guilty of the international crime of torture even within his own state. That plainly cannot have been the intention. In my judgment it would run completely contrary to the intention of the Convention if there was anybody who could be exempt from guilt. The crucial question is not whether Senator Pinochet falls within the definition in article 1: he plainly does. The question is whether, even so, he is procedurally immune from process. To my mind the fact that a head of state can be guilty of the crime casts little, if any, light on the question whether he is immune from prosecution for that crime in a foreign state.

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in article 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the article 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle aut dedere aut punire - either you extradite or you punish: Burgers and Danelius, Handbook, p. 131. Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an article 5(1) state. However, at a session in 1984 all objections to the principle of aut dedere aut punire were withdrawn. "The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation:" Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26. If

there is no prosecution by, or extradition to, an article 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under article 6) must exercise the jurisdiction under article 5(2) by prosecuting him under article 7(1).

I gather the following important points from the Torture Convention: (1) torture within the meaning of the Convention can only be committed by "a public official or other person acting in an official capacity," but these words include a head of state. A single act of

official torture is "torture" within the Convention; (2) superior orders provide no defence; (3) if the states with the most obvious jurisdiction (the article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction; (4) there is no express provision dealing with state immunity of heads of state, ambassadors or other officials; (5) since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore "contractually" bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity

attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted ratione personae.

What then when the ambassador leaves his post or the head of state is deposed? The position of the ambassador is covered by the Vienna Convention on Diplomatic Relations (1961). After providing for immunity from arrest (article 29) and from criminal and civil jurisdiction

(article 31), article 39(1) provides that the ambassador's privileges shall be enjoyed from the moment he takes up post; and paragraph (2) provides:

"When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

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

In my judgment at common law a former head of state enjoys similar immunities, ratione materiae, once he ceases to be head of state. He too loses immunity ratione personae on ceasing to be head of state: see Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers" 1994-III 247 Recueil des cours, p. 88 and the cases there cited. He can be sued on his private obligations: Ex-King Farouk of Egypt v. Christian Dior (1957) 24 I.L.R. 228; Jimenez v. Aristeguieta (1962) 311 F.2d 547. As ex-head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: Hatch v. Baez (1876) 7 Hun 596. Thus, at common law, the position of the former ambassador and the former head of state appears to be much the same: both enjoy immunity for acts done in performance of their respective functions whilst in office.

I have belaboured this point because there is a strange feature of the United Kingdom law which I must mention shortly. The State Immunity Act 1978 modifies the traditional complete immunity normally afforded by the common law in claims for damages against foreign states. Such modifications are contained in Part I of the Act. Section 16(1) provides

that nothing in Part I of the Act is to apply to criminal proceedings. Therefore Part I has no direct application to the present case. However, Part III of the Act contains section 20(1), which provides:

"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 a head of a diplomatic mission."

The correct way in which to apply article 39(2) of the Vienna Convention to a former head of state is baffling. To what "functions" is one to have regard? When do they cease since the former head of state almost certainly never arrives in this country let alone leaves it? Is a former head of state's immunity limited to the exercise of the functions of a member of the mission, or is that again something which is subject to "necessary modification?" It is hard to resist the suspicion that something has gone wrong. A search was done on the parliamentary history of the section . From this it emerged that the original section 20(1)(a) read "a sovereign or other head of state who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom." On that basis the section would have been intelligible. However it was changed by a government amendment the mover of which said that the clause as introduced "leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom;" he said that the amendment was to ensure that heads of state would be treated like heads of diplomatic missions "irrespective of presence in the United Kingdom." The parliamentary history, therefore, discloses no clear indication of what was intended. However, in my judgment it does not matter unduly since Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law. Accordingly, "the necessary modifications" which need to be made will produce the result that a former head of state has immunity in relation to acts done as part of his official functions when head of state. Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity ratione materiae in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function. This is the view taken by Sir Arthur Watts Q.C. in his Hague Lecture who said, at p. 82:

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"While generally international law ... does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community. States are artificial legal persons: they can only act through the institutions and agencies of the state, which means, ultimately, through its officials and other

individuals acting on behalf of the state. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. Problems in this area - such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this purpose - have not affected the general acceptance of the principle of individual responsibility for international criminal conduct."

Later he said, at p. 84: "It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes."

It can be objected that Sir Arthur was looking at those cases where the international community has established an international tribunal in relation to which the regulating document expressly makes the head of state subject to the tribunal's jurisdiction: see, for example, the Nuremberg Charter, article 7; the Statute of the International Criminal Tribunal for Former Yugoslavia; the Statute of the International Criminal Tribunal for Rwanda and the Statute of the International Criminal Court. It is true that in these cases it is expressly said that the head of state or former head of state is subject to the court's jurisdiction. But those are cases in which a new court with no existing jurisdiction is being established. The jurisdiction being established by the Torture Convention and the Hostages Convention is one where existing domestic courts of all the countries are being authorised and required to take jurisdiction internationally. The question is whether, in this new type of jurisdiction, the only possible view is that those made subject to the jurisdiction of each of the state courts of the world in relation to torture are not entitled to claim immunity.

I have doubts whether, before the coming 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 organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment

the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed "by or with the acquiesence of a public official or

other person acting in an official capacity." As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. 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 right to 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 have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile.

As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of

torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

In issuing to the magistrate an authority to proceed under section 7 of the Extradition Act 1989, the Secretary of State proceeded on the basis

that the whole range of torture charges and murder charges against Senator Pinochet would be the subject matter of the extradition proceedings. Your Lordships' decision excluding from consideration a very large number of those charges constitutes a substantial change in the circumstances. This will obviously require the Secretary of State to reconsider his decision under section 7 in the light of the changed circumstances.

Lord Goff of Chieveley. My Lords,

I. Introduction

The background to the present appeal is set out, with economy and lucidity, in the opinion of my noble and learned friend Lord Browne-Wilkinson, which I have had the opportunity of reading in draft. I gratefully adopt his account and, to keep my own opinion as short as reasonably possible, I do not propose to repeat it. The central question in the appeal is whether Senator Pinochet is entitled as former head of state to the benefit of state immunity ratione materiae in respect of the charges advanced against him, as set out in the schedule of charges prepared by Mr. Alun Jones on behalf of the Government of Spain.

II. The principal issue argued on the appeal

Before the Divisional Court, and again before the first Appellate Committee, it was argued on behalf of the Government of Spain that Senator Pinochet was not entitled to the benefit of state immunity basically on two grounds, viz. first, that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the international law principle of state immunity; and second, that the crimes with which he is charged are crimes against international law, in respect of which state immunity is not available. Both arguments were rejected by the Divisional Court, but a majority of the first Appellate Committee accepted the second argument. The leading opinion was delivered by Lord Nicholls of Birkenhead, whose reasoning was of great simplicity. He said [2000] 1 A.C. 61, 108-109:

"In my view, article 39(2) of the Vienna Convention, as modified and applied to former heads of state by section 20 of the Act of 1978, is apt to confer immunity 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. This formulation, and this test for determining what are the functions of a head of state for this purpose, are sound in principle and were not the subject of controversy before your Lordships. International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All

states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made 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."

Lord Hoffmann agreed, and Lord Steyn delivered a concurring opinion to the same effect.

Lord Slynn of Hadley and Lord Lloyd of Berwick, however, delivered substantial dissenting opinions. In particular, Lord Slynn, at pp. 77e-82a, considered in detail the "developments in international law relating to what are called international crimes." On the basis of the material so reviewed by him, he concluded, at p. 79c-d:

"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 requires that a claim of state or head of state immunity, itself a well established principle of international law, should be overridden."

He went on to consider whether international law now recognises that some crimes, and in particular crimes against humanity, are outwith the protection of head of state immunity. He referred to the relevant material, and observed, at p. 81:

"except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question as to whether otherwise existing immunities were taken away. Nor did they always specifically recognise the jurisdiction of, or confer jurisdiction on, national courts to try such crimes."

He then proceeded to examine the Torture Convention of 1984, the Genocide Convention of 1948 and the Taking of Hostages Convention of 1983, and concluded that none of them had removed the long established immunity of former heads of state.

I have no doubt that, in order to consider the validity of the argument advanced on behalf of the Government of Spain on this point, it was necessary to carry out the exercise so performed by Lord Slynn; and I am therefore unable, with all respect, to accept the simple approach of the majority of the first Appellate Committee. Furthermore, I wish to record my respectful agreement with the analysis, and conclusions, of Lord Slynn set out in the passages from his opinion to which I have referred. I intend no disrespect to the detailed arguments advanced before your Lordships on behalf of the appellants in this matter, when I say that in my opinion

they did not succeed in shaking the reasoning, or conclusions, of Lord Slynn which I have set out above. However, having regard to (1) the extraordinary impact on this case of the double criminality rule, to which I will refer in a moment, and (2) the fact that a majority of your Lordships have formed the view that, in respect of

the very few charges (of torture or conspiracy to torture) which survive the impact of the double criminality rule, the effect of the Torture Convention is that in any event Senator Pinochet is not entitled to the benefit of state immunity, the present issue has ceased to have any direct bearing on the outcome of the case. In these circumstances, I do not consider it necessary or appropriate to burden this opinion with a detailed consideration of the arguments addressed to the Appellate Committee on this issue. However, I shall return to the point when I come to consider the topic of state immunity later in this opinion.

III. The double criminality rule

During the course of the hearing before your Lordships, two new issues emerged or acquired an importance which they had not previously enjoyed. The first of these is the issue of double criminality, to which I now turn.

At the hearing before your Lordships Mr. Alun Jones, for the appellants, sought to extend backwards the period during which the crimes charged were alleged to have been committed, with the effect that some of those crimes could be said to have taken place before the coup following which Senator Pinochet came into power. The purpose was obviously to enable the appellants to assert that, in respect of these crimes, no immunity as former head of state was available to him. As a result Miss Clare Montgomery, for Senator Pinochet, revived the submission that certain of the charges related to crimes which were not extradition crimes because they were not, at the time they were alleged to have been committed, criminal under the law of this country, thus offending against the double criminality rule. Mr. Alun Jones replied to this argument but, for the reasons given by my noble and learned friend, Lord Browne-Wilkinson, with which I am respectfully in complete agreement, I, too, am satisfied that Miss Montgomery's submission was well founded.

The appellants did not, however, analyse the consequences of this argument, if successful, in order to identify the charges against Senator Pinochet which would survive the application of the double criminality rule. That substantial task has, however, been undertaken by my noble and learned friend, Lord Hope of Craighead, to whom your Lordships owe a debt of gratitude. His analysis I respectfully accept. As he truly says, the impact upon the present case is profound. The great mass of the offences with which Senator Pinochet is charged must be excluded, as must also be the charge of hostage-taking which does not disclose an offence under the Taking of Hostages Act 1982. The principal charges which survive are those which relate to acts of torture alleged to have been committed, or conspiracies to torture which are alleged to have been active, after 29 September 1988, the date on which section 134 of the Criminal Justice Act 1988 (which gave effect to the Torture Convention in this country) came into effect. These are: charge 30, which relates to a

single act of torture alleged to have been committed on 24 June 1989; and charges 2 and 4, which allege conspiracies to torture between 1 August 1973 and 1 January 1972 respectively, and 1 January 1990, in so far as they relate to the relatively brief period between 29 September 1988 and 1 January 1990. In addition, however, the charge of conspiracy to commit murder in Spain (charge 9), and such

conspiracies to commit murder in Spain as can be shown to form part of the allegations in charge 4, also survive.

IV. State immunity

Like my noble and learned friend, Lord Browne-Wilkinson, I regard the principles of state immunity applicable in the case of heads of state and former heads of state as being relatively non-controversial, though the legislation on which they are now based, the State Immunity Act 1978, is in a strange form which can only be explained by the legislative history of the Act.

There can be no doubt, in my opinion, that the Act is intended to provide the sole source of English law on this topic. This is because the long title to the Act provides, inter alia, that the Act is "to make new provision with regard to the immunities and privileges of heads of state." Since in the present case we are concerned with immunity from criminal process, we can ignore Part I (which does not apply to criminal proceedings) and turn straight to Part III, and in particular to section 20. Section 20(1) provides: "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."

The function of the Diplomatic Privileges Act 1964 is to give effect to the Vienna Convention on Diplomatic Relations in this country, the relevant articles of which are scheduled to the Act. The problem is, of course, how to identify the "necessary modifications" when applying the Vienna Convention to heads of state. The nature of the problem is apparent when we turn to article 39 of the Convention, which provides:

"(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

At first this seems very strange, when applied to a head of state. However, the scales fall from our eyes when we discover from the legislative history of the Act that it was originally intended to apply only to a sovereign or

other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country - hence the form of the long title, which was amended to apply simply to heads of state. We have, therefore, to be

robust in applying the Vienna Convention to heads of state "with the necessary modifications." In the case of a head of state, there can be no question of tying article 39(1) or (2) to the territory of the receiving state, as was suggested on behalf of the appellants. Once that is realised, there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set: see Alcom Ltd. v. Republic of Colombia [1984] A.C. 580, 597g, per Lord Diplock. The effect is that a head of state will, under the statute as at international law, enjoy state immunity ratione personae so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity ratione materiae "in respect of acts performed [by him] in the exercise of his functions [as head of state]," the critical question being "whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority:" see Sir Arthur Watts Q.C., "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," (1994-III) 247 Recueil des cours, at p. 56. In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not.

There can be no doubt that the immunity of a head of state, whether ratione personae or ratione materiae, applies to both civil and criminal proceedings. This is because the immunity applies to any form of legal process. The principle of state immunity is expressed in the Latin maxim par in parem non habet imperium, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state. That the principle applies in criminal proceedings is reflected in the Act of 1978, in that there is no equivalent provision in Part III of the Act to section 16(4) which provides that Part I does not apply to criminal proceedings.

However, a question arises whether any limit is placed on the immunity in respect of criminal offences. Obviously the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character. It follows, in my opinion, that the mere fact that the crime in question is torture does not exclude state immunity. It has however been stated by Sir Arthur Watts, at pp. 81-84, that a head of state may be personally responsible:

"for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community."

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He then referred to a number of instruments, including the Charter of the Nuremberg Tribunal (1945), the Tokyo Convention: Charter of the International Military Tribunal for the trial of major war criminals in the Far East (1946), the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (provisionally

adopted in 1988), and the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), all of which expressly provide for the responsibility of heads of state, apart from the Charter of the Tokyo Tribunal which contains a similar provision regarding the official position of the accused. He concluded, at p. 84:

"It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes."

So far as torture is concerned, however, there are two points to be made. The first is that it is evident from this passage that Sir Arthur is referring not just to a specific crime as such, but to a crime which offends against the public order of the international community, for which a head of state may be internationally (his emphasis) accountable. The instruments cited by him show that he is concerned here with crimes against peace, war crimes and crimes against humanity. Originally these were limited to crimes committed in the context of armed conflict, as in the case of the Nuremberg and Tokyo Charters, and still in the case of the Yugoslavia Statute, though there it is provided that the conflict can be international or internal in character. Subsequently, the context has been widened to include, inter alia, torture "when committed as part of a widespread or systematic attack against a civilian population" on specified grounds. A provision to this effect appeared in the International Law Commission's Draft Code of Crimes of 1996 (which was, I understand, provisionally adopted in 1988), and also appeared in the Statute of the International Tribunal for Rwanda (1994), and in the Rome Statute of the International Criminal Court (adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998); and see also the view expressed obiter by the U.S. Court of Appeals in Siderman de Blake v. Republic of Argentina (1992) 965 F.2d 699, 716. I should add that these developments were foreshadowed in the International Law Commission's Draft Code of Crimes of 1954; but this was not adopted, and there followed a long gap of about 35 years before the developments in the 1990s to which I have referred. It follows that these provisions are not capable of evidencing any settled practice in respect of torture outside the context of armed conflict until well after 1989 which is the latest date with which we are concerned in the present case. The second point is that these instruments are all concerned with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts. This supports the conclusion of Lord Slynn [1998] 3 W.L.R. 1456, 1474 that "except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the

question whether otherwise existing immunities were taken away," with which I have already expressed my respectful agreement.

It follows that, if state immunity in respect of crimes of torture has been excluded at all in the present case, this can only have been done by the Torture Convention itself.

V. Torture Convention

I turn now to the Torture Convention of 1984, which lies at the heart of the present case. This is concerned with the jurisdiction of national courts, but its "essential purpose" is to ensure that a torturer does not escape the consequences of his act by going to another country: see the Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by Burgers (the Chairman-Rapporteur of the Convention) and Danelius, at p. 131. The articles of the Convention proceed in a logical order. Article 1 contains a very broad definition of torture. For present purposes, it is important that torture has to be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Article 2 imposes an obligation on each state party to take effective measures to prevent acts of torture in any territory under its jurisdiction. Article 3 precludes refoulement of persons to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Article 4 provides for the criminalisation of torture by each state party. Article 5 is concerned with jurisdiction. Each state party is required to establish its jurisdiction over the offences referred to in article 4 in the following cases: "(a) When the offences are committed in any territory under its jurisdiction ... (b) When the alleged offender is a national of that state; (c) When the victim is a national of that state if that state considers it appropriate" and also "over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ..."

Article 7 is concerned with the exercise of jurisdiction. Article 7(1) provides:

"The state party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

This provision reflects the principle aut dedere aut punire, designed to ensure that torturers do not escape by going to another country.

I wish at this stage to consider briefly the question whether a head of state, if not a public official, is at least a "person acting in a public capacity" within article 1(1) of the Torture Convention. It was my first reaction that he is not, on the ground that no one would ordinarily describe a head of state such as a monarch or the president of a republic as a "public official," and the subsidiary words "other person acting in a public capacity" appeared to be intended to catch a person who, while not a public official, has fulfilled the role of a public official, for example, on a

temporary or ad hoc basis. Miss Montgomery, for Senator Pinochet, submitted that the words were not apt to include a head of state relying in particular on the fact that in a number of earlier conventions heads of state are expressly mentioned in this context in addition to responsible government officials. However, Dr. Collins for the Republic of Chile

conceded that, in the Torture Convention, heads of state must be regarded as falling within the category of "other person acting in a public capacity;" and in these circumstances I am content to proceed on that basis. The effect of Dr. Collins's concession is that a head of state could be held responsible for torture committed during his term of office, although (as Dr. Collins submitted) the state of which he was head would be able to invoke the principle of state immunity, ratione personae or materiae, in proceedings brought against him in another national jurisdiction if it thought right to do so. Accordingly, on the argument now under consideration, the crucial question relates to the availability of state immunity.

It is to be observed that no mention is made of state immunity in the Convention. Had it been intended to exclude state immunity, it is reasonable to assume that this would have been the subject either of a separate article, or of a separate paragraph in article 7, introduced to provide for that particular matter. This would have been consistent with the logical framework of the Convention, under which separate provision is made for each topic, introduced in logical order.

VI. The issue whether immunity ratione materiae has been excluded under the Torture Convention

(a) The argument

I now come to the second of the two issues which were raised during the hearing of the appeal, viz. whether the Torture Convention has the effect that state parties to the Convention have agreed to exclude reliance on state immunity ratione materiae in relation to proceedings brought against their public officials, or other persons acting in an official capacity, in respect of torture contrary to the Convention. In broad terms I understand the argument to be that, since torture contrary to the Convention can only be committed by a public official or other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity ratione materiae, it would be inconsistent with the obligations of state parties under the Convention for them to be able to invoke state immunity ratione materiae in cases of torture contrary to the Convention. In the case of heads of state this objective could be achieved on the basis that torture contrary to the Convention would not be regarded as falling within the functions of a head of state while in office, so that although he would be protected by immunity ratione personae while in office as head of state, no immunity ratione materiae would protect him in respect of allegations of such torture after he ceased to hold office. There can, however, be no doubt that, before the Torture Convention, torture by public officials could be the subject of state immunity. Since therefore exclusion of immunity is said to result from the Torture Convention and there is no express term of the

Lordships by the appellants and those supporting them, which was that both torture contrary to the Torture Convention, and hostage-taking contrary to the Taking of Hostages Convention, constituted crimes under international law, and that such crimes cannot be part of the functions of a head of state as a matter of international law.

The argument now under consideration was not advanced before the Divisional Court; nor can it have been advanced before the first Appellate Committee, or it would have been considered by both Lord Slynn of Hadley and Lord Lloyd of Berwick in their dissenting opinions. It was not advanced before your Lordships by the appellants and those supporting them, either in their written cases, or in their opening submissions. In fact, it was introduced into the present case as a result of interventions by members of the Appellate Committee in the course of the argument. This they were, of course, fully entitled to do; and subsequently the point was very fairly put both to Miss Montgomery for Senator Pinochet and to Dr. Collins for the Government of Chile. It was subsequently adopted by Mr. Lloyd Jones, the amicus curiae, in his oral submissions to the Committee. The appellants, in their written submissions in reply, restricted themselves to submitting that "The conduct alleged in the present case is not conduct which amounts to official acts performed by the [applicant] in the exercise of his functions [as head of state]." They did not at that stage go so far as to submit that any torture contrary to the Torture Convention would not amount to such an official act. However, when he came to make his final oral submissions on behalf of the appellants, Professor Greenwood, following the lead of Mr. Lloyd Jones, and perhaps prompted by observations from the Committee to the effect that this was the main point in the case, went beyond his clients' written submissions in reply and submitted that, when an offence of torture is committed by an official within the meaning of section 134 of the Criminal Justice Act 1988 and article 1 of the Torture Convention, no immunity ratione materiae can attach in respect of that act.

It is surprising that an important argument of this character, if valid, should previously have been overlooked by the fourteen counsel (including three distinguished Professors of International Law) acting for the appellants, and for Amnesty International and Human Rights Watch which are supporting the appellants in this litigation. The concern thereby induced as to the validity of the argument is reinforced by the fact that it receives no support from the literature on the subject and, on the material before your Lordships, appears never to have been advanced before. At all events, having given the matter the most careful consideration, I am satisfied that it must be rejected as contrary to principle and authority, and indeed contrary to common sense.

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(b) Waiver of immunity by treaty must be express

On behalf of the Government of Chile Dr. Collins's first submission was that a state's waiver of its immunity by treaty must always be express. With that submission, I agree.

I turn first to Oppenheim's International Law, vol. I. The question of waiver of state immunity is considered, at pp. 351-355, from which I quote the following passage:

"A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement ... A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case ..."

It is significant that, in this passage, the only examples given of implied waiver of immunity relate to actual submission by a state to the jurisdiction of a court or tribunal by instituting or intervening in proceedings, or by taking a step in proceedings.

A similar approach is to be found in the Report of the International Law Commission on the Jurisdictional Immunities of States and their Property reported in 1991 Y.B.I.L.C., vol. II, Part 2, in which a fuller exposition of the subject is to be found. Article 7 of the Commission's Draft Articles on this subject is entitled "Express consent to exercise of jurisdiction." Article 7(1) provides:

"A state cannot invoke immunity from jurisdiction in a proceeding before a court of another state with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding."

I turn to the commentary on article 7(1), from which I quote paragraph (8) in full:

"In the circumstances under consideration, that is, in the context of the state against which legal proceedings have been brought, there appear to be several recognisable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of 'implied consent' as a possible exception to the general principles of state immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, including by the means provided in article 8" - which is concerned with the effect of participation in a proceeding before a court - "It remains to be

seen how consent would be given or expressed so as to remove the obligation of the court of another state to refrain from the exercise of its jurisdiction against an equally sovereign state."

The two examples then provided of how such consent would be given or expressed are (i) consent given in a written contract, or by a declaration or a written communication in a specific proceeding, and (ii) consent given in advance by international agreement. In respect of

the latter, reference is made, in paragraph (10), to such consent being expressed in a provision of a treaty concluded by states; there is no reference to such consent being implied.

The general effect of these passages is that, in a treaty concluded between states, consent by a state party to the exercise of jurisdiction against it must, as Dr. Collins submitted, be express. In general, moreover, implied consent to the exercise of such jurisdiction is to be regarded only as an added explanation or justification for an otherwise valid and recognised exception, of which the only example given is actual submission to the jurisdiction of the courts of another state.

The decision of the Supreme Court of the United States in Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683 is consistent with the foregoing approach. In an action brought by a shipowner against the Argentine Republic for the loss of a ship through an attack by aircraft of the Argentine Air Force, the defendant relied upon state immunity. Among other arguments the plaintiff suggested that the defendant had waived its immunity under certain international agreements to which the United States was party. For this purpose, the plaintiff invoked paragraph 1605(a) (1) of the Foreign Sovereign Immunities Act 1976, which specifies, as one of a number of exceptions to immunity of foreign states, a case in which the foreign state has waived its immunity either explicitly or by implication. It was the plaintiff's contention that there was an implicit waiver in the relevant international agreements. This submission was tersely rejected by Rehnquist C.J., at p. 693, who delivered the judgment of the court, in the following words: "Nor do we see how a foreign state can waive its immunity under paragraph 1605(a) (1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts ..." Once again, the emphasis is on the need for an express waiver of immunity in an international agreement. This cannot be explained away as due to the provisions of the United States Act. On the contrary, the Act contemplates the possibility of waiver by implication; but in the context of a treaty the Supreme Court was only prepared to contemplate express waiver.

I turn next to the State Immunity Act 1978, the provisions of which are also consistent with the principles which I have already described. In Part I of the Act (which does not apply to criminal proceedings: see section 16(4)) it is provided by section 1(1) that "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act." For the present purposes, the two relevant provisions are section 2, concerned with submission to the jurisdiction, and section 9, concerned with submissions to arbitration by an agreement in writing. Section 2(2) recognises that a state may submit to

the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity; but my reading of the Act leads me to understand that such a submission to the jurisdiction is here regarded as an express rather than an implied waiver of immunity or agreement to

submit to the jurisdiction. This is consistent with Part III of the Act, which by section 20 provides that, subject to the provisions of that section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state. Among the articles of the Vienna Convention on Diplomatic Relations so rendered applicable by section 2 of the Act of 1964 is article 32 concerned with waiver of immunity, paragraph 2 of which provides that such waiver must always be express, which I read as including an actual submission to the jurisdiction, as well as an express agreement in advance to submit. Once again, there is no provision for an implied agreement.

In the light of the foregoing it appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must, as Dr. Collins submitted, always 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.

(c) The functions of public officials and others acting in an official capacity

However it is, as I understand it, suggested that this well established principle can be circumvented in the present case on the basis that it is not proposed that state parties to the Torture Convention have agreed to waive their state immunity in proceedings brought in the states of other parties in respect of allegations of torture within the Convention. It is rather that, for the purposes of the Convention, such torture does not form part of the functions of public officials or others acting in an official capacity including, in particular, a head of state. Moreover since state immunity ratione materiae can only be claimed in respect of acts done by an official in the exercise of his functions as such, it would follow, for example, that the effect is that a former head of state does not enjoy the benefit of immunity ratione materiae in respect of such torture after he has ceased to hold office.

In my opinion, the principle which I have described cannot be circumvented in this way. I observe first that the meaning of the word "functions" as used in this context is well established. The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is as true of a serious crime, such as murder or torture, as it is of a lesser crime. As Lord Bingham of Cornhill C.J. said in the Divisional Court:

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"a former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity. If the former sovereign is immune from process in respect of some crimes, where does one draw the line?"

It was in answer to that question that the appellants advanced the theory that one draws the line at crimes which may be called

"international crimes." If, however, a limit is to be placed on governmental functions so as to exclude from them acts of torture within the Torture Convention, this can only be done by means of an implication arising from the Convention itself. Moreover, as I understand it, the only purpose of the proposed implied limitation upon the functions of public officials is to deprive them, or as in the present case a former head of state, of the benefit of state immunity; and in my opinion the policy which requires that such a result can only be achieved in a treaty by express agreement, with the effect that it cannot be so achieved by implication, renders it equally unacceptable that it should be achieved indirectly by means of an implication such as that now proposed.

(d) An implication must in any event be rejected

In any event, however, even if it were possible for such a result to be achieved by means of an implied term, there are, in my opinion, strong reasons why any such implication should be rejected.

I recognise that a term may be implied into a treaty, if the circumstances are such that "the parties must have intended to contract on the basis of the inclusion in the treaty of a provision whose effect can be stated with reasonable precision;" see Oppenheim's International Law, vol. I, pp. 1271- 1272, n. 4. It would, however, be wrong to assume that a term may be implied into a treaty on the same basis as a term may be implied into an ordinary commercial contract, for example to give the contract business efficacy (as to which see Treitel, The Law of Contract, 9th ed. (1995), pp. 185 et seq.). This is because treaties are different in origin, and serve a different purpose. Treaties are the fruit of long negotiation, the purpose being to produce a draft which is acceptable to a number, often a substantial number, of state parties. The negotiation of a treaty may well take a long time, running into years. Draft after draft is produced of individual articles, which are considered in depth by national representatives, and are the subject of detailed comment and consideration. The agreed terms may well be the fruit of "horse-trading" in order to achieve general agreement, and proposed articles may be amended, or even omitted in whole or in part, to accommodate the wishes or anxieties of some of the negotiating parties. In circumstances such as these, it is the text of the treaty itself which provides the only safe guide to its terms, though reference may be made, where appropriate, to the travaux préparatoires. But implied terms cannot, except in the most obvious cases, be relied on as binding the state parties who ultimately sign the treaty, who will in all probability include those who were not involved in the preliminary negotiations.

In this connection, however, I wish first to observe that the assumption underlying the present argument, viz. that the continued availability of state immunity is inconsistent with the obligations of state parties to the Convention, is in my opinion not justified. I have already summarised the principal articles of the Convention; and at this stage I need only refer to article 7 which requires that a state party under whose jurisdiction a person alleged to have committed torture is found, shall, in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of

prosecution. I wish to make certain observations on these provisions. First of all, in the majority of cases which may arise under the Convention, no question of state immunity will arise at all, because the public official concerned is likely to be present in his own country. Even when such a question does arise, there is no reason to assume that state immunity will be asserted by the state of which the alleged torturer is a public official; on the contrary, it is only in unusual cases, such as the present, that this is likely to be done. In any event, however, not only is there no mention of state immunity in the Convention, but in my opinion it is not inconsistent with its express provisions that, if steps are taken to extradite him or to submit his case to the authorities for the purpose of prosecution, the appropriate state should be entitled to assert state immunity. In this connection, 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.

The danger of introducing the proposed implied term in the present case is underlined by the fact that there is, as Dr. Collins stressed to your Lordships, nothing in the negotiating history of the Torture Convention which throws any light on the proposed implied term. Certainly the travaux préparatoires shown to your Lordships reveal no trace of any consideration being given to waiver of state immunity. They do however show that work on the draft Convention was on foot as long ago as 1979, five years before the date of the Convention itself. It is surely most unlikely that during the years in which the draft was under consideration no thought was given to the possibility of the state parties to the Convention waiving state immunity. Furthermore, if agreement had been reached that there should be such a waiver, express provision would inevitably have been made in the Convention to that effect. Plainly, however, no such agreement was reached. There may have been recognition at an early stage that so many states would not be prepared to waive their immunity that the matter was not worth pursuing; if so, this could explain why the topic does not surface in the travaux préparatoires. In this connection it must not be overlooked that there are many reasons why states, although recognising that in certain circumstances jurisdiction should be vested in another national court in respect of acts of torture committed by public officials within their own jurisdiction, may nevertheless have considered it imperative that they should be able, if necessary, to assert state immunity. The Torture Convention applies not only to a series of acts of systematic torture, but to the commission of, even acquiescence in, a single act of physical or mental torture. Extradition can nowadays be sought, in some parts of the world, on the basis of a simple allegation unsupported by

prima facie evidence. In certain circumstances torture may, for compelling political reasons, be the subject of an amnesty, or some other form of settlement, in the state where it has been, or is alleged to have been, committed.

Furthermore, if immunity ratione materiae was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of a different political persuasion. In this connection, it is a mistake to assume that state parties to the

Convention would only wish to preserve state immunity in cases of torture in order to shield public officials guilty of torture from prosecution elsewhere in the world. Such an assumption is based on a misunderstanding of the nature and function of state immunity, which is a rule of international law restraining one sovereign state from sitting in judgment on the sovereign behaviour of another. As Lord Wilberforce said in I Congreso del Partido [1983] 1 A.C. 244, 272:
"The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another." State immunity ratione materiae operates therefore to protect former heads of state, and (where immunity is asserted) public officials, even minor public officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, including accusation and arrest in respect of alleged crimes. It can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious - a matter which can be of great significance where, for example, a former head of state is concerned and political passions are aroused. Preservation of state immunity is therefore a matter of particular importance to powerful countries whose heads of state perform an executive role, and who may therefore be regarded as possible targets by governments of states which, for deeply felt political reasons, deplore their actions while in office. But, to bring the matter nearer home, we must not overlook the fact that it is not only in the United States of America that a substantial body of opinion supports the campaign of the I.R.A. to overthrow the democratic government of Northern Ireland. It is not beyond the bounds of possibility that a state whose government is imbued with this opinion might seek to extradite from a third country, where he or she happens to be, a responsible Minister of the Crown, or even a more humble public official such as a police inspector, on the ground that he or she has acquiesced in a single act of physical or mental torture in Northern Ireland. The well known case of Ireland v. United Kingdom (1978) 2 E.H.R.R. 25 provides an indication of circumstances in which this might come about.

Reasons such as these may well have persuaded possible state parties to the Torture Convention that it would be unwise to give up the valuable protection afforded by state immunity. Indeed, it would be strange if state parties had given up the immunity ratione materiae of a head of state which is regarded as an essential support for his immunity ratione personae. In the result, the subject of waiver of state immunity could well not have been pursued, on the basis that to press for its adoption would only imperil the very substantial advantages which could be achieved by

the Convention even if no waiver of state immunity was included in it. As I have already explained, in cases arising under the Convention, state immunity can only be relevant in a limited number of cases. This is because the offence is normally committed in the state to which the official belongs. There he is unprotected by immunity, and under the Convention the state has simply to submit the case to the competent authorities. In practice state immunity is relevant in only two cases - where the offender is present in a third state, or where the offender is present in a state one of whose nationals was the victim, that state being different from the state where the offence was

committed. A case such as the present must be regarded as most unusual. Having regard to considerations such as these, not to press for exclusion of state immunity as a provision of the Convention must have appeared to be a relatively small price to pay for the major achievement of widespread agreement among states (your Lordships were informed that 116 states had signed the Convention) in respect of all the other benefits which the Convention conferred. After all, even where it was possible for a state to assert state immunity, in many cases it would not wish to expose itself to the opprobrium which such a course would provoke; and in such cases considerable diplomatic or moral pressure could be exerted upon it to desist.

I wish to stress the implications of the fact that there is no trace in the travaux préparatoires of any intention in the Convention to exclude state immunity. It must follow, if the present argument is correct, first that it was so obvious that it was the intention that immunity should be excluded that a term could be implied in the Convention to that effect, and second that, despite that fact, during the negotiating process none of the states involved thought it right to raise the matter for discussion. This is remarkable. Moreover, it would have been the duty of the responsible senior civil servants in the various states concerned to draw the attention of their governments to the consequences of this obvious implication, so that they could decide whether to sign a Convention in this form. Yet nothing appears to have happened. There is no evidence of any question being raised, still less of any protest being made, by a single state party. The conclusion follows either that every state party was content without question that state immunity should be excluded sub silentio, or that the responsible civil servants in all these states, including the United Kingdom, failed in their duty to draw this very important matter to the attention of their governments. It is difficult to imagine that either of these propositions can be correct. In particular it cannot, I suspect, have crossed the minds of the responsible civil servants that state immunity was excluded sub silentio in the Convention.

The cumulative effect of all these considerations is, in my opinion, to demonstrate the grave difficulty of recognising an implied term, whatever its form, on the basis that it must have been agreed by all the state parties to the Convention that state immunity should be excluded. In this connection it is particularly striking that, in Burgers and Danelius, Handbook on the Torture Convention, it is recognised, at p. 31, that the obligation of a state party, under article 5(1) of the Convention, to establish jurisdiction over offences of torture committed within its territory, is subject to an exception in the case of those benefiting from

special immunities, including foreign diplomats. It is true that this statement could in theory be read as limited to immunity ratione personae; but in the absence of explanation it should surely be read in the ordinary way as applicable both to immunity ratione personae and its concomitant immunity ratione materiae, and in any event the total silence in this passage on the subject of waiver makes it highly improbable that there was any intention that immunity ratione materiae should be regarded as having been implicitly excluded by the Convention. Had there been such an intention, the authors would have been bound to refer to it. They do not do so.

The background against which the Torture Convention is set adds to the improbability of the proposition that the state parties to the Convention must have intended, directly or indirectly, to exclude state immunity ratione materiae. Earlier Conventions made provision for an international tribunal. In the case of such Conventions, no question of par in parem non habet imperium arose; but heads of state were expressly mentioned, so ensuring that they are subject to the jurisdiction of the international tribunal. In the case of the Taking of Hostages Convention and the Torture Convention, jurisdiction was vested in the national courts of state parties to the Convention. Here, therefore, for the first time the question of waiver of state immunity arose in an acute form. Curiously, the suggestion appears to be that state immunity was waived only in the case of the Torture Convention. Apart from that curiosity, however, for state parties to exclude state immunity in a Convention of this kind would be a remarkable surrender of the basic protection afforded by international law to all sovereign states, which underlines the necessity for immunity to be waived in a treaty, if at all, by express provision; and, having regard in particular to the express reference to heads of state in earlier Conventions, state parties would have expected to find an express provision in the Torture Convention if it had been agreed that state immunity was excluded. That it should be done by implication in the Torture Convention seems, in these circumstances, to be most improbable.

I add that the fact that 116 states have become party to the Torture Convention reinforces the strong impression that none of them appreciated that, by signing the Convention, each of them would silently agree to the exclusion of state immunity ratione materiae. Had it been appreciated that this was so, I strongly suspect that the number of signatories would have been far smaller. It should not be forgotten that national representatives involved in the preliminary discussions would have had to report back to their governments about the negotiation of an important international convention of this kind. Had such a representative, or indeed a senior civil servant in a country whose government was considering whether the country should become a party to the Convention, been asked by his Secretary of State the question whether state immunity would be preserved, it is unlikely that a point would have occurred to him which had been overlooked by all the 14 counsel (including, as I have said, three distinguished professors of international law) appearing for the appellants and their supporters in the present case. It is far more probable that he would have had in mind the clear and simple words of Rehnquist C.J. in the Amerada Hess case, 109 S.Ct. 683 and have answered that, since there

was no mention of state immunity in the Convention, it could not have been affected. This demonstrates how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio. Common sense therefore supports the conclusion reached by principle and authority that this cannot be done.

(e) Conclusion

For these reasons I am of the opinion that the proposed implication must be rejected not only as contrary to principle and authority, but also as contrary to common sense.

VII. The conclusion of Lord Hope of Craighead

My noble and learned friend, Lord Hope of Craighead, having concluded that, so far as torture is concerned, only charges 2 and 4 (in so far as they apply to the period after 29 September 1988) and charge 30 survive the application of the double criminality point, has nevertheless concluded that the benefit of state immunity is not available to Senator Pinochet in respect of these three charges. He has reached this conclusion on the basis that (1) the two conspiracy charges, having regard to paragraph 9(3) of the extradition request, reveal charges that Senator Pinochet was party to a conspiracy to carry out a systematic, if not a widespread, attack on a section of the civil population, i.e. to torture those who opposed or might oppose his government, which would constitute a crime against humanity (see, e.g. , article 7(1) of the Rome Statute of the International Criminal Court 1998); and (2) the single act of torture alleged in charge 30 shows that an alleged earlier conspiracy to carry out such torture, constituting a crime against humanity, was still alive when that act was perpetrated after 29 September 1988. Furthermore, although he is (as I understand the position) in general agreement with Lord Slynn of Hadley's analysis, he considers that such a crime against humanity, or a conspiracy to commit such a crime, cannot be the subject of a claim to state immunity in a national court, even where it is alleged to have taken place before 1 January 1990.

I must first point out that, apart from the single act of torture alleged in charge 30, the only other cases of torture alleged to have occurred since 29 September 1988 are two cases, referred to in the extradition request but not made the subject of charges, which are alleged to have taken place in October 1988. Before that, there is one case alleged in 1984, before which it is necessary to go as far back as 1977. In these circumstances I find it very difficult to see how, after 29 September 1988, it could be said that there was any systematic or widespread campaign of torture, constituting an attack on the civilian population, so as to amount to a crime against humanity. Furthermore, in so far as it is suggested that the single act of torture alleged in charge 30 represents the last remnant of a campaign which existed in the 1970s, there is, quite apart from the factual difficulty of relating the single act to a campaign which is alleged to have been in existence so long ago, the question whether it would be permissible, in the context of extradition, to have regard to the earlier charges of torture,

excluded under the double criminality rule, in order to establish that the single act of torture was part of a campaign of systematic torture which was still continuing in June 1989. This raises a question under section 6(4)(b) and (5) of the Extradition Act 1989, provisions which are by no means clear in themselves or easy to apply in the unusual circumstances of the present case.

In truth, however, the real problem is that, since the appellants did not consider the position which would arise if they lost the argument on the double criminality point, they did not address questions of this kind. If they had done so, the matter would have been argued out before the Appellate Committee, and Miss Montgomery and Dr. Collins would have had an opportunity to reply and would no doubt have had a good deal to say on the subject. This is after all a criminal matter, and it is no

part of the function of the court to help the prosecution to improve their case. In these circumstances it would not, in my opinion, be right to assist the prosecution by now taking such a point as this, when they have failed to do so at the hearing, in order to decide whether or not this is a case in which it would be lawful for extradition to take place.

I wish to add that, in any event, for the reasons given by Lord Slynn of Hadley to which I have already referred, I am of the opinion that in 1989 there was no settled practice that state immunity ratione materiae was not available in criminal proceedings before a national court concerned with an alleged crime against humanity, or indeed as to what constituted a crime against humanity: see [2000] 1 A.C. 61, 79c-d and 80-81. This is a matter which I have already considered in Part IV of this opinion.

For all these reasons I am, with great respect, unable to accompany the reasoning of my noble and learned friend on these particular points.

VIII. Conclusion

For the above reasons, I am of the opinion that by far the greater part of the charges against Senator Pinochet must be excluded as offending against the double criminality rule; and that, in respect of the surviving charges - charge 9, charge 30 and charges 2 and 4 (in so far as they can be said to survive the double criminality rule) - Senator Pinochet is entitled to the benefit of state immunity ratione materiae as a former head of state. I would therefore dismiss the appeal of the Government of Spain from the decision of the Divisional Court.

Lord Hope of Craighead. My Lords, this is an appeal against the decision of the Divisional Court to quash the provisional warrants of 16 and 22 October 1998 which were issued by the metropolitan stipendiary magistrate under section 8(1)(b) of the Extradition Act 1989. The application to quash had been made on two grounds. The first was that Senator Pinochet as a former head of state of the Republic of Chile was entitled to immunity from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state. The second was that the charges which had been made against him specified conduct which would not have been punishable in England when the acts

were done, with the result that these were not extradition crimes for which it would be lawful for him to be extradited.

The Divisional Court quashed the first warrant, in which it was alleged that Senator Pinochet had murdered Spanish citizens in Chile, on the ground that it did not disclose any offence for which he could be extradited to Spain. Its decision on that point has not been challenged in this appeal. It also quashed the second warrant, in which it was alleged that Senator Pinochet was guilty of torture, hostage-taking, conspiracy to take hostages and conspiracy to commit murder. It did so on the ground that Senator Pinochet was entitled to immunity as a former head of state from the process of the English courts. The court held that the question whether these were offences for which, if he had no immunity, it would be lawful for him to be extradited was not a matter

to be considered in that court at that stage. But Lord Bingham of Cornhill C.J. said that it was not necessary for this purpose that the conduct alleged constituted a crime which would have been punishable in this country at the time when it was alleged to have been committed abroad.

When this appeal was first heard in your Lordships' House the argument was directed almost entirely to the question whether Senator Pinochet was entitled as a former head of state to claim sovereign immunity in respect of the charges alleged against him in the second provisional warrant. It was also argued that the offences of torture and hostage-taking were not offences for which he could be extradited until these became offences for which a person could be prosecuted extraterritorially in the United Kingdom. But the second argument appears to have been regarded as no more than a side issue at that stage. This is not surprising in view of the terms of the second provisional warrant. The offences which it specified extended over periods lasting well beyond the date when the conduct became extraterritorial offences in this country. Only Lord Lloyd of Berwick dealt with this argument in his speech, and he confined himself to one brief comment. He said that it involved a misunderstanding of section 2 of the Extradition Act 1989, as in his view section 2(1)(a) referred to conduct which would constitute an offence in the United Kingdom now, not to conduct which would have constituted an offence then: [2000] 1 A.C. 61, 88d-e.

The offences alleged against Senator Pinochet

Four offences were set out in the second provisional warrant of 22October 1998. These were: (1) torture between 1 January 1988 and December 1992; (2) conspiracy to torture between 1 January 1988 and 31December 1992; (3) (a) hostage-taking and (b) conspiracy to take hostages between 1 January 1982 and 31 January 1992; and (4) conspiracy to commit murder between January 1976 and December 1992.

These dates must be compared with the date of the coup which brought Senator Pinochet to power in Chile, which was 11 September 1973, and the date when he ceased to be head of state, which was 11March 1990. Taking the dates in the second provisional warrant at their face value, it appears (a) that he was not being charged with any acts of torture prior to 1 January 1988, (b) that he was not being charged with

any acts of hostage-taking or conspiracy to take hostages prior to I January 1982 and (c) that he was not being charged with any conspiracy to commit murder prior to January 1976. On the other hand he was being charged with having committed these offences up to December 1992, well after the date when he ceased to be head of state in Chile.

The Government of Spain has taken the opportunity of the interval between the end of the first hearing of this appeal and the second hearing to obtain further details from the Spanish judicial authorities. It has explained that the provisional warrant was issued under circumstances of urgency and that the facts are more developed and complex than first appeared. And a number of things have happened since the date of the first hearing which, it is submitted, mean that the provisional warrant no longer has any life or effect. On 9 December 1998

the Secretary of State issued an authority to proceed under section 7(4) of the Act of 1989. On 10 December 1998 the Spanish indictment was preferred in Madrid, and on 24 December 1998 further particulars were drafted in accordance with article 13 of the European Convention on Extradition for furnishing with the extradition request.

Mr. Alun Jones for the appellants said that it would be inappropriate for your Lordships in these circumstances to confine an examination of the facts to those set out in the provisional warrant and that it would be unfair to deprive him of the ability to rely on material which has been served within the usual time limits imposed in the extradition process. He invited your Lordships to examine all the material which was before the Secretary of State in December, including the formal request which was signed at Madrid on 3 November 1998 and the further material which has now been submitted by the Spanish Government. Draft charges have been prepared, of the kind which are submitted in extradition proceedings as a case is presented to the magistrate at the beginning of the main hearing under section 9(8) of the Act. This has been done to demonstrate how the charges which are being brought by the Spanish judicial authorities may be expressed in terms of English criminal law, to show the offences which he would have committed by his conduct against the law of this country.

The crimes which are alleged in the Spanish request are murder on such a scale as to amount to genocide and terrorism, including torture and hostage-taking. The Secretary of State has already stated in his authority to proceed that Senator Pinochet is not to be extradited to Spain for genocide. So that part of the request must now be left out of account. But my impression is that the omission of the allegation of genocide is of little consequence in view of the scope which is given in Spanish law to the allegations of murder and terrorism.

It is not our function to investigate the allegations which have been made against Senator Pinochet, and it is right to place on record the fact that his counsel, Miss Montgomery, told your Lordships that they are all strenuously denied by him. It is necessary to set out the nature and some of the content of these allegations, on the assumption that they are supported by the information which the Spanish judicial authorities have made available. This is because they form an essential part of the background to the issues of law which have been raised in this appeal. But the following summary must not be taken as a statement that the

allegations have been shown to be true by the evidence, because your Lordships have not considered the evidence.

The material which has been gathered together in the extradition request by the Spanish judicial authorities alleges that Senator Pinochet was party to a conspiracy to commit the crimes of murder, torture and hostage-taking, and that this conspiracy was formed before the coup. He is said to have agreed with other military figures that they would take over the functions of government and subdue all opposition to their control of it by capturing and torturing those who opposed them, who might oppose them or who might be thought by others to be likely to oppose them. The purpose of this campaign of torture was not just to inflict pain. Some of those who were to be tortured were to be released, to spread words of the steps that would be taken against those who

opposed the conspirators. Many of those who were to be tortured were to be subjected to various other forms of atrocity, and some of them were to be killed. The plan was to be executed in Chile and in several other countries outside Chile.

When the plan was put into effect victims are said to have been abducted, tortured and murdered pursuant to the conspiracy. This was done first in Chile, and then in other countries in South America, in the United States and in Europe. Many of the acts evidencing the conspiracy are said to have been committed in Chile before 11 September 1973. Some people were tortured at a naval base in August 1973. Large numbers of persons were abducted, tortured and murdered on 11 September 1973 in the course of the coup before the junta took control and Senator Pinochet was appointed its President. These acts continued during the days and weeks after the coup. A period of repression ensued, which is said to have been at its most intense in 1973 and 1974. The conspiracy is said to have continued for several years thereafter, but to have declined in intensity during the decade before Senator Pinochet retired as head of state on 11 March 1990. It is said that the acts committed in other countries outside Chile are evidence of the primary conspiracies and of a variety of sub-conspiracies within those states.

The draft charges which have been prepared in order to translate these broad accusations into terms of English law may be summarised as follows: (1) conspiracy to torture between 1 January 1972 and 10 September 1973 and between 1 August 1973 and 1 January 1990 - charges 1, 2 and 5; (2) conspiracy to take hostages between 1 August 1973 and 1 January 1990 - charge 3; (3) conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal between 1 January 1972 and 1 January 1990 - charge 4; (4) torture between 1 August 1973 and 8 August 1973 and on 11 September 1973 - charges 6 and 8 (there is no charge 7); (5) conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975 - charges 9 and 12; (6) attempted murder in Italy on 6 October 1975 - charges 10 and 11; (7) torture on various occasions between 11 September 1973 and May 1977 - charges 13 to 29 and 31 to 32; and (8) torture on 24 June 1989 - charge 30.

This summary shows that some of the alleged conduct relates to the period before the coup when Senator Pinochet was not yet head of state. Charges 1 and 5 (conspiracy to torture) and charge 6 (torture) relate

exclusively to that period. Charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) relate to conduct over many years including the period before the coup. None of the conduct now alleged extends beyond the period when Senator Pinochet ceased to be head of state.

Only one charge (charge 30 - torture on 24 June 1989) relates exclusively to the period after 29 September 1988 when section 134 of the Criminal Justice Act 1988, to which I refer later, was brought into effect. But charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) which relate to conduct over many years extend over this period also. Two acts of torture which are said to have occurred between 21 and 28 October 1988 are mentioned in the extradition request. They have not been included as separate counts in the list of

draft charges, but it is important not to lose sight of the fact that the case which is being made against Senator Pinochet by the Spanish judicial authorities is that each act of torture has to be seen in the context of a continuing conspiracy to commit torture. As a whole, the picture which is presented is of a conspiracy to commit widespread and systematic torture and murder in order to obtain control of the government and, having done so, to maintain control of government by those means for as long as might be necessary.

Against that background it is necessary first to consider whether the relevant offences for the purposes of this appeal are those which were set out in the second provisional warrant or those which are set out in the draft charges which have been prepared in the light of the further information which has been obtained from the Spanish judicial authorities.

On one view it might be said that, as the appeal is against the decision of the Divisional Court to quash the second provisional warrant, your Lordships should be concerned only with the charges which were set out in that document. If that warrant was bad on the ground that the charges which it sets out are charges in respect of which Senator Pinochet has immunity, everything else that has taken place in reliance upon that warrant must be bad also. If he was entitled to immunity, no order should have been made against him in the committal proceedings and the Secretary of State should not have issued an authority to proceed. But article 13 of the European Convention on Extradition (1957) which, following the enactment of the Extradition Act 1989, the United Kingdom has now ratified (see the European Convention on Extradition Order 1990 (S.I. 1990 No. 1507)), provides that if the information communicated by the requesting party is found to be insufficient to allow the requested party to make a decision in pursuance of the Convention the requested party may ask for the necessary supplementary information to be provided to it by the requesting party.

It is clear that the first provisional warrant was prepared in circumstances of some urgency, as it was believed that Senator Pinochet was about to leave the United Kingdom in order to return to Chile. Once begun, the procedure was then subject to various time limits. There was also the problem of translating the Spanish accusations, which cover so many acts over so long a period, into the terms of English criminal law. I do not think that it is surprising that the full extent of the allegations

which were being made was not at first appreciated. In my opinion the Spanish judicial authorities were entitled to supplement the information which was originally provided in order to define more clearly the charges which were the subject of the request. On this view it would be right to regard the material which is now available as explanatory of the charges which the second provisional warrant was intended to comprise. Mr. Clive Nicholls for Senator Pinochet said that he was content with this approach in the interests of finality.

Are the alleged offences "extradition crimes?"

If your Lordships are willing, as I suggest we should be, to examine this material it is necessary to subject it to further analysis. The starting

point is section 1(1) of the Extradition Act 1989, which provides that a person who is accused in a foreign state of the commission of an extradition crime may be arrested and returned to that state in accordance with the extradition procedures in Part III of the Act. The expression "extradition crime" is defined in section 2 of the Act under two headings. The first, which is set out in section 2(1)(a), refers to:

"conduct in the territory of a foreign state ... which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law."

The second, which is set out in section 2(1)(b) read with section 2(2), refers to an extraterritorial offence against the law of a foreign state which is punishable under that law with imprisonment for a term of 12 months or any greater punishment, and which in corresponding circumstances would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment.

For reasons which have been explained by my noble and learned friend, Lord Browne-Wilkinson, the critical issue on the question of sovereign immunity relates to the effect of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and the offences which allege torture. As to those alleged offences which do not fall within the scope of the Torture Convention and which could not be prosecuted here under section 134 of the Criminal Justice Act 1988, any loss of immunity would have to be decided on other grounds. But there is no need to examine this question in the case of those alleged offences for which Senator Pinochet could not in any event be extradited. The purpose of the following analysis is to remove from the list of draft charges those charges which fall into that category either because they are not extradition crimes as defined by section 2 of the Extradition Act 1989 or because for any other reason other than on grounds of immunity they are charges on which Senator Pinochet could not be extradited.

This analysis proceeds on the basis that the definition of the expression "extradition crime" in section 2 of the Act of 1989 requires the conduct

which is referred to in section 2(1)(a) to have been an offence which was punishable in the United Kingdom when that conduct took place. It also proceeds on the basis that it requires the extraterritorial offence which is referred to in section 2(1)(b) to have been an extraterritorial offence in the United Kingdom on the date when the offence took place. The principle of double criminality would suggest that this was the right approach, in the absence of an express provision to the contrary. The tenses used in section 2 seem to me to be equivocal on this point. They leave it open to examination in the light of the provisions of the Act as a whole. The argument in favour of the date when the conduct took place has particular force in the case of those offences listed in section 22(4) of the Act. These have been made extraterritorial offences in order to give effect to international conventions, but neither the

conventions nor the provisions which gave effect to them were intended to operate retrospectively.

I respectfully agree with the reasons which my noble and learned friend, Lord Browne-Wilkinson, has given for construing the definition as requiring that the conduct must have been punishable in the United Kingdom when it took place, and that it is not sufficient for the appellants to show that it would be punishable here were it to take place now.

Hostage-taking

An offence under the Taking of Hostages Act 1982 is one of those offences, wherever the act takes place, which is deemed by section 22(6) of the Extradition Act 1989 to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the International Convention against the Taking of Hostages of 18 December 1979 (1983) (Cmnd. 9100). Under section 1 of the Act of 1982 hostage-taking is an extraterritorial offence against the law of the United Kingdom. Section 1(1) of that Act defines the offence in these terms:

"A person, whatever his nationality, who, in the United Kingdom or elsewhere - (a) detains any other person ('the hostage'), and (b) in order to compel a state, international governmental organisation or person to do or to abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence."

Mr. Jones accepted that he did not have particulars of any case of hostage-taking. He said that his case was that Senator Pinochet was involved in a conspiracy to take hostages for the purposes which were made unlawful by section 1 of the Act. Charge 3 of the draft charges, which is the only charge which alleges conspiracy to take hostages, states that the course of conduct which was to be pursued was to include the abduction and torture of persons as part of a campaign to terrify and subdue those who were disposed to criticise or oppose Senator Pinochet or his fellow conspirators. Those who were not detained were to be intimidated, through the accounts of survivors and by rumour, by fear that they might suffer the same fate. Those who had been detained were to be compelled to divulge information to the conspirators by the threatened

injury and detention of others known to the abducted persons by the conspirators.

But there is no allegation that the conspiracy was to threaten to kill, injure or detain those who were being detained in order to compel others to do or to abstain from doing any act. The narrative shows that the alleged conspiracy was to subject persons already detained to threats that others would be taken and that they also would be tortured. This does not seem to me to amount to a conspiracy to take hostages within the meaning of section 1 of the Act of 1982. The purpose of the proposed conduct, as regards the detained persons, was to subject them to what can best be described as a form of mental torture.

One of the achievements of the Torture Convention was to provide an internationally agreed definition of torture which includes both physical and mental torture in the terms set out in article 1:

"For the purposes of this Convention, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ..."

The offence of torture under English law is constituted by section 134(1) of the Criminal Justice Act 1988, which provides:

"A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

Section 134(3) provides that it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission. So, in conformity with the Convention, the offence includes mental as well as physical torture. It seems to me that the conspiracy which charge 3 alleges against Senator Pinochet was a conspiracy to inflict mental torture, and not a conspiracy to take hostages.

I would hold therefore that it is not necessary for your Lordships to examine the Hostage Convention in order to see whether its terms were such as to deprive a former head of state of any immunity from a charge that he was guilty of hostage-taking. In my opinion Senator Pinochet is not charged with the offence of hostage-taking within the meaning of section 1(1) of the Taking of Hostages Act 1982.

Conspiracy to murder and attempted murder

The charges of conspiracy to torture include allegations that it was part of the conspiracy that some of those who were abducted and tortured would thereafter be murdered. Charge 4 alleges that in furtherance of that agreement about four thousand persons of many nationalities were murdered in Chile and in various other countries outside Chile. Two other

charges, charges 9 and 12, allege conspiracy to murder - in one case of a man in Spain and in the other of two people in Italy. Charge 9 states that Senator Pinochet agreed in Spain with others who were in Spain, Chile and France that the proposed victim would be murdered in Spain. Charge 12 does not say that anything was done in Spain in furtherance of the alleged conspiracy to murder in Italy. There is no suggestion in either of these charges that the proposed victims were to be tortured. Two further charges, charges 10 and 11, allege the attempted murder of the two people in Italy who were the subject of the conspiracy to commit murder there. Here again there is no suggestion that they were to be tortured before they were murdered.

Murder is a common law crime which, before it became an extraterritorial

offence if committed in a convention country under section 4 of the Suppression of Terrorism Act 1978, could not be prosecuted in the United Kingdom if it was committed abroad except in the case of a murder committed abroad by a British citizen: Offences against the Person Act 1861 (24 25 Vict. c. 100), section 9, as amended. A murder or attempted murder committed by a person in Spain, whatever his nationality, is an extradition crime for the purposes of his extradition to Spain from the United Kingdom under section 2(1)(a) of the Extradition Act 1989 as it is conduct which would be punishable here if it occurred in this country. But the allegation relating to murders in Spain and elsewhere which is made against Senator Pinochet is not that he himself murdered or attempted to murder anybody. It is that the murders were carried out, or were to be carried out, in Spain and elsewhere as part of a conspiracy and that he was one of the conspirators.

Section 1 of the Criminal Law Act 1977 created a new statutory offence of conspiracy to commit an offence triable in England and Wales. The offence of conspiracy which was previously available at common law was abolished by section 5. Although the principal offence was defined in the statute more narrowly, in other respects it codified the pre-existing law. It came into force on 1 December 1977 (S.I. 1977 No. 1682 (C.58)). Subsection (4) of that section provides:

"In this Part of this Act 'offence' means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intention of the parties to the agreement."

The effect of that subsection is that a person, whatever his nationality, who agrees in England to a course of conduct which will involve the offence of murder abroad may be prosecuted here for the offence of conspiracy to murder even although the murder itself would not have been triable in this country. It re-enacted a provision to the same effect in section 4 of the Offences against the Person Act 1861, which it in part repealed: see Schedule 13 to the Act of 1977. Section 4 of the Act of 1861 was in these terms:

"All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's Dominions or not, and whosoever

shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's Dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than 10 and not less than three years - or to be imprisoned for any term not exceeding two years, with or without hard labour."

So the conduct which is alleged against Senator Pinochet in charge 9 - that between 1 January 1975 and 31 December 1976 he was a party to a conspiracy in Spain to murder someone in Spain - is an offence for which he could, unless protected by immunity, be extradited

to Spain under reference to section 4 of the Act of 1861, as it remained in force until the relevant part of it was repealed by the Act of 1977. This is because his participation in the conspiracy in Spain was conduct by him in Spain for the purposes of section 2(1)(a) of the Extradition Act 1989.

The conduct which is alleged against him in charge 4 is that he was a party to a conspiracy to murder, in furtherance of which about four thousand people were murdered in Chile and in various countries outside Chile including Spain. It is implied that this conspiracy was in Chile, so I would hold that this is not conduct by him in Spain for the purposes of section 2(1)(a) of Act of 1989. The question then is whether it is an extraterritorial offence within the meaning of section 2(1)(b) of that Act.

A conspiracy to commit a criminal offence in England is punishable here under the common law rules as to extraterritorial conspiracies even if the conspiracy was formed outside England and nothing was actually done in this country in furtherance of the conspiracy: Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225. In that case it was held by the Judicial Committee, applying the English common law, that a conspiracy to traffic in a dangerous drug in Hong Kong entered into in Thailand could be tried in Hong Kong although no act pursuant to that conspiracy was done in Hong Kong. Lord Griffiths, delivering the judgment of the Board, said, at p. 251:

"Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

In Reg. v. Sansom [1991] 2 Q.B. 130 the appellants had been charged with conspiracy contrary to section 1 of the Criminal Law Act 1977, which does not in terms deal with extraterritorial conspiracies. The Court of Appeal rejected the argument that the principle laid down in the Somchai case referred only to the common law and that it could not be applied to conspiracies charged under the Act of 1977. Taylor L.J. said, at p. 138b, that it should now be regarded as the law of England on this point.

As Lord Griffiths observed in the Somchai case, at p. 244c, it is still true, as a broad general statement, that English criminal law is local in its effect and that the criminal law does not concern itself with crimes committed abroad. But I consider that the common law of England

would, applying the rule laid down in the Somchai case, also regard as justiciable in England a conspiracy to commit an offence anywhere which was triable here as an extraterritorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. I do not think that this would be an unreasonable extension of the rule. It seems to me that on grounds of comity it would make good sense for the rule to be extended in this way in order to promote the aims of the Convention.

Prior to the coming into force of the Suppression of Terrorism Act 1978, a conspiracy which was formed outside this country to commit murder in some country other than England in pursuance of which nothing was done in England to further that conspiracy would not be punishable in England, as it was not the intention that acts done in pursuance of the conspiracy would result in the commission of a criminal offence in this country. The presumption against the extraterritorial application of the criminal law would have precluded such conduct from being prosecuted here. Section 4(1) of the Act of 1978 gives the courts of the United Kingdom jurisdiction over a person who does any act in a convention country which, if he had done that act in a part of the United Kingdom, would have made him guilty in that part of the United Kingdom of an offence mentioned in some, but not all, of the paragraphs of Schedule 1 to that Act. Murder is one of the offences to which that provision applies. But that Act, which was passed to give effect to the European Convention on the Suppression of Terrorism of 27 January 1977, did not come into force until 21 August 1978 (S.I. 1978 No. 1063 (C.28)). And Chile is not a Convention country for the purposes of that Act, nor is it one of the non-Convention countries to which its provisions have been applied by section 5 of the Act of 1978. Only two non-Convention countries have been so designated. These are the United States (S.I. 1986 No. 2146) and India (S.I. 1993 No. 2533).

Applying these principles, the only conduct alleged against Senator Pinochet as conspiracy to murder in charge 4 for which he could be extradited to Spain is that part of it which alleges that he was a party to a conspiracy in Spain to commit murder in Spain prior to 21 August 1978. As for the allegation that he was a party to a conspiracy in Spain or elsewhere to commit murder in a country which had been designated as a convention country after that date, the extradition request states that acts in furtherance of the conspiracy took place in France in 1975, in Spain in 1975 and 1976 and in the United States and Portugal in 1976. These countries have now been designated as countries to which the Suppression of Terrorism Act 1978 applies. But the acts which are alleged to have taken place there all predate the coming into force of that Act. So the extraterritorial jurisdiction cannot be applied to them.

The alleged offences of attempted murder in Italy are not, as such, offences for which Senator Pinochet could be extradited to Spain under reference to section 2(1)(a) of the Act of 1989 because the alleged conduct did not take place in Spain and because he is not of Spanish nationality. But for their date they would have been offences for which he could have been extradited from the United Kingdom to Spain under reference to section 2(1)(b), on the grounds, first, that murder is now an extraterritorial

offence under section 4(1)(a) of the Suppression of Terrorism Act 1978 as it is an offence mentioned in paragraph 1 of Schedule 1 to that Act, Italy has been designated as a Convention country (S.I. 1986 No. 1137) and, second, that an offence of attempting to commit that offence is an extraterritorial offence under section 4(1)(b) of the Act of 1978. But the attempted murders in Italy which are alleged against Senator Pinochet are said to have been committed on 6 October 1975. As the Act of 1978 was not in force on that date, these offences are not capable of being brought within the procedures laid down by that Act.

Finally, to complete the provisions which need to be reviewed under this heading, mention should be made of an amendment which was made to Schedule 1 to the Suppression of Terrorism Act 1978 by section 22 of the Criminal Justice Act 1988, which includes within the list of offences set out in that schedule the offence of conspiracy. That section appears in Part I of the Act of 1988, most of which was repealed before having been brought into force following the enactment of the Extradition Act 1989. But section 22 was not repealed. It was brought into force on 5 June 1990 (S.I. 1990 No. 1145 (C.32)). It provides that there shall be added at the end of the Schedule a new paragraph in these terms: "21. An offence of conspiring to commit any offence mentioned in a preceding paragraph of this Schedule." At first sight it might seem that the effect of this amendment was to introduce a statutory extraterritorial jurisdiction in regard to the offence of conspiracy, wherever the agreement was made to participate in the conspiracy. But this offence does not appear in the list of offences in that Schedule in respect of which section 4(1) of the Suppression of Terrorism Act 1978 gives jurisdiction, if committed in a Convention country, as extraterritorial offences. In any event section 22 was not brought into force until 5 June 1990 (S.I. 1990 No. 1145 (C.32)). This was after the last date when Senator Pinochet is alleged to have committed the offence of conspiracy.

Torture and conspiracy to torture

Torture is another of those offences, wherever the act takes place, which is deemed by section 22(6) of the Extradition Act 1989 to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the Torture Convention of 10 December 1984. But section 134 of the Criminal Justice Act 1988 also gave effect to the Torture Convention. It made it a crime under English law for a public official or a person acting in an official capacity to commit acts of both physical and mental torture: see subsection (3). And it made such acts of torture an extraterritorial offence wherever they were committed and whatever the nationality of the perpetrator: see subsection (1). Read with the broad definition which the expression "torture" has been given by article 1 of the Convention and in accordance with ordinary principles, the offence which section 134 lays down must be taken to include the ancillary offences of counselling, procuring, commanding and aiding or abetting acts of torture and of being an accessory before or after the fact to such acts. All of these offences became extraterritorial offences against the law of the United Kingdom within the

meaning of section 2(2) of the Extradition Act 1989 as soon as section 134 was brought into force on 29 September 1988.

Section 134 does not mention the offence of conspiracy to commit torture, nor does article 1 of the Convention, nor does section 22(6) of the Extradition Act 1989. So, while the courts of the United Kingdom have extraterritorial jurisdiction under section 134 over offences of official torture wherever in the world they were committed, that section does not give them extraterritorial jurisdiction over a conspiracy to commit torture in any other country where the agreement was made outside the United Kingdom and no acts in furtherance of the conspiracy took place here. Nor is it conduct which can be deemed to take place in the

territory of the requesting country under section 22(6) of the Act of 1989.

However, the general statutory offence of conspiracy under section 1 of the Criminal Law Act 1977 extends to a conspiracy to commit any offence which is triable in England and Wales. Among those offences are all the offences over which the courts in England and Wales have extraterritorial jurisdiction, including the offence under section 134 of the Act of 1988. And, for reasons already mentioned, I consider that the common law rule as to extraterritorial conspiracies laid down in Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225 applies if a conspiracy which was entered into abroad was intended to result in the commission of an offence, wherever it was intended to be committed, which is an extraterritorial offence in this country. Accordingly the courts of this country could try Senator Pinochet for acts of torture in Chile and elsewhere after 29 September 1988, because they are extraterritorial offences under section 134 of the Act of 1988. They could also try him here for conspiring in Chile or elsewhere after that date to commit torture, wherever the torture was to be committed, because torture after that date is an extraterritorial offence and the courts in England have jurisdiction over such a conspiracy at common law.

Torture prior to 29 September 1989

Section 134 of the Criminal Law Act 1988 did not come into force until 29 September 1988. But acts of physical torture were already criminal under English law. Among the various offences against the person which would have been committed by torturing would have been the common law offence of assault occasioning actual bodily harm or causing injury and the statutory offence under section 18 of the Offences against the Person Act 1861 of wounding with intent to cause grievous bodily harm. A conspiracy which was entered into in England to commit these offences in England was an offence at common law until the common law offence was replaced on 1 December 1977 by the statutory offence of conspiracy in section 1 of the Criminal Law Act 1977 which remains in force and available. As I have said, I consider that a conspiracy which was entered into abroad to commit these offences in England would be triable in this country under the common law rule as to extraterritorial conspiracies which was laid down in Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225 applies if they were extraterritorial offences at the time of the alleged conspiracy.

However none of these offences, if committed prior to the coming into force of section 134 of the Criminal Justice Act 1988, could be said to be extraterritorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Extradition Act 1989 as there is no basis upon which they could have been tried extraterritorially in this country. The offences listed in Schedule 1 to the Suppression of Terrorism Act 1978 include the common law offence of assault and the statutory offences under the Offences against the Person Act 1861. But none of these offences are included in the list of offences which are made extraterritorial offences if committed in a convention country by section 4(1) of the Extradition Act 1989. So the rule laid down in the Somchai case cannot be applied to any conspiracy to commit these offences in any country outside England, as it would not be an extraterritorial conspiracy according to English law. Senator Pinochet

could only be extradited to Spain for such offences under reference to section 2(1)(a) of the Act of 1989 if he was accused of conduct in Spain which, if it occurred in the United Kingdom, would constitute an offence which would be punishable in this country. Section 22(6) of the Act of 1989 is of no assistance, because torture contrary to the Torture Convention had not yet become an offence in this country.

None of the charges of conspiracy to torture and none of the various torture charges allege that Senator Pinochet did anything in Spain which might qualify under section 2(1)(a) of the Act of 1989 as conduct in that country. All one can say at this stage is that, if the information presented to the magistrate under section 9(8) of the Act of 1989 in regard to charge 4 were to demonstrate (i) that he did something in Spain prior to 29 September 1988 to commit acts of torture there, or (ii) that he was party to a conspiracy in Spain to commit acts of torture in Spain, that would be conduct in Spain which would meet the requirements of section 2(1)(a) of that Act.

Torture after 29 September 1989

The effect of section 134 of the Criminal Justice Act 1988 was to make acts of official torture, wherever they were committed and whatever the nationality of the offender, an extraterritorial offence in the United Kingdom. The section came into force two months after the passing of the Act on 29 September 1988, and it was not retrospective. As from that date official torture was an extradition crime within the meaning of section 2(1) of the Extradition Act 1989 because it was an extraterritorial offence against the law of the United Kingdom.

The general offence of conspiracy which was introduced by section 1 of the Criminal Law Act 1977 applies to any offence triable in England and Wales: section 1(4). So a conspiracy which took place here after 29 September 1988 to commit offences of official torture, wherever the torture was to be carried out and whatever the nationality of the alleged torturer, is an offence for which Senator Pinochet could be tried in this country if he has no immunity. This means that a conspiracy to torture which he entered into in Spain after that date is an offence for which he could be extradited to Spain, as it would be an extradition offence under section 2(1)(a) of the Act of 1989. But, as I have said, I consider that the

common law of England would, applying the rule laid down in Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225, also regard as justiciable in England a conspiracy to commit an offence which was triable here as an extraterritorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. This means that he could be extradited to Spain under reference to section 2(1)(b) of the Act of 1989 on charges of conspiracy to torture entered into anywhere which related to periods after that date. But, as section 134 of the Act of 1988 does not have retrospective effect, he could not be extradited to Spain for any conduct in Spain or elsewhere amounting to a conspiracy to commit torture, wherever the torture was to be carried out, which occurred before 29 September 1988.

The conduct which is alleged against Senator Pinochet under the heading of conspiracy in charge 4 is not confined to the allegation that he was a party to an agreement that people were to be tortured. Included in that charge is the allegation that many people in various countries were murdered after being tortured in furtherance of the conspiracy that they would be tortured and then killed. So this charge includes charges of torture as well as conspiracy to torture. And it is broad enough to include the ancillary offences of counselling, procuring, commanding, aiding or abetting, or of being accessory before or after the fact to, these acts of torture. Ill-defined as this charge is, I would regard it as including allegations of torture and of conspiracy to torture after 29 September 1988 for which, if he has no immunity, Senator Pinochet could be extradited to Spain on the ground that, as they were extraterritorial offences against the law of the United Kingdom, they were extradition crimes within the meaning of section 2(1) of the Act of 1989.

What is the effect of the qualification which I have just mentioned, as to the date on which these allegations of torture and conspiracy to torture first became offences for which, at the request of Spain, Senator Pinochet could be extradited? In the circumstances of this case its effect is a profound one. It is to remove from the proceedings the entire course of such conduct in which Senator Pinochet is said to have engaged from the moment he embarked on the alleged conspiracy to torture in January 1972 until 29 September 1988. The only offences of torture and conspiracy to torture which are punishable in this country as extraterritorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Act of 1989 are those offences of torture and conspiracy to torture which he is alleged to have committed on or after 29 September 1988. But almost all the offences of torture and murder, of which there are alleged to have been about 4,000 victims, were committed during the period of repression which was at its most intense in 1973 and 1974. The extradition request alleges that during the period from 1977 to 1990 only about 130 such offences were committed. Of that number only three have been identified in the extradition request as having taken place after 29 September 1988. Of the various offences which are listed in the draft charges only charge 30, which refers to one act of official torture in Chile on 24 June 1989, relates exclusively to the period after 29 September 1988. Two of the charges of conspiracy to commit torture extend in part over

the period after that date. Charge 2 alleges that Senator Pinochet committed this offence during the period from 1 August 1973 to 1 January 1990, but it does not allege that any acts of torture took place in furtherance of that conspiracy. Charge 4 alleges that he was party to a conspiracy to commit torture in furtherance of which acts of murder following torture were committed in various countries including Spain during the period from 1 January 1972 to 1 January 1990. The only conduct alleged in charges 2 and 4 for which Senator Pinochet could be extradited to Spain is that part of the alleged conduct which relates to the period after 29 September 1988.

Although the allegations of conspiracy to torture in charge 2 and of torture and conspiracy to torture in charge 4 must now be restricted to the period from 29 September 1988 to 1 January 1990, the fact that these allegations remain available for the remainder of the period is

important because of the light which they cast on the single act of torture alleged in charge 30. For reasons which I shall explain later, I would find it very difficult to say that a former head of state of a country which is a party to the Torture Convention has no immunity against an allegation of torture committed in the course of governmental acts which related only to one isolated instance of alleged torture. But that is not the case which the Spanish judicial authorities are alleging against Senator Pinochet. Even when reduced to the period from 29 September 1988 until he left office as head of state, which the provisions for specialty protection in section 6(4) of the Extradition Act 1989 would ensure was the only period in respect of which the Spanish judicial authorities would be entitled to bring charges against him if he were to be extradited, the allegation is that he was a party to the use of torture as a systematic attack on all those who opposed or who might oppose his government.

The extradition request states that between August 1977, when the National Intelligence Directorate (D.I.N.A.) was dissolved and replaced by the National Intelligence Bureau (C.N.I.), the C.N.I., the Directorate of Communications of the Militarised Police (D.I.C.O.M.C.A.R.) and the Avenging Martyrs Commando (C.O.V.E.R.M.A.), while engaged in a policy of repression acting on orders emanating from Augusto Pinochet, systematically performed torture on detainees. Among the methods which are said to have been used was the application of electricity to sensitive parts of the body, and it is alleged that the torture sometimes led to the victim's death. Charge 30 alleges that the victim died after having been tortured by inflicting electric shock. The two victims of an incident in October 1988, which is mentioned in the extradition request but is not the subject of a separate count in the list of draft charges, are said to have shown signs of the application of electricity after autopsy. It appears that the evidence has revealed only these three instances after 29 September 1988 when acts of official torture were perpetrated in pursuance of this policy. Even so, this does not affect the true nature and quality of those acts. The significance of charges 2 and 4 may be said to lie in the fact that they show that a policy of systematic torture was being pursued when those acts were perpetrated.

I must emphasise that it is not our function to consider whether or not the evidence justifies this inference, and I am not to be taken as saying that

it does. But it is plain that the information which is before us is capable of supporting the inference that the acts of torture which are alleged during the relevant period were of that character. I do not think that it would be right to approach the question of immunity on a basis which ignores the fact that this point is at least open to argument. So I consider that the argument that Senator Pinochet has no immunity for this reduced period is one which can properly be examined in the light of developments in customary international law regarding the use of widespread or systematic torture as an instrument of state policy.

Charges which are relevant to the question of immunity

The result of this analysis is that the only charges which allege extradition crimes for which Senator Pinochet could be extradited to Spain if he has no immunity are: (1) those charges of conspiracy to

torture in charge 2, of torture and conspiracy to torture in charge 4 and of torture in charge 30 which, irrespective of where the conduct occurred, became extraterritorial offences as from 29 September 1988 under section 134 of the Criminal Justice Act 1988 and under the common law as to extra territorial conspiracies; (2) the conspiracy in Spain to murder in Spain which is alleged in charge 9; (3) 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.

So far as the law of the United Kingdom is concerned, the only country where Senator Pinochet could be put on trial for the full range of the offences which have been alleged against him by the Spanish judicial authorities is Chile.

State immunity

Section 20(1)(a) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 applies, subject to "any necessary modifications," to a head of state as it applies to the head of a diplomatic mission. The generality of this provision is qualified by section 20(5), which restricts the immunity of the head of state in regard to civil proceedings in the same way as Part I of the Act does for diplomats. This reflects the fact that section 14 already provides that heads of state are subject to the restrictions in Part I. But there is nothing in section 20 to indicate that the immunity from criminal proceedings which article 31(1) of the Vienna Convention as applied by the Act of 1964 gives to diplomats is restricted in any way for heads of state. Section 23(3), which provides that the provisions of Parts I and II of the Act do not operate retrospectively, makes no mention of Part III. I infer from this that it was not thought that Part III would give rise to the suggestion that it might operate in this way.

It seems to me to be clear therefore that what section 20(1) did was to give statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts. Marcos and Marcos v. Federal Department of Police (1989) 102 I.L.R 198, 203 supports

this view, as it was held in that case that the article 39(2) immunity was available under customary international law to the former head of State of the Republic of the Philippines.

The question then is to what extent does the immunity which article 39(2) gives to former diplomats have to be modified in its application to former heads of state? The last sentence of article 39(2) deals with the position after the functions of the diplomat have come to an end. It provides that "with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." It is clear that this provision is dealing with the residual immunity of the former diplomat ratione materiae, and not with the immunity ratione personae which he enjoys when still serving as a diplomat. In its application to

a former head of state this provision raises two further questions: (1) does it include functions which the head of state performed outside the receiving state from whose jurisdiction he claims immunity, and (2) does it include acts of the kind alleged in this case - which Mr. Alun Jones accepts were not private acts but were acts done in the exercise of the state's authority?

As to the first of these two further questions, it is plain that the functions of the head of state will vary from state to state according to the acts which he is expected or required to perform under the constitution of that state. In some countries which adhere to the traditions of constitutional monarchy these will be confined largely to ceremonial or symbolic acts which do not involve any executive responsibility. In others the head of state is head of the executive, with all the resources of the state at his command to do with as he thinks fit within the sphere of action which the constitution has given to him. I have not found anything in customary international law which would require us to confine the expression "his functions" to the lowest common denominator. In my opinion the functions of the head of state are those which his own state enables or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state. These may include instructing or authorising acts to be done by those under his command at home or abroad in the interests of state security. It would not be right therefore to confine the immunity under article 39(2) to acts done in the receiving state. I would not regard this as a "necessary modification" which has to be made to it under section 20(1) of the Act of 1978.

As to the second of those questions, I consider that the answer to it is well settled in customary international law. The test is whether they were private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other. It is whether the act was done to promote the state's interests - whether it was done for his own benefit or gratification or was done for the state: United States of America v. Noriega (1990) 746 F.Supp. 1506, 1519-1521. Sir Arthur Watts Q.C. in his Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours, p. 56, said: "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." The sovereign or governmental acts of

one state are not matters upon which the courts of other states will adjudicate: I Congreso del Partido [1983] 1 A.C. 244, 262c, per Lord Wilberforce. The fact that acts done for the state have involved conduct which is criminal does not remove the immunity. Indeed the whole purpose of the residual immunity ratione materiae is to protect the former head of state against allegations of such conduct after he has left office. Ahead of state needs to be free to promote his own state's interests during the entire period when he is in office without being subjected to the prospect of detention, arrest or embarrassment in the foreign legal system of the receiving state: see United States v. Noriega, at p. 1519; Lafontant v. Aristide (1994) 844 F.Supp. 128, 132. The conduct does not have to be lawful to attract the immunity.

It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The examples which Lord Steyn [2000] 1 A.C. 61, 115c-e gave of the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of jus cogens. This compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct. As Sir Arthur Watts Q.C. said in his Hague Lectures, p. 89, n. 198, in respect of conduct constituting an international crime, such as war crimes, special considerations apply.

But even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts. There is plenty of source material to show that war crimes and crimes against humanity have been separated out from the generality of conduct which customary international law has come to regard as criminal. These developments were described by Lord Slynn of Hadley [2000] 1 A.C. 61, 80e-81a and I respectfully agree with his analysis. As he said, at p. 81a-b, except in regard to crimes in particular situations where international tribunals have been set up to deal with them and it is part of the arrangement that heads of state should not have any immunity, there is no general recognition that there has been a loss of immunity from the jurisdiction of foreign national courts. This led him to sum the matter up in this way, at p. 81:

"So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary

conditions and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention."

That is the background against which I now turn to the Torture Convention. As all the requirements which Lord Slynn laid out in the passage at p. 81d-f save one are met by it, when read with the provisions of sections 134 and 135 of the Criminal Justice Act 1988 which gave the force of law to the Convention in this country, I need deal only with the one issue which remains. Did it make it clear that a former head of state has no immunity in the courts of a state which has jurisdiction to try the crime?

The Torture Convention and loss of immunity

The Torture Convention is an international instrument. As such, it must be construed in accordance with customary international law and against the background of the subsisting residual former head of state immunity. Article 32(2) of the Vienna Convention, which forms part of the provisions in the Diplomatic Privileges Act 1964 which are extended to heads of state by section 20(1) of the State Immunity Act 1978, subject to "any necessary modifications," states that waiver of the immunity accorded to diplomats "must always be express." No modification of that provision is needed to enable it to apply to heads of state in the event of it being decided that there should be a waiver of their immunity. The Torture Convention does not contain any provision which deals expressly with the question whether heads of state or former heads of state are or are not to have immunity from allegations that they have committed torture.

But there remains the question whether the effect of the Torture Convention was to remove the immunity by necessary implication. Although article 32(2) says that any waiver must be express, we are required nevertheless to consider whether the effect of the Convention was necessarily to remove the immunity. This is an exacting test. Section 1605(a)(1) of the United States Federal Sovereignty Immunity Act provides for an implied waiver, but this section has been narrowly

construed: Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 720; Princz v. Federal Republic of Germany (1994) 26 F.3d 1166, 1174; Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683, 693. In international law the need for clarity in this matter is obvious. The general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states.

The preamble to the Torture Convention explains its purpose. After referring to article 5 of the Universal Declaration of Human Rights which provides that no one shall be subjected to torture or other cruel, inhuman or degrading treatment and to the United Nations Declaration of 9December 1975 regarding torture and other cruel, inhuman or degrading treatment or punishment, it states that it was desired "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." There then follows in article 1 a definition of the term "torture" for the purposes of the Convention. It is expressed in the widest possible terms. It means "any act by which severe pain or

suffering, whether physical or mental, is intentionally inflicted" for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. It is confined however to official torture by its concluding words, which require such pain or suffering to have been "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

This definition is so broadly framed as to suggest on the one hand that heads of state must have been contemplated by its concluding words, but to raise the question on the other hand whether it was also contemplated that they would by necessary implication be deprived of their immunity. The words "public official" might be thought to refer to someone of lower rank than the head of state. Other international instruments suggest that where the intention is to include persons such as the head of state or diplomats they are mentioned expressly in the instrument: see article 27 of the Rome Statute of the International Criminal Court which was adopted on 17 July 1998. But a head of state who resorted to conduct of the kind described in the exercise of his function would clearly be "acting in an official capacity." It would also be a strange result if the provisions of the Convention could not be applied to heads of state who, because they themselves inflicted torture or had instigated the carrying out of acts of torture by their officials, were the persons primarily responsible for the perpetration of these acts.

Yet the idea that the framing of the definition in these terms in itself was sufficient to remove the immunity from prosecution for all acts of torture is also not without difficulty. The jus cogens character of the immunity enjoyed by serving heads of state ratione personae suggests that, on any view, that immunity was not intended to be affected by the Convention. But once one immunity is conceded it becomes harder, in the absence of an express provision, to justify the removal of the other immunities. It may also be noted that Burgers and Danelius, Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at p. 131, make this comment on article 5(1) of the Convention which sets out the measures which each state party is

required to take to establish its jurisdiction over the offences of torture which it is required by article 4 to make punishable under its own criminal law:

"This means, first of all, that the state shall have jurisdiction over the offence when it has been committed in its territory. Under international or national law, there may be certain limited exceptions to this rule, e.g. in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted in so far as they apply to criminal acts in general and are not unduly extensive."

These observations, although of undoubted weight as Jan Herman Burgers of the Netherlands was a Chairman-Rapporteur to the Convention, may be thought to be so cryptic as to defy close analysis. But two points are worth making about them. The first is that they recognise that the

provisions of the Convention are not inconsistent with at least some of the immunities in customary international law. The second is that they make no mention of any exception which would deprive heads of state or former heads of state of their customary international law immunities. The absence of any reference to this matter suggests that the framers of the Convention did not consider it. The Reports of the Working Group on the Draft Convention to the Economic and Social Council of the Commission on Human Rights show that many meetings were held to complete its work. These extended over several years, and many issues were raised and discussed before the various delegations were content with its terms. If the issue of head of state and former head of state immunity was discussed at any of these meetings, it would without doubt have been mentioned in the reports. The issue would have been recognised as an important one on which the delegations would have to take instructions from their respective governments. But there is no sign of this in any of the reports which have been shown to us.

The absence of any discussion of the issue is not surprising, once it is appreciated that the purpose of the Convention was to put in place as widely as possible the machinery which was needed to make the struggle against torture more effective throughout the world. There was clearly much to be done, as the several years of discussion amply demonstrate. According to Burgers and Danelius, p. 1, the principal aim was to strengthen the existing position by a number of supportive measures. A basis had to be laid down for legislation to be enacted by the contracting states. An agreed definition of torture, including mental torture, had to be arrived at for the adoption by states into their own criminal law. Provisions had to be agreed for the taking of extraterritorial jurisdiction to deal with these offences and for the extradition of offenders to states which were seeking to prosecute them. As many states do not extradite their own citizens and the Convention does not oblige states to extradite, they had to undertake to take such measures as might be necessary to establish jurisdiction over these offences in cases where the alleged offender was present within their territory but was not to be extradited. For many, if not all, states these arrangements were innovations upon their domestic law. Waiver of immunities was not

mentioned. But, as Yoram Dinstein, "Diplomatic Immunity from Jurisdiction Ratione Materiae" (1966) 15 I.C.L.Q. 76, 80 had already pointed out it would be entirely meaningless to waive the immunity unless local courts were able, as a consequence, to try the offender.

These considerations suggest strongly that it would be wrong to regard the Torture Convention as having by necessary implication removed the immunity ratione materiae from former heads of state in regard to every act of torture of any kind which might be alleged against him falling within the scope of article 1. In Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-717 it was held that the alleged acts of official torture, which were committed in 1976 before the making of the Torture Convention, violated international law under which the prohibition of official torture had acquired the status of jus cogens. Cruel acts had been perpetrated over a period of seven days by men acting under the direction of the military governor. Argentina was being ruled by an anti-semitic military junta, and epithets were used by those who tortured him which indicated that Jose Siderman was being tortured

because of his Jewish faith. But the definition in article 1 is so wide that any act of official torture, so long as it involved "severe" pain or suffering, would be covered by it.

As Burgers and Danelius point out at p. 122, although the definition of torture in article 1 may give the impression of being a very precise and detailed one, the concept of "severe pain and suffering" is in fact rather a vague concept, on the application of which to a specific case there may be very different views. There is no requirement that it should have been perpetrated on such a scale as to constitute an international crime in the sense described by Sir Arthur Watts in his Hague Lectures at p. 82, that is to say a crime which offends against the public order of the international community. A single act of torture by an official against a national of his state within that state's borders will do. The risks to which former heads of state would be exposed on leaving office of being detained in foreign states upon an allegation that they had acquiesced in an act of official torture would have been so obvious to governments that it is hard to believe that they would ever have agreed to this. Moreover, even if your Lordships were to hold that this was its effect, there are good reasons for doubting whether the courts of other states would take the same view. An express provision would have removed this uncertainty.

Nevertheless there remains the question whether the immunity can survive Chile's agreement to the Torture Convention if the torture which is alleged was of such a kind or on such a scale as to amount to an international crime. Sir Arthur Watts Q.C. in his Hague Lectures, p. 82 states that the idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. The international agreements to which states have been striving in order to deal with this problem in international criminal courts have been careful to set a threshold for such crimes below which the jurisdiction of those courts will not be available. The Statute of the International Tribunal for the Former Yugoslavia (1993) includes torture in article 5 as one of the crimes against humanity. In paragraph 48 of his Report to the United Nations the Secretary-General explained that crimes

against humanity refer to inhuman acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population. Similar observations appear in paragraphs 131 to 135 of the Secretary-General's Report of 9 December 1994 on the Rwanda conflict. Article 3 of the Statute of the International Criminal Tribunal for Rwanda (1994) included torture as one of the crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population" on national, political, ethnic or other grounds. Article 7 of the Rome Statute contains a similar limitation to acts of widespread or systematic torture.

The allegations which the Spanish judicial authorities have made against Senator Pinochet fall into that category. As I sought to make clear in my analysis of the draft charges, we are not dealing in this case - even upon the restricted basis of those charges on which Senator Pinochet could lawfully be extradited if he has no immunity - with isolated acts of official torture. We are dealing

with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an international crime. This is because he is said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic torture within Chile and elsewhere as an instrument of government. On the other hand it is said that, for him to lose his immunity, it would have to be established that there was a settled practice for crime of this nature to be so regarded by customary international law at the time when they were committed. I would find it hard to say that it has been shown that any such settled practice had been established by 29 September 1988. But we must be careful not to attach too much importance to this point, as the opportunity for prosecuting such crimes seldom presents itself.

Despite the difficulties which I have mentioned, I think that there are sufficient signs that the necessary developments in international law were in place by that date. The careful discussion of the jus cogens and erga omnes rules in regard to allegations of official torture in Siderman de Blake v. Republic of Argentina, 26 F.2d 699, 714-718, which I regard as persuasive on this point, shows that there was already widespread agreement that the prohibition against official torture had achieved the status of a jus cogens norm. Articles which were published in 1988 and 1989 are referred to, at p. 717, in support of this view. So I think that we can take it that that was the position by 29 September 1988. Then there is the Torture Convention of 10 December 1984. Having secured a sufficient number of signatories, it entered into force on 26 June 1987. In my opinion, once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, 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.

As Sir Arthur Watts Q.C. has explained in his Hague Lectures, at p. 82, the general principle in such cases is that of individual responsibility for international criminal conduct. After a review of various general

international instruments relating mainly but not exclusively to war crimes, of which the most recent was the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind of 1988, he concludes, at p. 84, that it can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes. Ahead of state is still protected while in office by the immunity ratione personae, but the immunity ratione materiae on which he would have to rely on leaving office must be denied to him.

I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity ratione materiae with respect to all acts of official torture as defined in article 1. It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile

ratified the Convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available.

I consider that the date as from which the immunity ratione materiae was lost was 30 October 1988, which was the date when Chile's ratification of the Torture Convention on 30 September 1988 took effect. Spain had already ratified the Convention. It did so on 21 October 1987. The Convention was ratified by the United Kingdom on 8 December 1988 following the coming into force of section 134 of the Criminal Justice Act 1988. On the approach which I would take to this question the immunity ratione materiae was lost when Chile, having ratified the Convention to which section 134 gave effect and which Spain had already ratified, was deprived of the right to object to the extraterritorial jurisdiction which the United Kingdom was able to assert over these offences when the section came into force. But I am content to accept the view of my noble and learned friend, Lord Saville of Newdigate, that Senator Pinochet continued to have immunity until 8 December 1988 when the United Kingdom ratified the Convention.

Conclusion

It follows that I would hold that, while Senator Pinochet has immunity ratione materiae from prosecution for the conspiracy in Spain to murder in Spain which is alleged in charge 9 and for such conspiracies in Spain to murder in Spain and such conspiracies in Spain prior to 8 December 1988 to commit acts of torture in Spain as could be shown to be part of the allegations in charge 4, he has no immunity from prosecution for the charges of torture and of conspiracy to torture which relate to the period after that date. None of the other charges which are made against him are extradition crimes for which, even if he had no immunity, he could be extradited. On this basis only I, too, would allow the appeal, to the extent necessary to permit the extradition to proceed on the charges of torture and conspiracy to torture relating to the period after 8 December 1988.

[2000]

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Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

Lord Hope of Craighead

The profound change in the scope of the case which can now be made for the extradition to Spain of Senator Pinochet will require the Secretary of State to reconsider his decision to give authority to proceed with the extradition process under section 7(4) of the Extradition Act 1989 and, if he decides to renew that authority, with respect to which of the alleged crimes the extradition should be authorised. It will also make it necessary for the magistrate, if renewed authority to proceed is given, to pay very careful attention to the question whether the information which is laid before him under section 9(8) of the Act supports the allegation that torture in pursuance of a conspiracy to commit systematic torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

Lord Hutton. My Lords, the rehearing of this appeal has raised a number of separate issues which have been fully considered in the speech of my noble and learned friend, Lord Browne-Wilkinson, which I have had the benefit of reading in draft. I am in agreement with his reasoning and conclusion that the definition of an

"extradition crime" in the Extradition Act 1989 requires the conduct to be criminal under United Kingdom law at the date of commission. I am also in agreement with the analysis and conclusions of my noble and learned friend, Lord Hope of Craighead as to the alleged crimes in respect of which Senator Pinochet could be extradited apart from any issue of immunity. I further agree with the view of Lord Browne-Wilkinson that Senator Pinochet is entitled to immunity in respect of charges of murder and conspiracy to murder, but I wish to make some observations on the issue of immunity claimed by Senator Pinochet in respect of charges of torture and conspiracy to torture.

Senator Pinochet ceased to be head of state of Chile on 11 March 1990, and he claims immunity as a former head of state. The distinction between the immunity of a serving head of state and the immunity of a former head of state is discussed by Sir Arthur Watts Q.C. in his monograph, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers." He states, at p. 53:

"It is well established that, put broadly, a head of state enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other states. This immunity - to the extent that it exists - becomes effective upon his assumption of office, even in respect of events occurring earlier. Ahead of state's immunity is enjoyed in recognition of his very special status as a holder of his state's highest office."

And, at p. 88:

"A former head of state is entitled under international law to none of the facilities, immunities and privileges which international law accords to heads of states in office. After his loss of office he may be sued in relation to his private activities, both those taking place while he was still head of state, as well as those occurring before becoming head of state or since ceasing to be head of state."

And, at p. 89:

"Ahead of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador's appointment has come to an end."

Section 20 in Part III of the State Immunity Act 1978 provides that, subject to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state, and section 2 of the Act of 1964 provides that the articles of the Vienna Convention on Diplomatic Relations set out in Schedule 1 to the Act shall have the force of law in the United Kingdom. The articles set out in Schedule 1 include articles 29, 31 and 39. Article 29 provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." Article 31 provides: "(1)

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state." Article 39 provides:

"(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

One of the issues raised before your Lordships is whether section 20 of the State Immunity Act 1978 relates only to the functions carried out by a foreign head of state when he is present within the United Kingdom, or whether it also applies to his actions in his own state or in another country. Section 20 is a difficult section to construe, but I am of opinion that, with the necessary modifications, the section applies the provisions of the Diplomatic Privileges Act, and therefore the articles of the Vienna Convention, to the actions of a head of state in his own country or elsewhere, so that, adopting the formulation of Lord Nicholls of Birkenhead [1998] 3 W.L.R. 1456, 1499e in the earlier hearing, with the addition of seven words, the effect of section 20 of the Act of 1978, section 2 of the Diplomatic Privileges Act and of the articles of the Vienna Convention is that: "A former head of state shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him, whether in his own country or elsewhere, in the exercise of his functions as a head of state."

I consider, however, that section 20 did not change the law in relation to the immunity from criminal jurisdiction to which a former head of state was entitled in the United Kingdom but gave statutory form to the relevant principle of international law which was part of the common law.

Therefore the crucial question for decision is whether, if committed, the acts of torture (in which term I include acts of torture and conspiracy to commit torture) alleged against Senator Pinochet were carried out by him in the performance of his functions as head of state. I say "if committed" because it is not the function of your Lordships in this appeal to decide whether there is evidence to substantiate the allegations and Senator Pinochet denies them. Your Lordships had the advantage of very learned and detailed submissions from counsel for the parties and the interveners and from the amicus curiae (to which submissions I would wish to pay tribute) and numerous authorities from many jurisdictions were cited.

It is clear that the acts of torture which Senator Pinochet is alleged to have committed were not acts carried out in his private capacity for his personal gratification. If that had been the case they would have been private acts and it is not disputed that Senator Pinochet, once he

had ceased to be head of state, would not be entitled to claim immunity in respect of them. It was submitted on his behalf that the acts of torture were carried out for the purposes of protecting the state and advancing its interests, as Senator Pinochet saw them, and were therefore governmental functions and were accordingly performed as functions of the head of state. It was further submitted that the immunity which Senator Pinochet claimed was the immunity of the state of Chile itself. In the present proceedings Chile intervened on behalf of Senator Pinochet and in paragraph 10 of its written case Chile submitted:

"the immunity of a head of state (or former head of state) is an aspect of state immunity ... Immunity of a head of state in his public capacity is equated with state immunity in international law ... Actions against representatives of a foreign government in respect of their governmental or official acts are in substance proceedings against the state which they represent, and the immunity is for the benefit of the state."

Moreover, it was submitted that a number of authorities established that the immunity which a state is entitled to claim in respect of the acts of its former head of state or other public officials applies to acts which are unlawful and criminal.

My Lords, in considering the authorities it is necessary to have regard to a number of matters. First, it is a principle of international law that a state may not be sued in the courts of another state without its consent (although this principle is now subject to exceptions - the exceptions in the law of the United Kingdom being set out in the State Immunity Act 1978). Halsbury's Laws of England, 4th ed., vol. 18 (1977), p. 794, para. 1548 states:

"An independent sovereign state may not be sued in the English courts against its will and without its consent. This immunity from

the jurisdiction is derived from the rules of international law, which in this respect have become part of the law of England. It is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity."

Secondly, many of the authorities cited by counsel were cases where an action in tort for damages was brought against a state. Thirdly, a state is responsible for the actions of its officials carried out in the ostensible performance of their official functions notwithstanding that the acts are performed in excess of their proper functions. Oppenheim's International Law, vol. I, pp. 545-546, para. 165 states:

"In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of

their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are prima facie attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior."

Fourthly, in respect of the jurisdiction of the courts of the United Kingdom, foreign states are now expressly given immunity in civil proceedings (subject to certain express exceptions) by statute. Part I of the State Immunity Act 1978 relating to civil proceedings provides in section 1(1): "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act." But Part I of the Act has no application to criminal jurisdiction and section 16(4) in Part I provides: "This Part of this Act does not apply to criminal proceedings." In the United States of America section 1604 of the Foreign Sovereign Immunities Act 1976 provides:

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter."

Counsel for Senator Pinochet and for Chile relied on the decision of the Court of Appeal in Al-Adsani v. Government of Kuwait (1996) 107 I.L.R. 536 where the plaintiff brought an action for damages in tort against the government of Kuwait claiming that he had been tortured in Kuwait by officials of that government. The Court of Appeal upheld a claim by the government of Kuwait that it was entitled to immunity. Counsel for the plaintiff submitted that the rule of international law prohibiting torture is so fundamental that it is jus cogens which overrides all other principles of international law, including the principle of sovereign immunity. This submission was rejected by the Court of Appeal on the ground that immunity was given by section 1 of the State Immunity Act 1978 and that the immunity was not subject to an overriding qualification in respect of torture or other acts contrary to international law which did not fall within one of the express exceptions contained in the succeeding sections of the Act. Ward L.J. stated, at pp. 549-550:

"Unfortunately, the Act is as plain as plain can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity is afforded in respect of acts of torture committed outside this jurisdiction."

A similar decision was given by the United States Court of Appeals, Ninth

Circuit, in Siderman de Blake v. Republic of Argentina, 965 F.2d 699 where an Argentine family brought an action for damages in tort against Argentina and one of its provinces for acts of torture by military officials. Argentina claimed that it was entitled to immunity under the Foreign Sovereign Immunities Act and the Court of Appeals, with reluctance, upheld this claim. The argument advanced on behalf of the plaintiffs was similar to that advanced in the Al-Adsani case, but the court ruled that it was obliged to reject it because of the express provisions of the Foreign Sovereign Immunities Act, stating at pp. 718-719:

"The Sidermans argue that since sovereign immunity itself is a principle of international law, it is trumped by jus cogens. In short, they argue that when a state violates jus cogens, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. As a matter of international law, the Sidermans' argument carries much force ... Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the F.S.I.A. We must interpret the F.S.I.A. through the prism of Amerada Hess. Nothing in the text or legislative history of the F.S.I.A. explicitly addresses the effect violations of jus cogens might have on the F.S.I.A.'s cloak of immunity. Argentina contends that the Supreme Court's statement in Amerada Hess that the F.S.I.A. grants immunity 'in those cases involving alleged violations of international law that do not come within one of the F.S.I.A.'s exceptions,' 109 S.Ct. 683, 688, precludes the Sidermans' reliance on jus cogens in this case. Clearly, the F.S.I.A. does not specifically provide for an exception to sovereign immunity based on jus cogens. In Amerada Hess, the court had no occasion to

consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of jus dispositivum, the norms derived from international agreements or customary international law with which the Amerada Hess court dealt. However, the court was so emphatic in its pronouncement 'that immunity is granted in those cases involving alleged violations of international law that do not come within one of the F.S.I.A.'s exceptions,' Amerada Hess, at p. 688, and so specific in its formulation and method of approach, at p. 690 ('Having determined that the F.S.I.A. provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here'), that we conclude that if violations of jus cogens committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of jus cogens does not confer jurisdiction under the F.S.I.A."

It has also been decided that where an action for damages in tort is brought against officials of a foreign state for actions carried out by them in ostensible exercise of their governmental functions, they can claim state immunity, notwithstanding that their actions were illegal. The state itself, if sued directly for damages in respect of their actions would be entitled to immunity and this immunity would be impaired if damages were awarded against the officials and then the state was obliged to indemnify them. In Jaffe v. Miller (1993)

13 O.R.(3d) 745 government officials were sued in tort for laying false criminal charges and for conspiracy for kidnap, and it was held that they were entitled to claim immunity. Finlayson J.A., delivering the judgment of the Ontario Court of Appeal, stated at pp. 758-759:

"I also agree with the reasoning on this issue put forward by counsel for the respondents. Counsel submitted that to confer immunity on a government department of a foreign state but to deny immunity to the functionaries, who in the course of their duties performed the acts, would render the State Immunity Act ineffective. To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. Counsel submitted that when functionaries are acting within the scope of their official duties, as in the present case, they come within the definition of 'foreign state.'"

In my opinion these authorities and similar authorities relating to claims for damages in tort against states and government officials do not support the claim of Senator Pinochet to immunity from criminal proceedings in the United Kingdom because the immunity given by Part I of the State Immunity Act 1978 does not apply to criminal proceedings.

Counsel for Senator Pinochet and for Chile further submitted that under the rules of international law courts recognise the immunity of a

former head of state in respect of criminal acts committed by him in the purported exercise of governmental authority. In Marcos and Marcos v. Federal Department of Police, 102 I.L.R. 198 the United States instituted criminal proceedings against Ferdinard Marcos, the former President of the Philippines, and his wife, who had been a minister in the Philippine Government. They were accused of having abused their positions to acquire for themselves public funds and works of art. The United States authorities sought legal assistance from the Swiss authorities to obtain banking and other documents in order to clarify the nature of certain transactions which were the subject of investigation. Mr. Marcos and his wife claimed immunity as the former leaders of a foreign state. In its judgment the Swiss federal tribunal stated, at p. 203:

"The immunity in relation to their functions which the appellants enjoyed therefore subsisted for those criminal acts which were allegedly committed while they were still exercising their powers in the Republic of the Philippines. The proceedings brought against them before the United States courts could therefore only be pursued pursuant to an express waiver by the State of the Philippines of the immunity which public international law grants them not as a personal advantage but for the benefit of the state over which they ruled."

The tribunal then held that the immunity could not be claimed by Mr. and Mrs. Marcos in Switzerland because there had been an express waiver by the State of the Philippines. However I would observe that in that case Mr. and Mrs. Marcos were not accused of violating a rule of international law which had achieved the status of jus cogens.

Counsel also relied on the decision of the Federal Constitutional Court of the Federal Republic of Germany In re Former Syrian Ambassador to the German Democratic Republic (unreported), 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96. In that case the former Syrian ambassador to the German Democratic Republic was alleged to have failed to prevent a terrorist group from removing a bag of explosives from the Syrian Embassy, and a few hours later the explosives were used in an attack which left one person dead and more than 20 persons seriously injured. Following German unification and the demise of the German Democratic Republic in 1990 a District Court in Berlin issued an arrest warrant against the former ambassador for complicity in murder and the causing of an explosion. The Provincial Court quashed the warrant but the Court of Appeal overruled the decision of the Provincial Court and restored the validity of the warrant, holding that "The complainant was held to have contributed to the attack by omission. He had done nothing to prevent the explosives stored at the embassy building from being removed." The former ambassador then lodged a constitutional complaint claiming that he was entitled to diplomatic immunity.

The Constitutional Court rejected the complaint and held that the obligation limited to the former German Democratic Republic to recognise the continuing immunity of the complainant, according to article 39(2) of

the Vienna Convention, was not transferred to the Federal Republic of Germany by the international law of state succession.

Counsel for Senator Pinochet and for Chile relied on the following passage in the judgment of the constitutional court:

"For the categorisation as an official act, it is irrelevant whether the conduct is legal according to the legal order of the Federal Republic of Germany (see above B.II.2.a(bb)) and whether it fulfilled diplomatic functions in the sense of article 3 of the V.C.D.R. (see also the position taken by the [Swiss] Federal Political Department on 12 May 1961, Schweizerisches Jahrbuch für internationles Recht ('S.J.I.R.') 21 (1964) 171; however, a different position was taken by the Federal Political Department on 31 January 1979, reproduced in S.J.I.R. 36 (1980) 210, 211 f.). The commission of criminal acts does not simply concern the functions of the mission. If a criminal act was never considered as official, there would be no substance to continuing immunity. In addition, there is no relevant customary international law exception from diplomatic immunity here (see Preamble to the V.C.D.R., 5th paragraph) ... Diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law. The diplomat can in such situations only be declared persona non grata."

However, two further parts of the judgment are to be noted. First, it appears that the explosives were left in the embassy when the ambassador was absent, and his involvement began after the explosives had been left in the embassy. The report states:

"The investigation conducted by the Public Prosecutor's Office concluded that the bombing attack was planned and carried out by a terrorist group. The complainant's sending state had, in a

telegram, instructed its embassy in East Berlin to provide every possible assistance to the group. In the middle of August 1983 a member of the terrorist group appeared in the embassy while the complainant was absent and requested permission from the then third secretary to deposit a bag in the embassy. In view of the telegram, which was known to him, the third secretary granted that permission. "Later, the member of the terrorist group returned to the embassy and asked the third secretary to transport the bag to West Berlin for him in an embassy car. At the same time, he revealed that there were explosives in the bag. The third secretary informed the complainant of the request. The complainant first ordered the third secretary to bring him the telegram, in order to read through the text carefully once again, and then decided that the third secretary could refuse to provide the transportation. After the third secretary had returned and informed the terrorist of this, the terrorist took the bag, left the embassy and conveyed the explosive in an unknown manner towards West Berlin."

It appears that these facts were taken into account by the constitutional court when it stated:

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"The complainant acted in the exercise of his official functions as a member of the mission, within the meaning of article 39(2) (2) of the V.C.D.R., because he is charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending state. The complainant was charged with having done nothing to prevent the return of the explosive. The Court of Appeal derived the relevant obligation of conduct out of the official responsibility of the complainant, as leader of the mission, for objects left in the embassy. After the explosive was left in the embassy and therefore in the complainant's sphere of control and responsibility, he was obligated, within the framework of his official duties, to decide how the explosive would then be dealt with. The complainant made such a decision, apparently on the basis of the telegraphed instruction from his sending state, so that private interests are not discernible (on the classification of activities on the basis of instructions see the Bingham case in McNair, International Law Opinions, vol. 1 (1956), pp. 196, 197; Denza, Diplomatic Law (1976), p. 249f.; Salmon, Manuel de Droit Diplomatique (1994), p. 458ff.). Instead, the complainant responded to the third secretary directly, in his position as the superior official, and, according to the view of the Court of Appeal, sought the best solution for the embassy."

In addition the constitutional court stated that the rules of diplomatic law constitute a self-contained regime and drew a distinction between the immunity of a diplomat and the immunity of a head of state or governmental official and stated:

"Article 7 of the Charter of the International Military Tribunal of Nuremberg (U.N.T.S. vol. 82, p. 279) and following it article 7(2) of the Statute of the International Criminal Tribunal for Yugoslavia (I.L.M. 32 (1993) p. 1192), as well as article 6(2) of the Statute for the International Criminal Tribunal for Rwanda (I.L.M. 33 (1994), p. 1602) state that the official position of an accused, whether as a leader of a state or as a responsible official in a government department, does not serve to free him from responsibility or mitigate punishment. Exemptions

from immunity for cases of war criminals, violations of international law and offences against jus cogens under international law have been discussed as developments of this rule ... However, as the wording of article 7 of the Charter of the International Military Tribunal of Nuremberg makes clear, these exceptions are relevant only to the applicable law of state immunity and the immunity of state organs that flows directly from it, in particular for members of the government, and not to diplomatic immunity. State immunity and diplomatic immunity represent two different institutions of international law, each with their own rules, so that no inference can be drawn from any restrictions in one sphere as to possible effects in the other."

Therefore I consider that the passage in the judgment relied on by counsel does not give support to the argument that acts of torture, although criminal, can be regarded as functions of a head of state.

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In 1946 the General Assembly of the United Nations affirmed: "The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" and gave the following directive to its International Law Commission:

"This Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."

Pursuant to this directive the 1950 Report of the International Law Commission to the General Assembly set out the following principle followed by the commentary contained in paragraph 103:

"The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible government official does not relieve him from responsibility under international law. 103. This principle is based on article 7 of the Charter of the Nuremberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as head of state or responsible government official did not relieve him from international responsibility. 'The principle of international law which, under certain circumstances, protects the representatives of a state,' said the Tribunal, 'cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment ... ' The same idea was also expressed in the following passage of the findings: 'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law.'"

The 1954 International Law Commission draft code of offences against the peace and security of mankind provided in article III: "The fact that a person acted as head of state or as responsible Government official does not relieve him of responsibility for committing any of the offences defined in the code." The Statute of the

International Criminal Tribunal for the Former Yugoslavia established by the Security Council of the United Nations in 1993 for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 provided in article 7(2): "The official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment." The Statute of the International Criminal Tribunal for Rwanda established by the Security Council of the United Nations in 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda in 1994 provided in article 6(2): "The official position of any accused person, whether as

head of state or government or as a responsible government official shall not relieve such person of criminal responsibility nor mitigate punishment." The 1996 Draft Code of the International Law Commission of Crimes Against the Peace and Security of Mankind provided in article 7: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of state or government, does not relieve him of criminal responsibility or mitigate punishment." In July 1998 in Rome the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute of the International Criminal Court. The preamble to the Statute states, inter alia:

"Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognising that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes ... Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for the enforcement of international justice, Have agreed as follows ..."

Article 5 of the Statute provides that jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole which include crimes against humanity. Article 7 states that "crime against humanity" means a number of acts including murder and torture when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 27 provides:

"(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."

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Therefore since the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. Torture has been recognised as such a crime. The preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, which has been signed by the United Kingdom, Spain and Chile and by over one hundred other nations, states:

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognising that those rights derive from the inherent dignity of the human person, Considering the obligation of states under the Charter, in particular article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Having regard also to the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, Have agreed as follows ..."

Article 1 defines "torture" as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes specified in the article such as punishment or intimidation or obtaining information or a confession, and such pain and suffering is inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Convention then contains a number of articles designed to make the measures against public officials who commit acts of torture more effective. Burgers and Danelius, Handbook on the Convention, stated, at p. 1:

"It is expedient to redress at the outset a widespread misunderstanding as to the objective of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations in 1984. Many people assume that the Convention's principal aim is to outlaw

torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct in so far as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above-mentioned practices are already outlawed

under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures."

As your Lordships hold that there is no jurisdiction to extradite Senator Pinochet for acts of torture prior to 29 September 1988, which was the date on which section 134 of the Criminal Justice Act 1988 came into operation, it is unnecessary to decide when torture became a crime against international law prior to that date, but I am of opinion 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.

The appellants accepted that in English courts a serving head of state is entitled (ratione personae) to immunity in respect of acts of torture which he has committed. Burgers and Danelius, referring to the obligation of a state party to the convention to establish its jurisdiction over offences of torture, recognise that some special immunities may exist in respect of acts of torture and state, at p. 131:

"Under international or national law, there may be certain limited exceptions to this rule, e.g. in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted in so far as they apply to criminal acts in general and are not unduly extensive."

It is also relevant to note that article 98 of the 1998 Rome Statute establishing the International Criminal Court provides:

"The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the co-operation of that third state for the waiver of the immunity."

But the issue in the present case is whether Senator Pinochet, as a former head of state, can claim immunity (ratione materiae) on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state. In my opinion he is not entitled to claim such immunity. The Torture Convention makes it clear that no state is to tolerate torture by its public officials or by persons acting in an official capacity and article 2 requires that: "(1) Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 2 further provides that: "(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal

political instability or any other public emergency, may be invoked as a justification of torture." Article 4 provides:

"(1) Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each state party shall make

these offences punishable by appropriate penalties which take into account their grave nature."

Article 7 provides:

"(1) The state party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

I do not accept the argument advanced by counsel on behalf of Senator Pinochet that the provisions of the Convention were designed to give one state jurisdiction to prosecute a public official of another state in the event of that state deciding to waive state immunity. I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present in another state.

Therefore having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but 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. It is relevant to observe that in 1996 the military government of Chile informed a United Nations working group on human rights violations in Chile that torture was unconditionally prohibited in Chile, that the constitutional prohibition against torture was fully enforced and that:

"It is therefore apparent that the practice of inflicting unlawful ill-treatment has not been instituted in our country as is implied by the resolution" - a U.N. resolution critical of Chile - "and that such ill-treatment is not tolerated; on the contrary, a serious, comprehensive and coherent body of provisions exist to prevent the occurrence of such ill-treatment and to punish those responsible for any type of abuse."

It is also relevant to note that in his opening oral submissions on behalf of Chile Dr.Lawrence Collins stated:

"the Government of Chile, several of whose present members were in prison or exile during those years, deplores the fact that the governmental authorities of the period of the dictatorship committed major violations of human rights in Chile. It reaffirms its commitment

to human rights, including the prohibition of torture."

In its written submissions (which were repeated by Dr. Collins in his oral submissions) Chile stated:

"The Republic intervenes to assert its own interest and right to have these matters dealt with in Chile. The purpose of the intervention is not to defend the actions of Senator Pinochet whilst he was head of

state. Nor is the purpose to prevent him from being investigated and tried for any crime he is alleged to have committed whilst in office, provided that any investigation and trial takes place in the only appropriate courts, namely those of Chile. The democratically elected Government of the Republic of Chile upholds the commitment of the Republic under international conventions to the maintenance and promotion of human rights. The position of the Chilean Government on state immunity is not intended as a personal shield for Senator Pinochet, but is intended to defend Chilean national sovereignty, in accordance with generally accepted principles of international law. Its plea, therefore, does not absolve Senator Pinochet from responsibility in Chile if the acts alleged against him are proved."

My Lords, the position taken by the democratically elected Government of Chile that it desires to defend Chilean national sovereignty and considers that any investigation and trial of Senator Pinochet should take place in Chile is understandable. But in my opinion that is not the issue which is before your Lordships; the issue is whether the commission of acts of torture taking place after 29 September 1988 was a function of the head of state of Chile under international law. For the reasons which I have given I consider that it was not.

Article 32(2) of the Vienna Convention set out in Schedule 1 to the Diplomatic Privileges Act 1964 provides that: "waiver must always be express." I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not under international law a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture.

A number of international instruments define a crime against humanity as one which is committed on a large scale. Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind 1996 provides:

"A crime against humanity means any of the following acts, when committed in a systematic manner or a large scale and instigated or directed by a government or by any organisation or group:
(a) murder; (b) extermination; (c) torture ..."

And article 7 of the 1998 Rome Statute of the International Criminal

Court provides:

"For the purposes of this statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination ... (f) torture ..."

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However, article 4 of the Torture Convention provides that: "Each state party shall ensure that all acts of torture are offences under its criminal law." (Emphasis added.)

Therefore I consider that a single act of torture carried out or instigated by a public official or other person acting in an official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale. Accordingly I am of opinion that Senator Pinochet cannot claim that a single act of torture or a small number of acts of torture carried out by him did not constitute international crimes and did not constitute acts committed outside the ambit of his functions as head of state.

For the reasons given by Oppenheim's International Law, vol. I, p. 545, which I have cited in an earlier part of this judgment, I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages under the principle stated in Jaffe v. Miller, 13 O.R.(3d) 745. But I am of opinion that there is no inconsistency between Chile and Senator Pinochet's entitlement to claim immunity if sued in civil proceedings for damages and Senator Pinochet's lack of entitlement to claim immunity in criminal proceedings for torture brought against him personally. This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in article 4 and the commentary thereon in the 1996 Draft Report of the International Law Commission:

"Responsibility of states. The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of states under international law. Commentary. (1) Although, as made clear by article 2, the present Code addresses matters relating to the responsibility of individuals for the crimes set out in Part II, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an 'agent of the state,' 'on behalf of the state,' 'in the name of the state' or even in a de facto relationship with the state, without being vested with any legal power. (2) The 'without prejudice' clause contained in article 4 indicates that the present Code is without prejudice to any question of the responsibility of a state under international law for a crime committed by one of its agents. As the commission already emphasised in the commentary to

article 19 of the draft articles on state responsibility, the punishment of individuals who are organs of the state 'certainly does not exhaust the prosecution of the international responsibility incumbent upon the state for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs'. The state may thus remain responsible and be unable to exonerate

itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime."

Therefore for the reasons which I have given I am of opinion that Senator Pinochet is not entitled to claim immunity in the extradition proceedings in respect of conspiracy to torture and acts of torture alleged to have been committed by him after 29 September 1988 and to that extent I would allow the appeal. However I am in agreement with the view of Lord Browne-Wilkinson that the Secretary of State should reconsider his decision under section 7 of the Extradition Act 1989 in the light of the changed circumstances arising from your Lordships' decision.

Lord Saville of Newdigate. My Lords, in this case the Government of Spain seeks the extradition of Senator Pinochet (the former head of state of Chile) to stand trial in Spain for a number of alleged crimes. On this appeal two questions of law arise.

Senator Pinochet can only be extradited for what in the Extradition Act 1989 is called an extradition crime. Thus the first question of law is whether any of the crimes of which he stands accused in Spain is an extradition crime within the meaning of that Act. As to this, I am in agreement with the reasoning and conclusions in the speech of my noble and learned friend, Lord Browne-Wilkinson. I am also in agreement with the reasons given by my noble and learned friend, Lord Hope of Craighead, in his speech for concluding that only those few allegations that he identifies amount to extradition crimes.

These extradition crimes all relate to what Senator Pinochet is said to have done while he was head of state of Chile. The second question of law is whether, in respect of these extradition crimes, Senator Pinochet can resist the extradition proceedings brought against him on the grounds that he enjoys immunity from these proceedings.

In general, under customary international law serving heads of state enjoy immunity from criminal proceedings in other countries by virtue of holding that office. This form of immunity is known as immunity ratione personae. It covers all conduct of the head of state while the person concerned holds that office and thus draws no distinction between what the head of state does in his official capacity (i.e. what he does as head of state for state purposes) and what he does in his private capacity.

Former heads of state do not enjoy this form of immunity. However, in general under customary international law a former head of state does enjoy immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state. This form of immunity is known as immunity ratione materiae.

These immunities belong not to the individual but to the state in

question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question.

In my judgment the effect of section 20(1)(a) of the State Immunity Act 1978 is to give statutory force to these international law immunities.

The relevant allegations against Senator Pinochet concern not his private activities but what he is said to have done in his official capacity

when he was head of state of Chile. It is accepted that the extradition proceedings against him are criminal proceedings. It follows that unless there exists, by agreement or otherwise, any relevant qualification or exception to the general rule of immunity ratione materiae, Senator Pinochet is immune from this extradition process.

The only possible relevant qualification or exception in the circumstances of this case relates to torture.

I am not persuaded that before the Torture Convention there was any such qualification or exception. Although the systematic or widespread use of torture became universally condemned as an international crime, it does not follow that a former head of state, who as head of state used torture for state purposes, could under international law be prosecuted for torture in other countries where previously under that law he would have enjoyed immunity ratione materiae.

The Torture Convention set up a scheme under which each state becoming a party was in effect obliged either to extradite alleged torturers found within its jurisdiction or to refer the case to its appropriate authorities for the purpose of prosecution. Thus as between the states who are parties to the Convention, there is now an agreement that each state party will establish and have this jurisdiction over alleged torturers from other state parties.

This country has established this jurisdiction through a combination of section 134 of the Criminal Justice Act 1988 and the Extradition Act 1989. It ratified the Torture Convention on 8 December 1988. Chile's ratification of the Convention took effect on 30 October 1988 and that of Spain just over a year earlier.

It is important to bear in mind that the Convention applies (and only applies) to any act of torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." It thus covers what can be described as official torture and must therefore include torture carried out for state purposes. The words used are wide enough to cover not only the public officials or persons acting in an official capacity who themselves inflict torture but also (where torture results) those who order others to torture or who conspire with others to torture.

To my mind it must follow in turn that a head of state, who for state purposes resorts to torture, would be a person acting in an official capacity within the meaning of this Convention. He would indeed to my

mind be a prime example of an official torturer.

It does not follow from this that the immunity enjoyed by a serving head of state, which is entirely unrelated to whether or not he was acting in an official capacity, is thereby removed in cases of torture. In my view it is not, since immunity ratione personae attaches to the office and not to any particular conduct of the office holder.

On the other hand, the immunity of a former head of state does attach to his conduct whilst in office and is wholly related to what he did in his official capacity.

So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has

agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture.

Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity ratione materiae of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity ratione materiae.

I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms. A former head of state who it is alleged resorted to torture for state purposes falls in my view fairly and squarely within those terms and on the face of it should be dealt with in accordance with them. 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."

I can see no valid basis for such an assertion. It is said that if it had been intended to remove immunity for alleged official torture from former heads of state there would inevitably have been some discussion of the point in the negotiations leading to the treaty. I am not persuaded that the apparent absence of any such discussions takes the matter any further. 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.

It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general

proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty.

For the same reasons it seems to me that the wider arguments based on act of state or non-justiciability must also fail, since they are equally inconsistent with the terms of the Convention agreed by these state parties.

I would accordingly allow this appeal to the extent necessary to permit the extradition proceedings to continue in respect of the crimes of torture and (where it is alleged that torture resulted) of conspiracy to torture, allegedly committed by Senator Pinochet after 8 December 1988. I would add that I agree with what my noble and learned friend, Lord Hope of Craighead, has said at the end of his speech with regard to the need for the

Secretary of State to reconsider his decision and (if renewed authority to proceed is given) the very careful attention the magistrate must pay to the information laid before him.

Lord Millett. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. Save in one respect, I agree with his reasoning and conclusions. Since the one respect in which I differ is of profound importance to the outcome of this appeal, I propose to set out my own process of reasoning at rather more length than I might otherwise have done.

State immunity is not a personal right. It is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet. It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute.

The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; par in parem non habet imperium. States were obliged to abstain from interfering in the internal affairs of one another. International law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form. The idea that individuals who commit crimes recognised as such by international law may be held internationally accountable for their actions is now an accepted doctrine of international law. The adoption by most major jurisdictions of the restrictive theory of state immunity, enacted into English law by Part I of the State Immunity Act 1978, has made major inroads into the doctrine as a bar to the jurisdiction of national courts to entertain

civil proceedings against foreign states. The question before your Lordships is whether a parallel, though in some respects opposite, development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts.

Two overlapping immunities are recognised by international law; immunity ratione personae and immunity ratione materiae. They are quite different and have different rationales.

Immunity ratione personae is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by section 20(1) of the State Immunity Act 1978, enacting customary

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international law and the Vienna Convention on Diplomatic Relations (1961).

The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state in relation both to his public and private acts.

This immunity is not in issue in the present case. Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.

Immunity ratione materiae is very different. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one 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. The immunity is the same whatever the rank of the office-holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the

state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1; Hatch v. Baez, 7 Hun 596; Underhill v. Hernandez (1897) 168 U.S. 250. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.

Given its scope and rationale, it is closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine. As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.

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Immunity ratione materiae is given statutory form in English law by the combined effect of section 20(1) of the State Immunity Act 1978 the Diplomatic Privileges Act 1964 and article 39(2) of the Vienna Convention. The Act of 1978 is not without its difficulties. The former head of state is given the same immunity "subject to all necessary modifications" as a former diplomat, who continues to enjoy immunity in respect of acts committed by him "in the exercise of his functions." The functions of a diplomat are limited to diplomatic activities, i.e. acts performed in his representative role in the receiving state. He has no broader immunity in respect of official or governmental acts not performed in exercise of his diplomatic functions: see Dinstein, "Diplomatic Immunity from Jurisdiction Ratione Materiae" (1966) 15 I.C.L.Q. 76, 82. There is therefore a powerful argument for holding that, by a parity of reasoning, the statutory immunity conferred on a former head of state by the Act of 1978 is confined to acts performed in his capacity as head of state, i.e. in his representative role. If so, the statutory immunity would not protect him in respect of official or governmental acts which are not distinctive of a head of state, but which he performed in some other official capacity, whether as head of government, commander-in-chief or party leader. It is, however, not necessary to decide whether this is the case, for any narrow statutory immunity is subsumed in the wider immunity in respect of other official or governmental acts under customary international law.

The charges brought against Senator Pinochet are concerned with his public and official acts, first as Commander-in-Chief of the Chilean army and later as head of state. He is accused of having embarked on a widespread and systematic reign of terror in order to obtain power and then to maintain it. If the allegations against him are true, he deliberately employed torture as an instrument of state policy. As international law stood on the eve of the Second World War, his conduct as head of state after he seized power would probably have attracted immunity ratione materiae. If so, I am of opinion that it would have been

equally true of his conduct during the period before the coup was successful. He was not then, of course, head of state. But he took advantage of his position as Commander-in-Chief of the army and made use of the existing military chain of command to deploy the armed forces of the state against its constitutional government. These were not private acts. They were official and governmental or sovereign acts by any standard.

The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law. Even before the end of the Second World War, however, it was questionable whether the doctrine of state immunity accorded protection in respect of conduct which was prohibited by international law. As early as 1841, according to Quincy Wright (see "The Law of the Nuremberg Trial" (1947) 41 A.J.I.L. 38, 71), many commentators held the view that: "the government's authority could not confer immunity upon its agents for acts beyond its powers under international law." Thus state immunity did not

provide a defence to a crime against the rules of war: see Sir Hersch Lauterpacht "The Subjects of the Law of Nations" (1947) 63 L.Q.R. 438, 442-443. Writing in "The Nuernberg Trial and Aggressive War" (1946) 59 Harv. L.Rev. 396 before the Nuremberg Tribunal delivered its judgment and commenting on the seminal judgment of Marshall C.J. in Schooner Exchange v. M'Faddon (1812) 11 U.S. (7 Cranch) 116, Sheldon Glueck observed, at p. 426:

"as Marshall implied, even in an age when the doctrine of sovereignty had a strong hold, the non-liability of agents of a state for 'acts of state' must rationally be based on the assumption that no member of the family of nations will order its agents to commit flagrant violations of international and criminal law."

Glueck added, at pp. 427-428:

"in modern times a state is - ex hypothesi - incapable of ordering or ratifying acts which are not only criminal according to generally accepted principles of domestic penal law but also contrary to that international law to which all states are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope; and must, in consequence, be held personally liable for their wrongful conduct."

It seems likely that Glueck was contemplating trial before municipal courts, for more than half a century was to pass before the establishment of a truly international criminal tribunal. This would also be consistent with the tenor of his argument that the concept of sovereignty was of relatively recent origin and had been mistakenly raised to what he described as the "status of some holy fetish."

Whether conduct contrary to the peremptory norms of international law

attracted state immunity from the jurisdiction of national courts, however, was largely academic in 1946, since the criminal jurisdiction of such courts was generally restricted to offences committed within the territory of the forum state or elsewhere by the nationals of that state. In this connection it is important to appreciate that the International Military Tribunal (the Nuremberg Tribunal) which was established by the four allied powers at the conclusion of the Second World War to try the major war criminals was not, strictly speaking, an international court or tribunal. As Sir Hersch Lauterpacht explained in Oppenheim's International Law, vol. II, 7th ed. (1952), pp. 580-581 (ed. Sir Hersch Lauterpacht), the tribunal was: "the joint exercise, by the four states which established the tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law."

In its judgment the tribunal described the making of the charter as an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered, and of the undoubted right of those countries to legislate for the occupied territories which had been recognised by the whole civilised world. Article 7 of the Charter of the International Military Tribunal provided:

"The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment." (My emphasis.)

In its judgment the tribunal ruled:

"the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the rules of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law ... The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law." (My emphasis.)

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

The principles of the Charter of the International Military Tribunal and the Judgment of the Tribunal were unanimously affirmed by Resolution 95 of the General Assembly of the United Nations in 1946. Thereafter it was no longer possible to deny that individuals could be held criminally

responsible for war crimes and crimes against peace and were not protected by state immunity from the jurisdiction of national courts. Moreover, while it was assumed that the trial would normally take place in the territory where the crimes were committed, it was not suggested that this was the only place where the trial could take place.

The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned.

In 1946 the General Assembly had entrusted the formulation of the principles of international law recognised in the Charter of the Nuremberg Tribunal and the judgment of the tribunal to the International Law Commission. It reported in 1954. It rejected the principle that international criminal responsibility for crimes against humanity should be limited to crimes committed in connection with war crimes or crimes against peace. It was, however, necessary to distinguish international crimes from

ordinary domestic offences. For this purpose, the commission proposed that acts would constitute international crimes only if they were committed at the instigation or the toleration of state authorities. This is the distinction which was later adopted in the Torture Convention. In my judgment it is of critical importance in relation to the concept of immunity ratione materiae. The very official or governmental character of the acts which is necessary to found a claim to immunity ratione materiae, and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime. It was, no doubt, for this reason that the Commission's draft code provided that: "The fact that a person acted as head of state or as a responsible government official does not relieve him of responsibility for committing any of the offences defined in the code."

The landmark decision of the Supreme Court of Israel in Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 is also of great significance. Eichmann had been a very senior official of the Third Reich. He was in charge of Department IV D-4 of the Reich Main Security Office, the department charged with the implementation of the Final Solution, and subordinate only to Heydrich and Himmler. He was abducted from Argentina and brought to Israel, where he was tried in the District Court for Tel Aviv. His appeal against conviction was dismissed by the Supreme Court. The means by which he was brought to Israel to face trial has been criticised by academic writers, but Israel's right to assert jurisdiction over the offences has never been questioned.

The court dealt separately with the questions of jurisdiction and act of state. Israel was not a belligerent in the Second World War, which ended three years before the state was founded. Nor were the offences committed within its territory. The District Court found support for its jurisdiction in the historic link between the state of Israel and the

Jewish people. The Supreme Court preferred to concentrate on the international and universal character of the crimes of which the accused had been convicted, not least because some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and gipsies).

As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities, including the judgment of the Permanent Court of International Justice in The Case of Lotus S.S., Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10 it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion. The limiting factor that prevents the exercise of extraterritorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.

Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been

convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted universal jurisdiction. See, for example, Greenspan's Modern Law of Land Warfare (1959), p. 420, where he writes:

"Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party."

This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute. The court explained that the limitation often imposed on the exercise of universal jurisdiction, that the state which apprehended the offender must first offer to extradite him to the state in which the offence was committed, was not intended to prevent the violation of the latter's territorial sovereignty. Its basis was purely practical. The great majority of the witnesses and the greater part of the evidence would normally be concentrated in that state, and it was therefore the most convenient forum for the trial.

Having disposed of the objections to its jurisdiction, the court rejected the defence of act of state. As formulated, this did not differ in any material respect from a plea of immunity ratione materiae. It was based on the fact that in committing the offences of which he had been convicted the accused had acted as an organ of the state, "whether as head of the state or a responsible official acting on the government's orders." The court applied article 7 of the

Nuremberg Charter (which it will be remembered expressly referred to the head of state) and which it regarded as having become part of the law of nations.

The case is authority for three propositions. (1) There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad. (2) War crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law. (3) The fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court.

The case was followed in the United States in Demjanjuk v. Petrovsky (1985) 603 F.Supp. 1468; affirmed 776 F.2d. 571. In the context of an extradition request by the State of Israel the court accepted Israel's right to try a person charged with murder in the concentration camps of Eastern Europe. It held that the crimes were crimes of universal jurisdiction, observing: "International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment." The difficulty is to know precisely what is the ambit of the expression "certain offences."

Article 5 of the Universal Declaration of Human Rights of 1948 and article 7 of the International Covenant on Civil and Political Rights of

1966 both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A resolution of the General Assembly in 1973 proclaimed the need for international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A further resolution of the General Assembly in 1975 proclaimed the desire to make the struggle against torture more effective throughout the world. The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of the Charter of the United Nations was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms.

The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. 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 order. Genocide was made an international crime by the Genocide Convention in 1948. By the time Senator Pinochet seized power, the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that by 1973 the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists that

this does not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and textbooks: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in Prosecutor v. Furundzija (unreported), 10 December 1998, where the court stated, at para. 156:

"at the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."

The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in the Eichmann case, and the definitions used in the more recent conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.

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Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

In their Handbook on the Torture Convention, Burgers and Danelius wrote at p. 1:

"Many people assume that the Convention's principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct in so far as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices

by a number of supportive measures."

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. I understand, however, that your Lordships take a different view, and consider that statutory authority is require before our courts can exercise extraterritorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by section 134 of the Criminal Justice Act 1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section .

The Torture Convention did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the Convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction. The charges against Senator Pinochet, however, are plainly of the requisite character. The Convention thus affirmed and extended an existing international crime and imposed obligations on the parties to the Convention to take measures to

prevent it and to punish those guilty
of it. As Burgers and Danielus explained, its main purpose was to introduce an institutional mechanism to enable this to be achieved. Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. Any state party in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or to initiate proceedings to prosecute him. The obligation imposed by the Convention resulted in the passing of section 134 of the Criminal Justice Act 1988.

I agree, therefore, that our courts have statutory extraterritorial jurisdiction in respect of the charges of torture and conspiracy to torture committed after the section had come into force and (for the reasons explained by my noble and learned friend, Lord Hope of Craighead) the charges of conspiracy to murder where the conspiracy took place in Spain.

I turn finally to the plea of immunity ratione materiae in relation to the remaining allegations of torture, conspiracy to torture and conspiracy to murder. I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity ratione materiae is not available in respect of an offence committed in the forum state, whether this be England or Spain.

The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The 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 coextensive with the offence.

In my view a serving head of state or diplomat could still claim immunity ratione personae if charged with an offence under section 134. He does not have to rely on the character of the conduct of which he is accused. The nature of the charge is irrelevant; his immunity is personal and absolute. But the former head of state and the former diplomat are in no different position from anyone else claiming to have acted in the exercise of state authority. If the applicant's arguments were accepted, section 134 would be a dead letter. Either the accused was acting in a private capacity, in which case he cannot be charged with an offence under the section ; or he was acting in an official capacity, in which case he would enjoy immunity from prosecution. Perceiving this weakness in her argument, counsel for Senator Pinochet submitted that the United Kingdom took jurisdiction so that it would be available if, but only if, the offending state waived its immunity. I reject this explanation out of hand. It is not merely far-fetched; it is entirely inconsistent with the aims and object of the Convention. The evidence shows that other states were to be placed under an obligation to take action precisely because the offending state could not be relied upon to do so.

My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal

jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.

In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court while at the same

time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action. This was the very object of the Torture Convention. It is important to emphasise that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture. Chile insists on the exclusive right to prosecute him. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.

My Lords, we have come a long way from what I earlier described as the classical theory of international law - a long way in a relatively short time. But as the Privy Council pointed out in In re Piracy Jure Gentium [1934] A.C. 586, 597, international law has not become a crystallised code at any time, but is a living and expanding branch of the law. Glueck observed, 59 Harv. L.Rev. 396, 398: "unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs." In a footnote to this passage he added:

"Much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time."

The law has developed still further since 1984, and continues to develop in the same direction. Further international crimes have been

created. Ad hoc international criminal tribunals have been established. A permanent international criminal court is in the process of being set up. These developments could not have been foreseen by Glueck and the other jurists who proclaimed that individuals could be held individually liable for international crimes. They envisaged prosecution before national courts, and this will necessarily remain the norm even after a permanent international tribunal is established. In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

For my own part, I would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture wherever and whenever carried out. But the majority of your Lordships think otherwise, and consider that Senator Pinochet can be extradited only in respect of a very limited number of charges. This will transform the position from that which the Secretary of State considered last December. I agree with my noble and learned friend, Lord Browne-Wilkinson, that it will be incumbent on the Secretary of State to reconsider the matter in the light of the very different circumstances which now prevail.

Lord Phillips of Worth Matravers. My Lords, the Spanish Government seeks extradition of Senator Pinochet to stand trial

for crimes committed in a course of conduct spanning a lengthy period. My noble and learned friend, Lord Browne-Wilkinson, has described how, before your Lordships' House, the Spanish Government contended for the first time that the relevant conduct extended back to 1 January 1972, and now covered a significant period before Senator Pinochet became head of state and thus before acts done in that capacity could result in any immunity. This change in the Spanish Government's case rendered critical issues that have hitherto barely been touched on. What is the precise nature of the double criminality rule that governs whether conduct amounts to an extradition crime and what parts of Senator Pinochet's alleged conduct satisfy that rule? On the first issue I agree with the conclusion reached by Lord Browne-Wilkinson and on the second I agree with the analysis of my noble and learned friend, Lord Hope of Craighead.

These conclusions greatly reduce the conduct that can properly form the subject of a request for extradition under our law. They leave untouched the question of whether the English court can assert any criminal jurisdiction over acts committed by Senator Pinochet in his capacity of head of state. It is on that issue, the issue of immunity, that I would wish to add some comments of my own.

State immunity

There is an issue as to whether the applicable law of immunity is to be found in the State Immunity Act 1978 or in principles of public international law, which form part of our common law. If the statute governs it must be interpreted, so far as possible, in a manner which accords with public international law. Accordingly I propose to start by considering the position at public international law.

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The nature of the claim to immunity

These proceedings have arisen because Senator Pinochet chose to visit the United Kingdom. By so doing he became subject to the authority that this state enjoys over all within its territory. He has been arrested and is threatened with being removed against his will to Spain to answer criminal charges which are there pending. That has occurred pursuant to our extradition procedures. Both the executive and the court has a role to play in the extradition process. It is for the court to decide whether the legal requirements which are a precondition to extradition are satisfied. If they are, it is for the Home Secretary to decide whether to exercise his power to order that Senator Pinochet be extradited to Spain.

If Senator Pinochet were still the head of state of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. Ahead of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile. While as a matter of courtesy a state may accord a visitor of Senator Pinochet's distinction certain privileges, it is under no legal obligation to do so. He accepts, and Chile accepts, that this country no

longer owes him any duty under international law by reason of his status, ratione personae. Immunity is claimed, ratione materiae, on the ground that the subject matter of the extradition process is the conduct by Senator Pinochet of his official functions when he was head of state. The claim is put thus in his written case:

"There is no distinction to be made between a head of state, a former head of state, a state official or a former state official, in respect of official acts performed under colour of their office. Immunity will attach to all official acts that are imputable or attributable to the state. It is therefore the nature of the conduct and the capacity of the applicant at the time of the conduct alleged, not the capacity of the applicant at the time of any suit, that is relevant."

We are not, of course, here concerned with a civil suit but with proceedings that are criminal in nature. Principles of the law of immunity that apply in relation to civil litigation will not necessarily apply to a criminal prosecution. The nature of the process with which this appeal is concerned is not a prosecution but extradition. The critical issue that the court has to address in that process is, however, whether the conduct of Senator Pinochet which forms the subject of the extradition request constituted a crime or crimes under English law. The argument in relation to extradition has proceeded on the premise that the same principles apply that would apply if Senator Pinochet were being prosecuted in this country for the conduct in question. It seems to me that that is an appropriate premise on which to proceed.

Why is it said to be contrary to international law to prosecute someone who was once head of state, or a state official, in respect of acts committed in his official capacity? It is common ground that the basis of

the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's. Were these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile. The following general principles are advanced in Chile's written case as supporting the immunity claimed:

"(a) the sovereign equality of states and the maintenance of international relations require that the courts of one state will not adjudicate on the governmental acts of another state; (b) intervention in the internal affairs of other states is prohibited by international law; (c) conflict in international relations will be caused by such adjudication or intervention."

These principles are illustrated by the following passage from Hatch v. Baez, 7 Hun 596, a case in which the former President of the Dominican Republic was sued in New York for injuries allegedly sustained at his hands in Santo Domingo:

"The counsel for the plaintiff relies on the general principle, that all persons, of whatever rank or condition, whether in or out of

office, are liable to be sued for acts done by them in violation of law. Conceding the truth and universality of that principle, it does not establish the jurisdiction of our tribunals to take cognisance of the official acts of foreign governments. We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgement on the acts of another government done within its own territory. Each state is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country. The only remedy for such wrongs must be sought through the intervention of the government of the person injured ... The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

This statement was made in the context of civil proceedings. I propose to turn to the sources of international law to see whether they establish that those principles have given rise to a rule of immunity in relation to criminal proceedings.

The sources of immunity

Many rules of public international law are founded upon or reflected in conventions. This is true of those rules of state immunity which relate to

civil suit: see the European Convention on State Immunity 1972. It is not, however, true of state immunity in relation to criminal proceedings. The primary source of international law is custom, that is "a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right:" Oppenheim's International Law, vol. I, p. 27. Other sources of international law are judicial decisions, the writing of authors and "the general principles of law recognised by all civilised nations:" see article 38 of the Statute of the International Court of Justice. To what extent can the immunity asserted in this appeal be traced to such sources?

Custom

In what circumstances might a head of state or other state official commit a criminal offence under the law of a foreign state in the course of the performance of his official duties?

Prior to the developments in international law which have taken place in the last 50 years, the answer is very few. Had the events with which this appeal is concerned occurred in the 19th century, there could have been no question of Senator Pinochet being subjected to criminal proceedings in this country in respect of acts, however heinous, committed in Chile. This would not have been because he would have been entitled to immunity from process, but for a more fundamental reason. He would have committed no crime under the law of England and the courts of England would not have purported to exercise a criminal jurisdiction in

respect of the conduct in Chile of any national of that state. I have no doubt that the same would have been true of the courts of Spain. Under international practice criminal law was territorial. This accorded with the fundamental principle of international law that one state must not intervene in the internal affairs of another. For one state to have legislated to make criminal acts committed within the territory of another state by the nationals of the latter would have infringed this principle. So it would to have exercised jurisdiction in respect of such acts. An official of one state could only commit a crime under the law of another state by going to that state and committing a criminal act there. It is certainly possible to envisage a diplomat committing a crime within the territory to which he was accredited, and even to envisage his doing so in the performance of his official functions - though this is less easy. Well established international law makes provision for the diplomat. The Vienna Convention on Diplomatic Relations (1961) provides for immunity from civil and criminal process while the diplomat is in post and, thereafter, in respect of conduct which he committed in the performance of his official functions while in post. Customary international law provided a head of state with immunity from any form of process while visiting a foreign state. It is possible to envisage a visiting head of state committing a criminal offence in the course of performing his official functions while on a visit and when clothed with status immunity. What seems inherently unlikely is that a foreign head of state should commit a criminal offence in the performance of his official functions while on a visit and subsequently return after ceasing to be head of state. Certainly this cannot have happened with

sufficient frequency for any custom to have developed in relation to it. Nor am I aware of any custom which would have protected from criminal process a visiting official of a foreign state who was not a member of a special mission had he had the temerity to commit a criminal offence in the pursuance of some official function. For these reasons I do not believe that custom can provide any foundation for a rule that a former head of state is entitled to immunity from criminal process in respect of crimes committed in the exercise of his official functions.

Judicial decisions

In the light of the considerations to which I have just referred, it is not surprising that Senator Pinochet and the Republic of Chile have been unable to point to any body of judicial precedent which supports the proposition that a former head of state or other government official can establish immunity from criminal process on the ground that the crime was committed in the course of performing official functions. The best that counsel for Chile has been able to do is to draw attention to the following obiter opinion of the Swiss Federal Tribunal in Marcos and Marcos v. Federal Department of Police, 102 I.L.R. 198, 202-203.

"The privilege of the immunity from criminal jurisdiction of heads of state ... has not been fully codified in the Vienna Convention [on Diplomatic Relations] ... But it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of states lead or

universally represent ... articles 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state."

Writings of authors

We have been referred to the writings of a number of learned authors in support of the immunity asserted on behalf of Senator Pinochet. Oppenheim, vol. I comments, at pp. 1043-1044, para. 456:

"All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity."

This comment plainly relates to civil proceedings.

Satow's Guide to Diplomatic Practice, 5th ed. (1979) deals in chapter 2 with the position of a visiting head of state. The authors deal largely with immunity from civil proceedings but state, at p. 10, para. 2.2, that under customary international law "he is entitled to immunity - probably without exception - from criminal and civil jurisdiction." After a further passage dealing with civil proceedings, the authors state, at p. 10, para. 2.4:

"A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state."

Sir Arthur Watts Q.C. in his Hague Lectures on "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers," (1994-III) 247 Recueil des cours deals with the loss of immunity of a head of state who is deposed on a foreign visit. He then adds, at p. 89:

"Ahead of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador's appointment has come to an end."

My Lords, I do not find these writings, unsupported as they are by any reference to precedent or practice, a compelling foundation for the immunity in respect of criminal proceedings that is asserted.

General principles of law recognised by all civilised nations

The claim for immunity raised in this case is asserted in relation to a novel type of extraterritorial criminal jurisdiction. The nature of that

jurisdiction I shall consider shortly. If immunity from that jurisdiction is to be established it seems to me that this can only be on the basis of applying the established general principles of international law relied upon by Chile to which I have already referred, rather than any specific rule of law relating to immunity from criminal process.

These principles underlie some of the rules of immunity that are clearly established in relation to civil proceedings. It is time to take a closer look at these rules, and at the status immunity that is enjoyed by a head of state ratione personae.

Immunity from civil suit of the state itself

It was originally an absolute rule that the court of one state would not entertain a civil suit brought against another state. All states are equal and this was said to explain why one state could not sit in judgment on another. This rule was not viable once states began to involve themselves in commerce on a large scale and state practice developed an alternative restrictive rule of state immunity under which immunity subsisted in respect of the public acts of the state but not for its commercial acts. A distinction was drawn between acts done jure imperii and acts done jure gestionis. This refinement of public international law was described by Lord Denning M.R. in Trendtex Trading Corporation v. Central Bank of

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Nigeria [1977] Q.B. 529. In that case the majority of the Court of Appeal held that the common law of England, of which international law forms part, had also changed to embrace the restrictive theory of state immunity from civil process. That change was about to be embodied in statute, the State Immunity Act 1978, which gave effect to the European Convention on State Immunity of 1972.

Part I of the Act starts by providing:

"General immunity from jurisdiction 1(1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

Part I goes on to make provision for a number of exceptions from immunity, the most notable of which is, by section 3, that in relation to a commercial transaction entered into by the state. Part I does not apply to criminal proceedings: section 16(4).

The immunity of a head of state ratione personae

An acting head of state enjoyed by reason of his status absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, in so far as civil

proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity.

When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained: see sections 14(1)(a) and 20(5) of the Act of 1978.

Immunity ratione materiae

This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of the business of the state while in office. While a head of state is serving, his status ensures him immunity. Once he is out of office, he is in the same position as any other state official and any immunity will be based upon the nature of the subject matter of the litigation. We were referred to a number of examples of civil proceedings against a former head of state where the validity of a claim to immunity turned, in whole or in part, on whether the transaction in question was one in which the defendant had acted in a public or a private capacity: Ex-King Farouk of Egypt v. Christian Dior, 24 I.L.R. 228; Société Jean Dessès v. Prince

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Farouk (1963) 65 I.L.R. 37; Jiminez v. Aristeguieta, 311 F.2d 547; United States v. Noriega, 117 F.3d 1206.

There would seem to be two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine. Two citations well illustrate the principle. 1. Underhill v. Hernandez, 168 U.S. 250, 252, per Fuller C.J.:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves ... The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military

commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact."

2. Buck v. Attorney-General [1965] Ch. 745, 770, per Diplock L.J.:

"As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent: see Duff Development Co. v. Kelantan Government [1924] A.C. 797, 820. As was made clear in Rahimtoola v. Nizam of Hyderabad [1958] A.C. 379, the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res

judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity."

It is contended on behalf of the applicant that the question of whether an official is acting in a public capacity does not depend upon whether he is acting within the law of the state on whose behalf he purports to act, or even within the limits of international law. His conduct in an official capacity will, whether lawful or unlawful, be conduct of the state and the state will be entitled to assert immunity in respect of it. In the field of civil litigation these propositions are supported by authority. There are a number of instances where plaintiffs have impleaded states claiming damages for injuries inflicted by criminal conduct on the part of state officials which allegedly violated international law. In those proceedings it was of the essence of the plaintiffs' case that the allegedly criminal conduct was conduct of the state and this was not generally in issue. What was in issue was whether the criminality of the conduct deprived the state of immunity and on that issue the plaintiffs failed. Counsel for the applicant provided us with an impressive, and depressing, list of such cases: Saltany v. Reagan (1988) 702 F.Supp. 319 (claims of assassination and terrorism); Siderman de Blake v. Republic of Argentina, 965 F.2d 699) (claim of torture); Princz v. Federal Republic of Germany, 26 F.3d 1166 (claim in respect of the Holocaust); Al-Adsani v. Government of Kuwait, 107 I.L.R. 536 (claim of torture); Sampson v. Federal Republic of Germany (1997) 975 F.Supp. 1108 (claim in respect of the Holocaust); Smith v. Socialist People's Libyan Arab Jamahiriya (1995) 886 F.Supp. 306; (1996) 101 F.3d 239 (claim in respect of Lockerbie bombing); Persinger v. Islamic Republic of Iran (1984) 729 F.2d 835 (claim in relation to hostage-taking at

the U.S. Embassy).

It is to be observed that all but one of those cases involved decisions of courts exercising the federal jurisdiction of the United States, Al-Adsani v. Government of Kuwait being a decision of the Court of Appeal of this country. In each case immunity from civil suit was afforded by statute - in America, the Foreign Sovereign Immunities Act and, in England, the State Immunity Act 1978. In each case the court felt itself precluded by the clear words of the statute from acceding to the submission that state immunity would not protect against liability for conduct which infringed international law.

The vital issue

The submission advanced on behalf of the respondent in respect of the effect of public international law can, I believe, be summarised as follows. (1) One state will not entertain judicial proceedings against a former head of state or other state official of another state in relation to conduct performed in his official capacity. (2) This rule applies even if the conduct amounts to a crime against international law. (3) This rule applies in relation to both civil and criminal proceedings.

For the reasons that I have given and if one proceeds on the premise that Part I of the State Immunity Act 1978 correctly reflects current international law, I believe that the first two propositions are made out in relation to civil proceedings. The vital issue is the extent to which they

apply to the exercise of criminal jurisdiction in relation to the conduct that forms the basis of the request for extradition. This issue requires consideration of the nature of that jurisdiction.

The development of international criminal law

In the latter part of this century there has been developing a recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur. In Oppenheim's International Law, vol. I, p. 998 the authors commented:

"While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind."

The appellants, and those who have on this appeal been given leave to support them, contend that this passage, which appears verbatim in earlier editions, is out of date. They contend that international law now recognises a category of criminal conduct with the following

characteristics. (1) It is so serious as to be of concern to all nations and not just to the state in which it occurs. (2) Individuals guilty of it incur criminal responsibility under international law. (3) There is universal jurisdiction in respect of it. This means that international law recognises the right of any state to prosecute an offender for it, regardless of where the criminal conduct took place. (4) No state immunity attaches in respect of any such prosecution.

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in or reflected by a considerable number of international instruments. Since the Second World War states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.

I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes - that is the right, under international law, of the courts of any state to prosecute

for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or to attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.

The principle of state immunity provides no bar to the exercise of criminal jurisdiction by an international tribunal, but the instruments creating such tribunals have tended, none the less, to make it plain that no exception from responsibility or immunity from process is to be enjoyed by a head of state or other state official. Thus the Charter of the Nuremberg Tribunal 1945 provides by article 7: "The official position of defendants, whether as head of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment." The Tokyo Charter of 1946, the Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993, the Statute of the International Criminal Tribunal for Rwanda 1994 and the Statute of the International Criminal Court 1998 all have provisions to like effect.

Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities ratione personae that

exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Suppression of the Crime of Genocide 1948, which provides: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals." Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to state immunity ratione materiae. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly would not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime. 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 coexist 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. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.

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There can be no doubt that the conduct of which Senator Pinochet stands accused by Spain is criminal under international law. The Republic of Chile has accepted that torture is prohibited by international law and that the prohibition of torture has the character of jus cogens and of obligation erga omnes. It is further accepted that officially sanctioned torture is forbidden by international law. The information provided by Spain accuses Senator Pinochet not merely of having abused his powers as head of state by committing torture, but of subduing political opposition by a campaign of abduction, torture and murder that extended beyond the boundaries of Chile. When considering what is alleged, I do not believe that it is correct to attempt to analyse individual elements of this campaign and to identify some as being criminal under international law and others as not constituting international crimes. If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign.

It is only recently that the criminal courts of this country acquired jurisdiction, pursuant to section 134 of the Criminal Justice Act 1984, to prosecute Senator Pinochet for torture committed outside the territorial jurisdiction, provided that it was committed in the performance, or purported performance, of his official duties. Section 134 was passed to give effect to the rights and obligations of this country under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, to which the United Kingdom, Spain and Chile are all signatories. That Convention outlaws the infliction of torture "by or at the instigation of or

with the consent or acquiescence of a public official or other person acting in an official capacity:" (article 1). Each state party is required to make such conduct criminal under its law, wherever committed. More pertinently, each state party is required to prosecute any person found within its jurisdiction who has committed such an offence, unless it extradites that person for trial for the offence in another state. The only conduct covered by this Convention is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The Convention is thus incompatible with the applicability of immunity ratione materiae. There are only two possibilities. One is that the states parties to the Convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that the states parties to the Convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture.

The State Immunity Act 1978

I have referred earlier to Part I of the State Immunity Act 1978, which does not apply to criminal proceedings. Part III of the Act, which is of general application, is headed "Miscellaneous and Supplementary." Under this Part, section 20 provides:

"(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;
(b) members of his family forming part of his household; and
(c) his private servants, 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."

The Diplomatic Privileges Act 1964 was passed to give effect to the Vienna Convention on Diplomatic Relations of 1961. The preamble to the Convention records that "peoples of all nations from ancient times have recognised the status of diplomatic agents." The Convention codifies long standing rules of public international law as to the privileges and immunities to be enjoyed by a diplomatic mission. The Act of 1964 makes applicable those articles of the Convention that are scheduled to the Act. These include article 29, which makes the person of a diplomatic agent immune from any form of detention and arrest, article 31 which confers on a diplomatic agent immunity from the criminal and civil jurisdiction of the receiving state and article 39, which includes the following provisions:

"(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.

However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

The question arises of how, after the "necessary modifications," these provisions should be applied to a head of state. All who have so far in these proceedings given judicial consideration to this problem have concluded that the provisions apply so as to confer the immunities enjoyed by a diplomat upon a head of state in relation to his actions wherever in the world they take place. This leads to the further conclusion that a former head of state continues to enjoy immunity in respect of acts committed "in the exercise of his functions" as head of state, wherever those acts occurred.

For myself, I would not accord section 20 of the Act of 1978 such broad effect. It seems to me that it does no more than to equate the position of a head of state and his entourage visiting this country with that of a diplomatic mission within this country. Thus interpreted, section 20 accords with established principles of international law, is readily applicable and can appropriately be described as supplementary to the other Parts of the Act. As Lord Browne-Wilkinson has demonstrated, reference to the parliamentary history of the section discloses that this was precisely the original intention of section 20, for the section expressly provided that it applied to a head of state who was "in the United Kingdom at the invitation or with the consent of the Government of the

United Kingdom." Those words were deleted by amendment. The mover of the amendment explained that the object of the amendment was to ensure that heads of state would be treated like heads of diplomatic missions "irrespective of presence in the United Kingdom."

Senator Pinochet and Chile have contended that the effect of section 20, as amended, is to entitle Senator Pinochet to immunity in respect of any acts committed in the performance of his functions as head of state anywhere in the world, and that the conduct which forms the subject matter of the extradition proceedings, in so far as it occurred when Senator Pinochet was head of state, consisted of acts committed by him in performance of his functions as head of state.

If these submissions are correct, the Act of 1978 requires the English court to produce a result which is in conflict with international law and with our obligations under the Torture Convention. I do not believe that the submissions are correct, for the following reasons.

As I have explained, I do not consider that section 20 of the Act of 1978 has any application to conduct of a head of state outside the United Kingdom. Such conduct remains governed by the rules of public international law. Reference to the parliamentary history of the section, which I do not consider appropriate, serves merely to confuse what appears to me to be relatively clear.

If I am mistaken in this view and we are bound by the Act of 1978 to accord to Senator Pinochet immunity in respect of all acts committed "in performance of his functions as head of state," I would

not hold that the course of conduct alleged by Spain falls within that description. Article 3 of the Vienna Convention, which strangely is not one of those scheduled to the Act of 1964, defines the functions of a diplomatic mission as including "protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law." (The emphasis is mine.)

In so far as Part III of the Act of 1978 entitles a former head of state to immunity in respect of the performance of his official functions I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way one can reconcile, as one must seek to do, the provisions of the Act of 1978 with the requirements of public international law.

For these reasons, I would allow the appeal in respect of so much of the conduct alleged against Senator Pinochet as constitutes extradition crimes. I agree with Lord Hope as to the consequences which will follow as a result of the change in the scope of the case.

Appeal allowed to extent that extradition to proceed for offences of torture and conspiracy to torture occurring after 8 December 1988.

Solicitors: Crown Prosecution Service, Headquarters; Bindman Partners; Kingsley Napley; Herbert Smith; Treasury Solicitor.

B. L. S.

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3

Immunities for Heads of State: Where Do We Stand?

BRIGITTE STERN

Some very important steps have been taken during the last few years in the field of international criminal justice, as previous chapters in this book have already noted: the landmark developments include the adoption on 17 July 1998 of the Statute of a permanent International Criminal Court (ICC), which can prosecute cases against heads of states, in spite of any protection or immunities they enjoy; the decisions in November 1998[1] and March 1999[2] in the United Kingdom of the House of Lords, according to which Augusto Pinochet could claim no immunity for acts of torture he was accused of, a decision which appears like a milestone in the history of international law; and the indictment the same month of Slobodan Milošević by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for his actions in Kosovo, this being the first time a serving head of state had been indicted before an international criminal tribunal. A step backwards seems however to have been made with the recent decision of the International Court of Justice (ICJ) in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*.[3]

All these decisions must be analysed, in order to see where we stand today as far as immunities are concerned, and to evaluate these evolutions, focusing on their positive aspects, but also on some of the critical questions they raise.[4]

[1] *Pinochet No 1.*

[2] *Pinochet No 3.*

[3] *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, 14 Feb 2002, General List 121. A similar step backwards, although in a civil claim and not a criminal case, was made by the European Court of Human Rights (ECHR) in the case *Al-Adsani*, Application N° 35763/97, judgment of 21 Nov 2001. See below.

[4] Among the extensive literature on the topic of heads of state immunities, see some recent contributions, Hervé Ascensio, 'L'immunité des chefs d'Etat et des gouvernants', in CEDIN, *L'immunité pénale des gouvernants* (Pedone, Paris, forthcoming); Michel Cosnard, 'Les immunités du chef d'Etat' in SFDI, *Le chef d'Etat et le droit international* (Pedone, Paris, 2002), 189; Marc Henzelin, 'Corruption, pillage des ressources et détournements de fonds étatiques: la fin des immunités pénales pour les chefs d'Etats ? Situation en droit suisse', (June 2002) *Rev. suisse de dr. int. et de dr. eur.*; Mary Margaret Penrose, 'It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law', (2000–1) *Columbia J Int'l L.* 193; Jill M Sears, 'Confronting the 'Culture of Impunity': Immunity of Heads of State from Nuremberg to *ex parte Pinochet*', (1999) *German Y. Int'l L.*, 42, 125; Joe Verhoven, 'Les immunités de juridiction et

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RELEVANT CONCEPTS

The immunities of present or former heads of state are just one category of immunities among others,[5] sometimes having the same character and scope as more general immunities, sometimes being totally specific to the head of state. Some of the tenets used in order to grant immunity to heads of state have their origin in customary international law, some have been codified in conventional international law and some merely reflect national approaches.

The Different Meanings of Immunity

As a matter of fact, immunity is a word used in several ways which should be distinguished for the sake of clarity.

Immunity can first refer to a kind of *substantive immunity*, meaning that the person benefiting from this kind of immunity would not have to abide by the existing laws. In this first meaning, immunity would amount to complete *irresponsibility*. This kind of immunity has been denounced in very strong terms by Jackson in his *Report to President Truman on the Basis for Trial of War Criminals*:[6]

> Nor should such a defence be recognised as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine rights of kings... We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law".

Of course, if such substantive immunity does not exist, then the consequences have to be drawn on the procedural level, and no general procedural immunity should be granted to heads of states. As stated by the ILC '(t)he absence of any procedural immunity with respect to prosecution and punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence'.[7]

But *procedural immunity* can exist without necessarily implying impunity: this is so, if this procedural immunity is only immunity from some procedures and not immunity from all possible procedures, or alternatively even when it is

d'exécution du chef d'Etat et de l'ancien chef d'Etat en droit international', *Rapport provisoire, Institut de droit international* (Institute of International Law, 2001), doc. mim.; and a reminder of an older but important contribution, Sir Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', *RCADI*, 247 (1994/III), 9.

[5] See for example, Christian Dominicé, 'Quelques observations sur l'immunité pénale de l'ancien chef d'Etat', (1999) *RGDIP*, 2, 298.

[6] (1946) *Temp. L Q* 19, 148.

[7] Report on the work of its 48th session, 6 May–26 July 1996, UN Doc. A/51/10, 41.

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immunity from all procedures, if this immunity exists only for a certain period of time.

Usually, when one speaks of procedural immunities—immunity from jurisdiction[8] and from execution[9]—reference is generally made to immunities for the acts attributable to one state or its representatives before the courts of a foreign state. But the concept of immunity is also used before national courts, even if the legal justification behind it is different, as will be seen later.[10]

It is also an open question whether immunities have the same scope in criminal matters and civil matters arising from the criminal act, this difficult question having led to a split in the European Court of Human Rights in the *Al-Adsani* case.[11]

Quite often, it is even used in a broader sense, meaning also that no procedure can be launched before an international tribunal, but strictly speaking the concept of immunity does not apply before the international courts.[12] It is interesting that this idea has been expressed by the Tokyo Tribunal, in the case of *Oshima*, Ambassador of Japan in Germany:

> Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trials by the Courts of the state to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction.[13]

Lastly, it happens sometimes that the expression 'immunity' is used in order to convey the idea that a head of state is protected from the jurisdiction of another state, even if that protection results from a theory other than immunity (like for example the Act of State doctrine, or the doctrine of *forum non conveniens*[14]).

In order to clarify things we shall speak of the absence of impunity before international tribunals, and only speak of immunities before national courts; and we shall try to distinguish immunities from the other defences put forward by heads of states having the same protective effect as immunity.

[8] Immunity from jurisdiction implies that a state cannot be arraigned before the courts of another state without its consent.

[9] Even if a judgement is duly entered into by the courts of one state against an act or an agent of another state, it is still impossible to execute that judgement against the property of that state: this is known as immunity from execution, or immunity from attachment.

[10] On this question in general, see Michel Cosnard, *La soumission des Etats aux tribunaux internes* (Pedone, Paris, 1996).

[11] See below.

[12] Christian Dominicé, for example, writes: 'The notion of immunity from jurisdiction is irrelevant before an international tribunal', our translation, above n5, 307.

[13] Röling and Rüter (eds), *The Tokyo Judgment. The International Military Tribunal for the Far East, 29 April 1946–12 November 1949*, I (UP Amsterdam BBV, Amsterdam, 1977), 456.

[14] That is, the doctrine under which a court can decline to hear, or can transfer, a case on the grounds that there is a more appropriate court (eg. in the home state) in which it could be heard; see the chapter in this book by Fiona McKay.

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The Diverse Immunities of a Head of State

It is usually considered that the ancestor of all immunities of the head of state is *sovereign immunity*, which seems to have existed before the state came into existence, and was granted to the person of the sovereign—the King, the Emperor, the Chief. This immunity, based on the necessary respect for the person of the sovereign, protects the latter from any interference by the courts of his own state or of another state, for all his acts, whether public or private, and whether concerning civil, administrative or criminal matters.

In addition, a rule developed in international law in order to confer state immunity to the entity that emerged in the XIV century, meaning that a state enjoys immunity of jurisdiction and of execution in civil and administrative matters—criminal responsibility of states having so far no existence in international or national law—before the authorities of all other foreign states. This idea is based on the principle of the sovereign equality of all states. Thus, state immunity appears more restricted than sovereign immunity, as it does not concern criminal matters, and concerns only acts done by an agent or organ of the state in an official capacity, not acts done in a private capacity. Naturally, in theory, in case his acts were not already covered by sovereign immunity, the head of state's acts would be liable to enjoy such immunities.

But international law has also developed so-called *diplomatic immunities* for the special agents of the state that represent the state in other countries and which are therefore particularly liable to the risk of being brought before the court of a foreign state. These immunities have first been developed in customary international law and are now codified in the Vienna Convention on Diplomatic Relations, 1961. They are granted in order to afford protection to the state more than to the person of the diplomat: as stated in the Preamble of the Convention, 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states'. It is generally admitted that the diplomatic immunities apply also, *mutatis mutandis,* to heads of state, whether one considers that customary international law applicable to heads of state has embodied more or less the same rules as expressed in the Vienna Convention, or that the Convention applies either directly or by virtue of a reference from a national law (as is the case in England), to heads of state. These diplomatic immunities, strictly speaking according to some writers, should apply only when the head of state is abroad within the territory of another state. As stated by Hazel Fox:[15]

> Immunity from civil and administrative jurisdiction is generally restricted to acts performed in the exercise of official functions,[16] but when the Head is in the territory of

[15] The Resolution of the Institute of International Law on the Immunities of Heads of State and Government, (2002), *ICLQ* 51 119, at 122.

[16] However, it is generally accepted that property personally belonging to a head of state located in the territory of another state shall not be subject to any measure of execution, except to give effect to a final judgment. See Art 4 (1) of the Institute of International Law Resolution of 2001.

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> another State in the exercise of official functions no such civil or administrative proceedings may be taken.

However, again, it seems to me that in fact sovereign immunities granted to the head of state while in office supersede the diplomatic immunities.

Finally, to be complete, one must also mention the great variety of *national immunities* given on the basis of the theory of separation of powers to Members of Parliaments and government or to heads of state before the courts of their own state: parliamentary immunities, among which was the senatorial immunity granted to Augusto Pinochet, immunities granted to the Presidents of most countries and so on.[17]

The Act of State Doctrine

To these diverse immunities—rooted, with the exception of purely national immunities, in international law—must be added, among the national theories, the Act of State doctrine—a doctrine developed as such in the Anglo-Saxon world, but which has equivalent approaches in the civil law countries: it is not, it must be insisted, a rule of international law but a judicial self-restraint doctrine.[18] However, it is worth mentioning, although it is not *stricto sensu* immunity, because it has often been invoked to justify a court's refusal to try former heads of state, and therefore plays exactly the same protective role as immunity. It should also be said that even if the Act of State doctrine does not concern criminal responsibility, it can be relevant in the pursuit of justice for crimes against humanity, as the granting of reparation in a civil case can participate in justice being done.

The idea behind the Act of State doctrine is that municipal law will refrain from examining the validity of the acts of foreign governments performed in their capacities as sovereigns within their territory. It is considered as being best described in the statement of the US Supreme Court in the often quoted citation of *Underhill v Fernandez*:[19]

> Every sovereign state is bound to respect the independence of every sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done in his own territory.'

The Act of State doctrine has been expressed in the *Restatement (Third) of the Foreign Relations Law of the United States*:[20]

[17] Recently a report to Tony Blair showed the responsibility of many officials in the spreading of the 'mad cow' disease in England. But, as stated in *Le Monde*, 28 Oct 2000, 1, 'The tens of politicians and civil servants cited are protected by "Crown immunity"', '"Vache folle": le mea culpa britannique'.

[18] As a matter of fact it can be set aside by the Executive, asking either that it not be used or that it be used in cases where it does not apply.

[19] 1897, 169 US 456. The English landmark precedent is *Buttes Gas v Hammer*, (1981) 3 AER 616 and (1982) AC 888.

[20] St Paul, American Law Institute, I (1987) 366–67.

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> . . . courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgement on other acts of governmental character done by a foreign state within its own territory and applicable there.

In a nutshell, the Act of State doctrine is applicable to acts attributable to another sovereign state, not exclusively to the head of state. Some limitations are inherently linked to the formulation of the doctrine itself: the act must be a sovereign act; the act must be performed within the territory of the state invoking it.

The fact that the act must be a sovereign act—and not an act performed by the state as a merchant—in order to benefit from the Act of State doctrine has been clearly expressed by the United States Supreme Court in *Alfred Dunhill v Republic de Cuba*,[21] where it refused to recognise a repudiation by the state of Cuba of commercial obligations as an act of state.

The fact that the act has to be performed in a foreign territory means that the US courts for example will not consider themselves prohibited from examining the taking by a foreign state of property situated in the US. A good example of such a restrictive interpretation was given in the case *Republic of Iraq v First National City Bank*,[22] where the revolutionary government tried to recover former King Faysal's assets held in a New York bank, after passing a decree depriving him of those assets; in this case, it has been stated that '(w)hen property confiscated is within the United States at the time of attempted confiscation, our courts will give effect to acts of state only if they are consistent with the policy and law of the United States'. In other words, self-restraint does not apply.

Many examples could illustrate the use of this doctrine by former heads of state in order to try to protect themselves. In the case *The Republic of Philippines v Marcos*,[23] the Republic of Philippines tried to recover or freeze assets it regarded as improperly acquired by former President Marcos and his wife Imelda, but the court ruled that 'adjudication is barred by the act of state doctrine'.[24]

It is precisely in order to avoid such an outcome that Iran, which wanted to get back assets of the former Shah it considered improperly acquired, included a specific provision in paragraph 14 of the Algiers Accords of 1981, stating that 'the claims of Iran should not be considered legally barred by the act of state doctrine'. The problem was then raised before the Iran-US Claims Tribunal in Case A/11 between the Islamic Republic of Iran and the United States concerning the former Shah's assets, each country presenting a different interpretation of the consequences that could be drawn from Article 14. In the view of Iran,

[21] 425 US 682 (1976), 15 *ILM* 735, *ILR* 66, 212.

[22] 241 F Supp 567 (SDNY 1965) affirmed, 353 F. 2d 47 (2d Cir 1965), certiorari denied, 382 US 1027, 86 S Ct.648, 15 L Ed 2d 540 (1966).

[23] United States Court of Appeals, 9th Cir, 818 F 2d 1473 (9th Cir 1987).

[24] *Ibid*, at 1490.

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the United States had undertaken in this provision not to bar the claims of Iran before the American courts for the return of the Shah's assets situated in the United States, either by the presentation of preliminary objections based on sovereign immunity or other defences, or by arguments based on the Act of State doctrine. In the view of the United States, however, the commitment to ensure that the Shah's assets would be returned to Iran through procedures before the American courts was not really one, as they invoked the separation of powers and the freedom of the courts to decide. And in fact the four suits brought by Iran were dismissed on *forum non conveniens*. In the Partial Award adopted on 7 April 2000,[25] the Iran-US Claims Tribunal, sitting in Full Tribunal, decided that the refusal of the courts of the United States to return the Shah's assets did not violate the Algiers Declaration:

> With respect to paragraph 14 of the General Declaration:
> Iran has not been denied access to United States courts to pursue its Pahlavi-assets claims and the United States did not guarantee Iran access to United States courts for the consideration of Iran's Pahlavi-assets claims on the merits.
> The United States is obliged to make known to all appropriate United States courts in which Pahlavi-assets litigation is pending that it is the United States Government's position that Iranian decrees and judgements relating to Pahlavi-assets should be enforced by United States courts in accordance with United States law. The phrase 'United States law' covers both procedural and substantive federal and state law in force in the United States. The United States did not guarantee that United States courts would enforce all Iranian decrees and judgements relating to the nationalisation and expropriation of Pahlavi-assets.[26]

In other words, the Iran-US Claims Tribunal, disregarding the rule of the *effet utile*, considered that nothing more was conceded to Iran by the provision of paragraph 14 than the application of the normal rules flowing from the Act of State doctrine.

Besides the two traditional limitations to the Act of State doctrine, there is a trend towards the development of new limitations to the use of the Act of State doctrine to protect states, mainly for acts performed on the territory of the state, but which are in flagrant violation of important rules of international law. Interestingly, it seems that in the United States this trend has started with the protection of property, then of human rights, while in the United Kingdom the evolution has started with human rights and developed in the field of the protection of property.

First, in the field of the protection of private property, it is well known that in the United States, an act of Congress, the Second Hickenlooper Amendment, has added a third limitation, to the extent that it will not apply for an act of confiscation of property in violation of international law. The same position seems to have been adopted very recently in the United Kingdom, in the case *Kuwait Airways*

[25] *The Islamic Republic of Iran v The United States of America*, Award N° 597-A11-FT.
[26] *Ibid*, para 313 D.

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Corporation (KAC) v Iraqi Airways Company (IAC) and others,[27] where it was decided for the first time that the acts of a foreign state within its territory may be refused recognition because they constitute flagrant breaches of public international law.[28] Therefore, Resolution 369 of 9 September 1990—by which Iraq transferred all property of KAC, worldwide, including ten aircraft that had been seized in Kuwait and brought to Iraq, to IAC—was not recognised as valid, as it was linked with the illegal aggression towards Kuwait by Iraq on 2 August 1990.

Secondly, in the field of the protection of human rights, the position in the United States is less affirmative and has not been adopted by an act of Congress:[29] however, the *Restatement* considers that '(a) claim on behalf of a victim of torture or genocide—*would*. . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates scrutiny of such acts'.[30] Some time ago in the UK, courts restricted the application of such a doctrine, when they were asked to take into consideration a Nazi decree depriving German Jews residing abroad of their citizenship and taking their properties: they considered the decree as being incapable of being a law, thus considering that it could not be an act of state entering in the functions of a state: the House of Lords held that 'so grave an infringement of human rights'[31] should lead to the refusal of recognition of the decree as law.

[27] This position was adopted first by the Court of Appeal (Nov 2000, 3 WLR 1117, 1127H–1128E) and then by the House of Lords (16 May 2002, [2002] UKHL 19, http://www.parliament.the-stationary-office.co.uk/pa/ld200102/ldjudgmt). However, it is possible that the English courts will not accept as easily as the US courts that private individuals have been deprived of their property by an act contrary to international law, as the remarks made in the judgment of *Oppenheimer v Cattermole*, 1976 AC 249 suggest. See n32. In the *KAC v IAC* case, the violation was recognised by the Security Council, which requested all states to refrain from recognising any effects to the aggression of Iraq on Kuwait. Lord Nicholls of Birkenhead of the House of Lords expressed this idea: 'RCC resolution 369 [transferring the KAC planes to IAC] was simply not a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today', 16 May 2002, para 28. Lord Steyn wrote along the same line: 'An English court may not give direct or indirect recognition to Resolution 369 for any purpose whatsoever. An English court may not recognise any Iraqi decree or act which would directly or indirectly enable Iraq or Iraqi enterprises to retain the spoils of illegal invasion', para 117.

[28] As stated by Lord Steyn, '(i)t is true that the Court of Appeal broke new ground. It was the first decision to hold that the acts of a foreign state within its territory may be refused recognition because they are contrary to public international law... In my view the Court of Appeal was right to extend the public policy exception beyond human rights violations to flagrant breaches of public international law', see preceding note, para 114.

[29] At least not as a general rule. But in specific circumstances the rule has also been set aside. A new exception has been added in the Foreign Sovereign Immunities Act, introduced by s 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, which applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage of hostage taking, against a state designated by the US as a sponsor of terrorism, were the claimant or victim was a national of the US at the moment of the facts.

[30] Our emphasis. As suggested by Lord Steyn, in this citation from *The Restatement* in his opinion of 25 Nov 1998 in the *Pinochet* case, the word 'probably' should today be replaced by the word 'generally'.

[31] *Oppenheimer v Cattermole*, 1976 AC 249.

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All in all, in order for the Act of State doctrine to protect an act from review in a foreign court, it must be a sovereign act and be performed on the territory of the state adopting the act, and not be in flagrant contradiction with the basic principles of international law, for example on the protection of property [32] or on the protection of fundamental human rights.

The Act of State doctrine seems to have been developed in order to give to the agents of the state acting in their official capacities the same protection that was formerly given to a sovereign, and did not seem to be of any use to the head of state benefiting from sovereign immunities. However, being of general application to all acts attributable to a state—to Parliament, the Executive power and so on—the Act of State doctrine is naturally applicable to the acts of the head of state as representing the state, and has indeed frequently be referred to by heads of state.

How Does All This Fit Together?

As stated earlier, it happens sometimes that the word 'immunity' is wrongfully utilised to signify that a person benefits from impunity or is not prosecuted, for reasons other than the technical legal bar of immunity.

What is quite clear is that, in order for the question of immunity to be raised before a court, the competence of the court has to be ascertained first. For example, in the *Pinochet* case, it was only after the Spanish judge was considered to have jurisdiction to prosecute and ask for extradition[33] and after the Law Lords ascertained in the UK that there existed an extradition crime, that they went on to consider the question of immunity.[34]

By the same token, although the ICJ in the *DRC v Belgium* case was not asked to rule on the existence of universal jurisdiction of the Belgian courts, the Court declared quite clearly that:

> ... in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister of Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.
>
> As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since *it is only where a State has jurisdiction*

[32] In the case cited in the preceding note, it is indeed suggested that English courts should only enforce 'clearly established rules of international law', adding: 'Of course on some points it may be by no means clear what the rule of international law is. Whether, for example, legislation of a particular type is contrary to international law because it is "confiscatory" is a question upon which there may well be wide differences of opinions between communist and capitalist countries', 1976, AC 249, at 278.

[33] The *Audiencia Nacional* had rejected on 29 Oct 1998 the challenge by state prosecutors to the jurisdiction of the Spanish judiciary to try Pinochet.

[34] This is very clear in the second decision of the Law Lords on these issues (*Pinochet No 3*).

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> *under international law in relation to a particular matter that there can be any question of immunities* in regard to the exercise of that jurisdiction.[35]

In other words immunity is a preliminary exception that is normally raised after the jurisdictional question is solved.

If immunity is a bar to the admissibility of the case at the procedural level, the existence of an Act of State is a bar to adjudicating on the merits of a case. In order to understand how state immunity and the Act of State doctrine overlap, while being distinct, reference can be made to the explanations given on this issue by Lord Berwick:

> Act of State is a confusing term. . . So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.[36]

Whatever analysis is made, it is clear that they are not at the same level.

The Act of State doctrine has been defined by Lord Nicholls in his opinion of 25 November 1998 as 'a common law principle of uncertain application which prevents the English courts from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country, or occasionally outside it'. Lord Nicholls explains that this Act of State doctrine yields to a contrary intention shown by Parliament; and, in his view, this contrary intention exists as far as torture is concerned, since the Criminal Justice Act of 1988 has embodied in English law the Torture Convention which makes clear that officials acting in an official capacity are to be prosecuted. They are even the only ones likely to be prosecuted under its terms.

In my view, in practical terms, the immunities benefiting heads of state by application of the Act of State doctrine duplicate the different immunities conferred to their acts, at least for the immunities *ratione materiae*. The protection granted to a head of state by sovereign immunities is broader than the protection granted by reference to the Act of State doctrine. One can however imagine that if the sovereign immunities are waived, then the Act of State doctrine can take over.

[35] Judgment of 14 Feb 2002, paras 45 and 46. Our emphasis.

[36] I would make a slightly different analysis, saying that immunity being a protection of the state can be waived by that state, while non-justiciability resulting from the Act of State doctrine being a decision of the prosecuting state can be waived by it and not by the prosecuted state.

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A good example of how the two theories interplay can be found in the above mentioned case of *Kuwait Airways Corporation (KAC) v Iraqi Airways Company (IAC) and others.* In a first judgment, the House of Lords, concerned with challenges to the jurisdiction of the English Court toward Iraq, decided first that Iraq was entitled to state immunity in relation to the removal of the aircraft from Kuwait to Iraq which was an exercise of governmental power by Iraq. But once the aircraft were handed over to the Iraqi public company by the legal act considered as an act of state, it decided secondly that the use by that company—IAC—of the airplanes was not covered by the immunity:

> IAC could not claim state immunity regarding the acts of which KAC was complaining, in so far as they were done after RCC resolution 369 came into force. IAC's retention and use of the aircraft as its own did not constitute acts done in the exercise of sovereign immunity'.[37]

In other words, Iraq was immune, but not IAC, against which KAC continued proceedings.

But then, in the discussion of IAC's liability toward KAC, the question of the validity of the acts undertaken by Iraq came to the forefront, as the situation of IAC was not the same if it was lawfully entitled to the property of the aircraft or not. At this stage, that is the discussion of the merits, the doctrine of Act of State was discussed and received a novel interpretation as mentioned. From the comparison between the two decisions of the House of Lords it appears that a gross violation of international law does not in itself suppress state immunity, while it can be used to decide that the Act of State doctrine does not apply. Immunity thus seems a stronger protection than Act of State.

International Rules Granting Immunities to an Acting Head of State

It is generally considered that the status of an acting head of state is defined by customary international law.

There is no specific international general convention on that topic, even if some international conventions refer expressly to the situation of an acting head of state.[38] The *Institut de droit international* attempted to codify the rules applicable to heads of state before foreign courts in 1891:[39] a distinction was then

[37] 1995, 1 WLR 1147, para 3.

[38] The Convention on the Punishment of Crimes against Internationally Protected Persons of 1973 includes the head of state in the definition of the protected persons, but does not deal with immunities. The Draft Articles of the ILC on Jurisdictional Immunities of States and their Property adopted in 1991 (*Yearbook ILC*, 1991, vol II, Part 2, 13), Art 3 declares: 'The present articles are ...without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*'. See also the Convention on Special Missions of 1969 that mentions the privileged status of the head of state.

[39] 'Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, les souverains ou chefs d'Etats étrangers', Hamburg session, (1889–1892, revised in 1892) *Ann. Inst dr int* 11 , 436–38

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drawn between the head of state acting as representing his state and the head of state acting as a private person. But this project never became positive law.

It is generally admitted that the immunities granted to diplomats by the Vienna Convention on Diplomatic Relations of 1961 apply, with the necessary modifications, to heads of state. If we turn then to the Convention on Diplomatic Relations, we find several articles dealing with immunity.

Article 29 provides that '(t)he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. . . '; in other words, the diplomatic agent, to which the head of state is assimilated, enjoys absolute immunity from execution.

Article 31 draws the extent and limits of his immunity from jurisdiction: 'A diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction', except in some cases, involving real property he does not hold for the purpose of his mission, succession questions and commercial activities.

The question is open here as to whether the head of state enjoys the same immunities as diplomats or stronger immunities. If it is considered that he enjoys the same immunities, the question remains open whether this is so only when he is abroad, or also when he is in his home country. If it is considered that he has different immunities, they will certainly be broader. Here we see how sovereign immunity and diplomatic immunity are articulated together, and that some necessary modifications are to be applied to the head of state.

Mainly, for the head of state, it seems that unlike the diplomat he is absolutely immune from criminal prosecution as well as from civil proceedings while he is abroad. No exceptions exist for certain matters, as it does for the diplomats.[40]

This means that heads of state benefit, according to customary international law, from absolute immunity from prosecution in another state while in office. They have an absolute immunity *ratione personae* while in office: their person is protected for all acts, whether public or private, before criminal courts.

On the contrary, it seems that their immunity from civil or administrative matters is far from absolute. This is, at least, how the Institute of International Law has restated its understanding of customary international law in Article 3 of the Resolution adopted in Vancouver in 2001:

> In civil and administrative matters, Head of State does not enjoy any immunity from jurisdiction before the courts of a foreign State, unless that suit relates to acts performed in the exercise of his or her official functions. Even in such a case, the Head of State shall enjoy no immunity in respect of a counterclaim. Nonetheless, nothing shall be done by way of court proceedings with regard to the Head of State while he or she is in the territory of that State, in the exercise of official functions.[40a]

[40] Either a restriction concerning the subject matter, or a restriction depending on his presence abroad.

[40a] See n 15

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International Rules Granting Immunities to a Former Head of State

It is less clear what rules govern the former head of state's immunities. In general, international law is quite silent on the situation of a former head of state.

The question of the extent to which a diplomatic agent—and by analogy a head of state—enjoys immunity, after he has left office, is provided in Article 39 of the Convention, which might be of some help in answering this question:

> 1 Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state. . .
> 2 When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country. . . However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

This last provision can give some information on the status of a former head of state. A distinction is usually drawn between the immunity *ratione personae* which is only enjoyed by the acting head of state, as mentioned earlier, and a more restricted immunity *ratione materiae* benefiting the former head of state. An acting head of state has an immunity based on his person's status, a former head of state on the category of acts performed.

Traditionally, the immunity *ratione materiae* was interpreted as based on a distinction between private acts and official acts, that is acts committed as part of the discharge of the head of state's functions.

Today however, the question is raised whether the acts for which a former head of state does not benefit from any immunity are not only private acts which are *functionally outside* the exercise of official duties, but also crimes under international law, which even if performed as part of the exercise of power, have to be considered as *teleologically outside* the functions of a head of state. The answer to this question was clearly affirmative in the decision of the House of Lords in the *Pinochet* case, but is less clear after the judgment of the ICJ in the *DRC v Belgium* case.

LIMITS TO IMPUNITY FOR PUBLIC OFFICIALS AND HEADS OF STATE BEFORE INTERNATIONAL COURTS

Strictly speaking, one does not deal here with immunity, but rather with impunity. It is quite clear that the theory of immunity has developed in order to protect a state and its agents from being tried in states' courts, primarily in the courts of another state. The immunity from arrest as well as the immunity from jurisdiction or execution is based on the sovereign equality of states. But naturally, the sovereign equality of states does not prevent a state's representative from being prosecuted before an international court, if this court is given jurisdiction over former or acting heads of state.

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Early International Criminal Law

Before an international tribunal, no procedural bar exists and it has also been asserted, so that things are unambiguous, that no excuse can exist on the merits, because of the official position of a defendant. In other words, immunity is not an issue before the international tribunals and irresponsibility has been clearly swept out. This has been asserted in the Versailles Treaty, in Article 227, indicting the Emperor Wilhelm de Hohenzollern, and then, more effectively, in the two Statutes of the Nuremberg and Tokyo Tribunals.

Article 7 of the Charter of the Nuremberg Tribunal states:

> The official position of defendants, whether heads of states or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 6 of the Statute of the Tokyo Tribunal reads:

> Neither the position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged. . .

These principles of international criminal law were restated in the seven Principles of Nuremberg by the International Law Commission in 1950. Principle III provides:

> The fact that the author of an act which constitutes a crime under international law has acted in his capacity as head of state or of government does not release him from his responsibility under international law.

The Recent Developments

When adopting the Draft Code of Crimes against the Peace and the Security of Mankind, the ILC adopted the same position, and explained why it was so necessary:

> . . . crimes against the peace and the security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans and policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorise the use of the essential means of destruction and to mobilise the personnel required for carrying out these crimes. A governmental official who plans, instigates, authorises or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respect, the most responsible for the crime. . . to invoke the sovereignty of the state.[41]

[41] Above n 38, 39.

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Articles 7(2) of the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) and 6(2) of the International Criminal Tribunal for Rwanda (ICTR) also repeat that heads of state do not benefit from any impunity. Both state that '(t)he official position of any accused person whether as a head of state or Government or as a responsible Government Official shall not relieve such person of criminal responsibility.'

Article 27 of the Statute of the International Criminal Court entitled 'Irrelevance of official position' is also quite explicit, and treats a head of state like any other person, as far as its substantive obligations are concerned and as far as the procedures against him are concerned (see appendices).

A word has to be said here of another article of the Statute which could at first sight seem to be in contradiction with this provision. Article 98 reads:

> The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunities of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of immunity.

It seems that this article's only purpose is to guarantee for example that a head of state of a country that is not a party to the Statute and thus has not accepted the jurisdiction of the Court, will not be arrested and surrendered while travelling to another state party to the Statute.

These rules asserting that heads of state must assume their responsibility and have no impunity before international tribunals apply naturally to former heads of state as well as to heads of state in office, as is shown by the indictment of Milošević by the ICTY in May 1999, for crimes committed in Kosovo, when he was still in office.

LIMITS TO IMMUNITY FOR PUBLIC OFFICIALS AND HEADS OF STATE BEFORE THE NATIONAL COURTS OF THEIR OWN STATE

Limits According to National Laws

It is evident that the best solution, when politically and legally feasible, is for the criminal head of state to be prosecuted before the courts of his own country. As stated by Human Rights Watch, '(c)rimes are far easier to prove in the country in which they were committed. . . and justice delivered locally. . . may be the most meaningful to the victims'.[42]

The extent to which a public official or a head of state will benefit from immunity from justice will depend on the content of the different national laws. These laws are based on the theory of separation of powers, and the necessity to afford a certain protection to the main political actors from judicial harassment.

[42] *The Pinochet Precedent* (HRW, New York, 2000), 18.

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In France, as is the case in many other countries, several immunities exist for categories of political leaders, and are even granted by the Constitution. In order that the immunities do not end up in irresponsibility, some special courts have been instituted: in other words, the immunities are accompanied by some privileges of jurisdiction.

Members of Parliament—whether of the National Assembly or of the Senate—benefit from an immunity in criminal matters, unless the Assembly to which they belong lifts that parliamentary immunity in order for them to be prosecuted before the ordinary courts. This protection of their function as representatives of the people of France is granted by Article 26 of the French Constitution of 4 October 1958:

> No member of Parliament may be prosecuted, sought out, arrested, held in custody or tried on account of opinions expressed or votes cast by him in the exercise of his functions. No member of Parliament may be prosecuted or arrested on account of any crime or misdemeanour, without the authorisation of the bureau of the Assembly of which he is a member. This authorisation is not required in case of *flagrante delicto*, or existence of a final sentence.
>
> The detention, measures of privation or restriction of liberty, or the prosecution of a member of Parliament may be suspended during the parliamentary session if the Assembly of which he is a member so demands.

The *members of the Government*—and among them the Prime Minister—also have immunities as far as criminal matters are concerned. In fact, their immunities are not expressly stated as for the members of Parliament, but result implicitly from the fact that they have to be prosecuted before a special court named *Cour de Justice de la République*, which means that they must be considered as benefiting from immunities of jurisdiction and cannot be prosecuted before the ordinary courts. Article 68-1 of the Constitution provides:

> Members of the Government are criminally responsible for actions performed in the carrying out of their duties and qualified as crimes or misdemeanours at the time they were committed. They are tried by the Court of Justice of the Republic (*Cour de Justice de la République*).[43]

And of course, the head of state—*the President of the Republic*—also has extensive immunities, stated in Article 68 of the Constitution:

> The President of the Republic is responsible for actions performed in the carrying out of his duties only in case of high treason. He can be indicted only by identical motions passed by the two assemblies by open ballot and by an absolute majority of their members; he is tried by the High Court of Justice (*Haute Cour de Justice*).[44]

[43] According to Art 68-2 this special court is composed of 12 members of Parliament elected by the National Assembly and the Senate and three judges from the *Cour de cassation*, one of them presiding the Court.

[44] Unlike the *Cour de Justice de la République*, no judge is a member of this *Haute Cour de Justice*, which appears more like a political organ than a court, as it is composed only of elected

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The existence of these privileges of jurisdiction appeared problematic when France wanted to ratify the Statute of the International Criminal Court. Since this Statute provides for the possible prosecution of a head of state or other state officials before the ICC, which was not envisioned by the Constitution, a modification of the Constitution had to be adopted, after the Constitutional Council had declared the Statute to be contrary to the French Constitution. This was done by the introduction of a new article in the Constitution, Article 53-2, after which the ICC Statute was ratified.

Other developments have recently occurred, as far as the immunities of the head of state are concerned. A debate arose on the issue of what happens regarding acts not committed in the discharge of official functions, for example private acts or, even more importantly, acts committed before coming into office. Strictly speaking, the Constitution deals only with acts performed as part of the head of state's function, as Article 68 refers to 'actions performed in the carrying out of his duties'. The issue was raised because of accusations of financial misappropriations that could have been committed when President Chirac was Mayor of Paris, of which he might be accused. The legal question was whether the case could be prosecuted before the ordinary courts while he was in office. The Minister of Justice, Mrs Guigou, declared bluntly that 'as any citizen, the President of the Republic can be brought to court if he commits misdemeanours',[45] but other voices were heard to the contrary.

The controversy was first resolved by the aforementioned decision[46] rendered by the Constitutional Council (CC), when it was asked to decide whether or not Article 27 of the ICC Statute was contrary to the French Constitution: in an *obiter dictum*, the CC decided that Article 68 of the French Constitution implies that the President of the Republic enjoys absolute immunity from criminal prosecution while in office for acts accomplished in the exercise of his functions except in the case of *haute trahison*:

> By Article 68 of the Constitution, the President of the Republic may not be held liable for acts performed in the exercise of his duties except in the case of high treason; moreover, he may be indicted only in the High Court of Justice by the procedure determined by that article.

As a matter of fact, two interpretations could have been given to the decision of the Constitutional Council. It could be understood that he can indeed be brought to the *Haute Cour de Justice* for acts committed outside his official functions—whether private acts committed while in office or acts committed before he was in office[47]—or, alternatively, that while in office he is absolutely

members of Parliament (Art 67 of the Constitution). In the United States, the personal responsibility of the President for acts committed outside his functions is set in motion by the procedure of impeachment.

[45] Declaration of 17 May 1998, cited in *Le Monde*, 20 Mar 2000, 8.

[46] Decision no. 98-408, 22 Jan 1999.

[47] This was the interpretation given by Arnaud de Montebourg, a socialist Member of Parliament, who had started to collect signatures to have Jacques Chirac tried by the *Haute Cour de*

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immune, except in the case of high treason, the only hypothesis under which he can be tried by the *Haute Cour de Justice*. As the question was heavily debated in France, the CC decided to give its authoritative interpretation of its own decision in a 'Communiqué'. Such a move is without precedent.[48] According to the CC, it is the second interpretation that has to prevail.

The *Cour de cassation*, then faced with a prosecution that could implicate Jacques Chirac, adopted the same position as the CC, in a decision rendered on 10 October 2001.[49] The question was whether he could be asked to give testimony before the French courts. The *Cour de cassation* first ruled that it had to decide that question by itself, and was not bound by the decision of the CC, which was only final and binding as far as the question of the constitutionality of Article 27 of the ICC Statute was concerned, but then it ended up with the same solution as the CC, stating that:

> *... L'article 68 doit être interprété en ce sens qu'étant élu directement par le peuple, pour assurer, notamment, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'Etat, le Président de la République ne peut, pendant la durée de son mandat, être entendu comme témoin assisté, ni être mis en examen, cité ou renvoyé pour une infraction quelconque devant une juridiction de droit commun.*

Finally, it should be mentioned that just as there exists an Act of State doctrine of judicial self-restraint towards the acts of a foreign state, doctrines of self-restraint towards certain domestic acts of a governmental nature have also developed in the different national systems: in France, for example it is called the doctrine of acts of government (*actes de gouvernement*), in the United States, the doctrine of 'political acts'.[50] These theories can also be of some relevance for heads of state in their own country.

Limits According to International Law where an International Crime is Concerned

More and more voices are heard stating that international human rights law imposes limitations on the legal possibility of a state adopting an amnesty law or other measures implying a waiver of investigation or prosecution for certain crimes. In other words, national laws should no longer deal with immunities as they see fit, at least where crimes of international law are concerned.

For example, the Inter-American Commission on Human Rights adopted two important decisions on 2 October 1992 referring respectively to the amnesty laws of Argentina and Uruguay. Although these laws were adopted with a view to favouring national reconciliation and helping the transition from dictatorship to democracy, the Commission considered that they were in violation of

justice. He is also the author of a book in which he accuses Jacques Chirac of criminal acts, *La Machine à trahir* (Denoël, Paris, 2000).

[48] See Frédéric Thiriez, 'Le communiqué de presse, source de droit ?', *Le Monde*, 21 Oct 2000.

[49] http://www.courdecassation.fr/agenda/arrets/arret/01-84922arr.htm, 3.

[50] They concern mainly the relations between the Executive and the Legislature, foreign relations and the conduct of war and in addition, for the United States, federal-state relations.

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international law, and more specifically of the American Convention of Human Rights and the American Declaration on the Rights and Duties of Man. It adopted the same analysis as far as the Chilean Amnesty law is concerned: according to the Inter-American Commission, 'Amnesty Law 2191 and its legal effects form part of a general policy of human rights violation by the military regime that governed Chile from September 1973 to March 1990'.[51]

The lawyers of victims in Chile have tried to use this analysis, linked with the superiority of international law over national law stated in the Chilean Constitution, in order to have the Chilean courts set aside the Amnesty Law protecting Pinochet.

An important precedent was set recently by the ICTY in the case of *Prosecutor v Anto Furundzija,*[52] where it was stated that if an amnesty law were passed for absolving torturers, this law should be disregarded—by international tribunals, foreign courts and national courts—because of the *erga omnes* value of the prohibition of torture:

> Prosecutions could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime.[53]

LIMITS TO IMMUNITY FOR PUBLIC OFFICIALS AND HEADS OF STATE BEFORE THE NATIONAL COURTS OF FOREIGN STATES

Limits to State Immunity in Civil Matters, According to National Laws and International Law

As mentioned previously, the principle of sovereign equality implies that the acts attributable to one state cannot be judged in the courts of another state. Therefore, immunities of jurisdiction and execution were granted to foreign states, these immunities naturally benefiting heads of state.

For a long time, state immunity was *absolute.* This immunity applied to all the acts of the state—laws, decrees—as well as to the organs and agents representing the state, the head of state being one of them. Naturally, state immunity was supposed to protect the state in its specific functions performed for the common good. As the principal beneficiary, the state could lift this immunity. In

[51] Cases 11.505 and 11.532 v Chile, Report of the Comision Interamericana de Derechos Humanos (CIDH), no. 36/96 and no. 25/98 of 7 April 1998, para 76.

[52] Decision of 10 Dec 1998, case no. TI-95-17/1-T, 38 *ILM*, (1999), 317.

[53] Para 155.

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addition, the state being considered unable to bear criminal responsibility, state immunity concerned only civil and administrative matters.

Today, it is the rule of *relative* immunity of states that prevails. The question is dealt with by principles of international law and sometimes by international conventions like the European Convention on State Immunities and its Additional Protocol of 1972, and is regulated in detail by the different national laws or precedents on state immunities. Generally speaking, it can be said that the state enjoys immunities only for its sovereign acts and not for its commercial activities.

As far as civil actions for torts are concerned, the well known Alien Tort Claims Act and Torture Victim Protection Act give the US courts jurisdiction over civil actions brought by aliens, for tortuous conduct by a person acting under the actual or apparent authority or under colour of law of a foreign state in violation of the law of nations, and have been mainly used in cases of abuses of human rights.[54] The English legislature has also adopted laws to the same effect: for example, the Criminal Justice Act 1988[55] has excluded immunity for acts of torture and the Taking of Hostages Act for acts of taking of hostages.[56]

Some instances involve not only public officials but also former heads of state. A good example is the case *In re Estate of Ferdinand Marcos*,[57] holding that Marcos could not hide behind his immunities, when sued in an action for damages by victims of acts of torture or wrongful deaths, as those acts could not be regarded as official acts committed within the scope of his authority. Another recent example is the case in which immunity was denied to Ayatollah Khamenei, Supreme Leader of the Islamic Republic of Iran and to Rafsanjani, former President, in a case brought against them by US victims of terrorism,[58] by application of the so-called 'Flatow Amendment' amending the Foreign Sovereign Immunities Act of the United States, providing for the denial of immunity to foreign states and their officials that facilitate and encourage terrorism.

International law has also started to limit immunities, as for example in Article 11 of the 1972 European Convention on State Immunity (the Basel Convention):

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

[54] See for example the landmark case, *Filartiga v Pana Irala*, 630 F 2d 876 (2nd Cir 1980) and 577 F Supp 860 (EDNY, 1984); see also *Kadic v Karadzić*, 70 F. 3d 232 (2nd Cir 1995). See the chapter in this volume by William Aceves and Paul Hoffman.

[55] Art 134.

[56] Art 1 para 1.

[57] *In re: Estate of Ferdinand Marcos Human Rights Litigation*, 25 F 3d 1467 (9th Cir 1994); see also *Trial of former President General Luis Garcia Meza and his collaborators on multiple charges relating to gross human rights violations*, Bolivian Supreme Court of Justice, 21 April 1993.

[58] *Flatow v Islamic Republic of Iran and al*, 99 F Supp 1 (DC Columbia, 1998).

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Limits to Immunities According to European Human Rights Law

This question of the limits to immunities in cases of torture has been strongly debated before the European Court of Human Rights (ECHR) in 2001 in the case *Al-Adsani v The United Kingdom* (torture and state immunity). The question raised in that case was whether a government can claim immunity for torture in civil proceedings against it.[59]

Mr Al-Adsani, who had dual British and Kuwaiti nationality, was tortured in Kuwait, and brought proceedings in the English courts. The High Court in a decision entered on 15 May 1995 held that the State Immunity Act of 1998 meant that he could not pursue a claim against the Government of Kuwait, stating:

> It was prepared provisionally to accept that the Government were vicariously responsible for conduct that would qualify as torture under international law. However, international law could be used only to assist in interpreting lacunae or ambiguities in a statute, and when the terms of a statute were clear, the statute had to prevail over international law.[60] The clear language of the 1978 Act bestowed immunity upon sovereign States for acts committed outside the jurisdiction and, by making express provision for exceptions, it excluded as a matter of construction implied exceptions. As a result, there was no room for an implied exception for acts of torture.[61]

The Court of Appeal having confirmed that decision, the Applicant, among others, complained of a violation of this right of access to a court under Article 6.1 of the European Convention on Human Rights.

The ECHR accepted the idea that the prohibition of torture has now become a rule of *jus cogens*, and quoted extensively the decision of the ICTY in the *Prosecutor v Furundzija* case:[62]

> It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency... This is linked to the fact ... that the prohibition of torture is a peremptory norm or *jus cogens* ... Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules.[63]

The ECHR then suggests that there is a distinction to be drawn, as was done by Lord Millet in the *Pinochet* case, between immunity *ratione materiae* from

[59] See the chapter in this book by Fiona McKay for a detailed discussion of the case.

[60] It can be stressed that this statement is an illustration of the reluctance of national courts to apply international law, when national law is in contradiction with it.

[61] As restated in the decision of the ECHR, para 17.

[62] Above n 52.

[63] Paras 144 and 151. Similar statements were made in *Prosecutor v Delasic and Others*, 16 Nov 1998, Case no. IT-96-21-T, para 454, and in *Prosecutor v Kunarac*, 22 Feb 2001, Case no. IT-96-23-T and IT-96-23/1, para 466.

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criminal jurisdiction and immunity *ratione personae* of sovereign states from civil jurisdiction for acts of torture.

And relying on that distinction, the ECHR considers that 'the grant of sovereign immunity to a State in civil proceedings pursues a legitimate aim of complying with international law, to promote comity and good relations between States through the respect of another State's sovereignty',[64] even if these civil proceedings are in pursuance of reparation for acts of torture and even if other considerations enter into play for the lifting of immunity of a former head of state in criminal proceedings for the same acts.

In a concurring opinion, Judge Pellonpää joined by Judge Bratza suggested that this decision was also taken for practical reasons:

> The somewhat paradoxical result, had the minority's view prevailed, could have been that precisely those States which so far have been most liberal in accepting refugees and asylum seekers, would have imposed upon them the additional burden of guaranteeing access to court for the determination of perhaps hundreds of refugees' civil claims for compensation for alleged torture.

There was been a dissenting opinion by Judge Rozakis and Caflish joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, in which all these judges criticised the distinction made by the majority, as far as the granting of immunities is concerned, between a criminal action against a head of state or other state agent and a civil action against the state stemming out of the same criminal act: according to them,

> (t)he distinction made by the majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule.[65]

The serious split in the ECHR—the decision was adopted by a majority of 9 against 8 votes—illustrates the on-going debate on the question of restricting immunities protecting states and their heads or agents.

In fact, the head of state accumulates both state immunity and sovereign immunity, the two having become in my view quite indistinguishable: it seems to me that sovereign immunity in its quasi-absolute formulation is the rule when the head of state is in office, while when he is no longer in office there operates a combination between state immunity in civil and administrative matters with its contemporary limitations, and sovereign immunity in criminal matters for the acts he performed in the exercise of his functions, with its contemporary uncertainties.

[64] *Al-Adsani* judgment, para 54.
[65] Para 4.

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Limits to Sovereign Immunities in Criminal Matters when an International Crime is Concerned[66]

The development of universal jurisdiction extends the cases where a foreign court will assert jurisdiction over a foreigner and thus a foreign head of state: this explains why the problems of immunities of former heads of state have come to the forefront in criminal matters. Universal jurisdiction is based on the idea that every state in the world has an interest in bringing to justice the authors of certain acts qualified as crimes under international law, wherever the crime was committed, by whomsoever it was committed and against whomsoever it was perpetrated. It is a matter of discussion among lawyers whether universal jurisdiction has to be based on a specific treaty like the 1984 UN Convention against Torture, or whether it can also be granted by a customary rule of international law, like the *jus cogens* rule prohibiting torture, crimes against humanity or genocide.[67]

There are several precedents that can be invoked, based on a specific interpretation of international law, according to which immunities of public officials or heads of state are to be disregarded when international crimes are at stake. As far as criminal suits are concerned, the most relevant case, before the *Pinochet* case, is the well known case of *Attorney-General of the Government of Israel v Eichmann*.[68]But the most relevant precedent to the effect that international law limits the immunities of a former head of state when an international crime has been committed is, of course, the *Pinochet* case.[69]

[66] According to the Resolution of 2001 of the Institute of International Law, it is stated in Art 13 that a former head of state enjoys only immunity for acts performed as part of his official functions, adding: 'Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.'

[67] See Brigitte Stern, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', (1998) 40, *German YIL* 280. International conventions create in general a compulsory universal jurisdiction, while customary law provides for a faculty to use universal jurisdiction. This explains the fact that although the Genocide Convention only provides for compulsory territorial jurisdiction, it can be asserted that a state can, on the basis of customary international law, bring someone accused of genocide before its own courts on the basis of universal jurisdiction.

[68] 36 ILR (1961) 5, para 30; see also *Trial of nine military commanders who had ruled Argentina between 1976 and 1982*, Arg Fed Court of Appeals, 9 Dec 1985 and Arg Supreme Court of Justice, 30 Dec 1986.

[69] For further discussion on the case, see the chapters in this book by Clare Montgomery and Mark Lattimer. Discussions of the case in French include: Jean-Yves de Cara, 'L'affaire Pinochet devant la Chambre des Lords', (1999), *AFDI*, 72; Michel Cosnard, 'Quelques observations sur les décisions de la Chambre des Lords du 25 Novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', (1999), *RGDIP*, 309; Isabelle Fichet et David Boyle, 'Le jugement de la Chambre des Lords dans l'affaire Pinochet: Un commentaire, http://www.ridi.org/adi/1998; Anne Muxart, 'Immunités de l'ex-chef d'Etat et compétence universelle: quelques réflexions à propos de l'affaire Pinochet', http://www.ridi.org/adi/1998; Brigitte Stern, 'Pinochet face à la justice', *Etudes*, Jan 2001, 7; 'International Decisions, (1999), *AJIL* 93, 696; Article in *Le Monde*, 'Les moyens d'oser', 29 Oct 1998,19; Article in *Le Monde*, 'Tremblez, anciens dictateurs', 26 Mar 1999, 17; Santiago Villalpando, 'L'affaire Pinochet: beaucoup de bruit pour rien? L'apport au droit international de la décision de la Chambre des Lords du 24 mars 1999', (2000) *RGDIP*, 394.

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THE QUESTION OF IMMUNITY IN THE *PINOCHET* CASE

Pinochet tried to invoke three different immunities: senatorial immunity, sovereign immunity and diplomatic immunity.

Before examining whether a former head of state can benefit from one or the other of those immunities, it must be ascertained that the person claiming them really is a former head of state.

The Status as Head of State, a Prerequisite for Immunities to Apply

During the first hearings before the House of Lords, one counsel against Pinochet argued that he never was a legal head of state, whether as the President of the Military Junta, the Supreme Chief of the Nation or the President of the Republic of Chile.

Most of the Lords denied this could be even discussed: Lord Lloyd of Berwick declared that '(i)t is clear beyond doubt that he was', Lord Nicholls of Birkenhead stated that

> the evidence shows he was the ruler of Chile from 11 September 1973, when a military junta of which he was the leader overthrew the previous government of President Allende, until 11 March 1990 when he retired from the office of president. I am prepared to assume he was head of state throughout the period.[70]

Only Lord Slynn of Hadley really discussed the issue: considering that Pinochet 'was not, in any event, appointed in a way recognised by the Constitution', he added that '(i)t seems clear, however, that the respondent acted as head of state', and was recognised *de facto* by other states to have the powers of a head of state, as they accepted for example that he could sign the letters of accreditation of ambassadors; therefore, he considered that he should be treated as a former head of state. The same type of reasoning was used in the case brought in the United States against Karadzic, considered as a head of state as he 'acted under the colour of law'.[71]

On the other hand, sovereign immunity was sometimes refused precisely because a head of state was not recognised by the state in which he was prosecuted: this is the reasoning used in the United States to refuse to grant sovereign immunity to Noriega, who, although the ruler of Panama, was never recognised by the United States.[72]

Another question of qualification can be briefly mentioned here. It must be recalled that under the Torture Convention, torture must be committed by a 'public official or a person acting in an official capacity'.

[70] Lord Steyn and Lord Browne-Wilkinson make the same type of assumption.
[71] Cited n 54.
[72] *United States v Noriega* (1990) 746 F Supp 1506.

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In the first decision of the House of Lords in *Pinochet*, Lord Slynn of Hadley declared that Pinochet as head of state was neither a public official, nor a person acting in an official capacity, in the sense of the Convention. The reason given for such a surprising interpretation was that the head of state was not mentioned as such and should therefore be considered as excluded from the reach of the Convention. This of course would produce strange results, because it implies that minor officials having participated in the actions of the Chilean government could be prosecuted, whereas the person orchestrating it all could not.

The Reliance on the State Immunity Act

In order to deal with the question of immunity, the Law Lords referred to UK law, more precisely to the State Immunity Act of 1978, which itself refers to international law.

Part I of the State Immunity Act deals with state immunity: this means that a foreign state 'is immune from the jurisdiction of the courts of the United Kingdom' (Article 1) except in some of the cases provided for in the Act, mainly the cases when the state acts not *jure imperii* but *jure gestionis*, in other words when it acts not as a sovereign, but as a merchant. Article 14 specifies that 'references to a state include references to (a) the sovereign or other head of that state in his public capacity; (b) the government of that state; (c) any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government and capable of suing and being sued'. Article 16(4) states that this first part of the Act dealing with state immunity 'does not apply to criminal matters'.

Part III of the Act deals with another type of immunity, diplomatic immunity, and refers to the Diplomatic Privileges Act 1964, which incorporates into the UK legal system the Vienna Convention on Diplomatic Relations.

Two points deserve to be mentioned. First, it must be noted that diplomatic protection as granted by the international convention shall apply to a sovereign or other head of state 'subject ... to any necessary modifications' (Article 20(1)). Secondly, this diplomatic immunity has to be added to the state immunity and does not enter in conflict with it, as is stated twice, in two different articles, one in Part I and one in Part III: Article 16(1) in Part I states that '(t)his Part of the Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964. . . '; Article 20(5) in Part III provides that '(t)his section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity'. In other words, it means that the different immunities must be added to each other instead of being considered as exclusive or contradictory.

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A Consensus on the Existence of Absolute Immunity for Acting Heads of State

All the Lords asserted that a current head of state is protected by an absolute and complete immunity both in civil and criminal matters, deriving from the historic immunity accorded to the king or emperor,[73] and expressed by analogy in the Vienna Convention on Diplomatic Relations.

In order to know which immunities an acting head of state enjoys in criminal matters, one must look at the situation of a diplomat sent to his post in a foreign state. Referring to Article 39,[74] the analogy is easy to make and was expressed by Lord Slynn of Hadley in his opinion of 25 November 1998:

> The necessary modification to "the moment he enters the territory of the receiving state. . . " and to "the moment when he leaves the country" is to the time when he "becomes head of state" to the time "when he ceases to be head of state". It therefore covers acts done by him whilst in his own state and in post. Conversely there is nothing to indicate that this immunity is limited to acts done within the state of which the person concerned is head.

The head of state in office, in other words, enjoys immunities as such, *ratione personae*: he has absolute immunity from civil, administrative and criminal jurisdiction, that is to say immunity for public as well as private acts.

The fact that a head of state has absolute immunity was stated by all the Lords: Lord Steyn for example, in his opinion of 25 November 1998 declared that '(i)t is common ground that a head of state in office has an absolute immunity against civil and criminal proceedings in the English Courts'.

The Situation of a Former Head of State

The picture changes for a former head of state, who sees his immunities restricted, as he only enjoys immunity *ratione materiae*: his immunity is restricted to 'acts performed in the exercise of his functions'. The whole question is to interpret what kind of acts are covered by this expression.

Some acts are undoubtedly private acts, some acts are beyond discussion public acts, but in-between, there is a grey zone where acts can be found to be clearly linked to the exercise of power without being performed in furtherance of the head of state's functions. 'Acts performed in the exercise of his functions' can mean that only private acts are excluded from the ongoing immunity and that *all official acts performed while he was in function* are covered by immunity from criminal jurisdiction; but it can also mean that only *acts possibly entering into the functions of a head of state* will continue to enjoy immunity after he has left power.

As stated in the decision of 25 November 1998 by Lord Slynn of Hadley, '(t)he sole question is whether (Pinochet) is entitled to immunity as a former head of

[73] Lord Hope went even as far as to consider this absolute immunity as a *jus cogens* rule.
[74] See p 84 of this chapter.

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state from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was head of state.' This issue is even more important when a specific category of illegal acts, crimes under international law, are involved: as stated by Lord Slynn of Hadley, 'the question is what effect, if any, the recognition of acts as international crimes has in itself on. . . immunity'.

Three answers can be given to that question, two of them being extreme positions: the first is that the existence of an international crime has no effect whatsoever on immunities, the author of such a crime committed in his capacity as head of state enjoying impunity before national courts; the second is that all crimes recognised as international crimes are outside the protection of the immunity for a former head of state; the third is that some official acts benefit from immunities and others not. What interpretation did the judges in the UK choose? How to define the functions of a head of state? Is a reference to the way international law defines the functions of a head of state possible? As we know, there was no unanimity on these questions.

At the High Court level,[75] the judges decided that Pinochet did enjoy absolute immunity for the acts performed in the exercise of his functions, whatever their nature. One of the judges, Justice Collins, rejected the argument that crimes under international law could never be part of the sovereign functions of a head of state, in recalling that quite often heads of state have committed such acts: 'Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to look very far back in history to see examples of that sort of thing having happened'.

In the first decision of 25 November 1998, by a three to two majority, the Law Lords adopted an historic ruling, revoking the granting of sovereign immunity to Pinochet. And in the second decision of 24 March 1999, by a six to one majority, the Law Lords upheld the same position and decided that Pinochet could not benefit from immunity so as to prevent its extradition to Spain.

Three Law Lords in Favour of Immunity

A narrow textual reading was adopted by Lord Slynn of Hadley, Lord Lloyd of Berwick and Lord Goff of Chieveley who considered that all acts committed as part of the official activities of the head of state were immune from prosecution in national courts.

If one considers the official acts that enjoy immunity, it must be conceded that it is not because an act is illegal that it is *ipso facto* disqualified from being an official act: if this were true, the institution of immunity would make no sense, as it is precisely to protect the head of state from prosecution that it was instituted. As stated by Lord Slynn of Hadley,

[75] 28 Oct 1998, Lord Bingham of Cornhill, *Smith Bernal Official Court Reporters*.

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> the fact that. . . a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great.

Lord Slynn of Hadley however leaves the door open for an evolution of this classical position: he admits in fact the possibility that the immunity enjoyed by a former head of state might be affected in the future, but only on the condition that it is clearly provided for by an international convention incorporated by legislation into the English legal system, which he doesn't think is the case yet with the Torture Convention.

The opinion of Lord Berwick follows a reasoning in several steps that brings him to the conclusion that immunity is maintained even when an international crime is committed. Under customary international law, it is accepted that a former head of state benefits only from immunity for his public acts. Naturally, the distinction between personal or private acts on the one hand and public or official acts done in execution or under the colour of sovereign authority on the other hand is not always easy: for example, in the *Noriega* case, the Fifth Circuit Court of Appeals concluded that Noriega's alleged drug trafficking could not conceivably constitute public acts on behalf of Panama.[76]

It is by a strict application of the dichotomy private acts/public acts that Lord Berwick refused to consider the crimes of which General Pinochet was accused as lifting the immunity:

> He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government, and that he did so in co-operation with other governments under Plan Condor, and in particular with the government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

It is worth noticing however that Lord Berwick could not help recognising that '(o)f course it is strange to think of murder or torture as 'official' acts or as part of the head of state's 'public functions''. Strange indeed.

Finally, Lord Berwick considers that even if there were no valid claims to sovereign immunity, the Court should decline jurisdiction on a question of extradition which involves sensitive questions of foreign relations.

The second time the House of Lords considered the matter, the only judge to be in favour of immunity, Lord Goff of Chieveley, considered to the same result that 'the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character'.[77]

[76] Case cited n 72.

[77] He considered that it was too dangerous to introduce a distinction among official acts, for it could be used in a political manner: he gave the example of a Minister of her Majesty that could be sued for acts of torture in Northern Ireland in another state that supported the IRA.

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Nine Law Lords Against Immunity

Most of the Lords could not accept that acts of torture could be qualified as official acts and considered that they must be disqualified *per se*.

For example, in the first decision, Lord Nicholls introduces an interpretation of the functions of a head of state according to international law, stating that 'it hardly needs saying that torture of his own subjects or of aliens, would not be regarded by international law as a function of a head of state'. And he adds: '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, and even more so, as it does to anyone else. The contrary would make a mockery of international law.'

In the same vein, Lord Steyn declared:

> ... by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage-taking and crimes against humanity... as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.

These acts are necessarily 'conduct falling beyond the scope of his functions as head of state'.

And Lord Steyn added: 'It follows inexorably from the reasoning of the High Court 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.'

The decision in *Pinochet No 3* of 24 March 1999 is rather disappointing as far as a general statement on the limits to immunities of former heads of state is concerned: only Lord Millett endorsed the idea that immunity is always overridden by the existence of international crimes. All the other Lords relied exclusively on the Torture Convention and interpreted it as meaning that, in this specific case, no immunity should be granted: they considered that immunity would be incompatible with the Convention, as its express provisions refer to the official character of torture as a constituent element of the international crime giving rise to universal jurisdiction.[78]

This of course, restricts considerably the scope of the decision taken. For example, Lord Browne-Wilkinson declared: 'I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function'. Also, in the words of Lord Saville:

> So far as the parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of the Convention. Each state party has agreed that the other states parties can exercise jurisdiction over alleged official torturers found within their territories... and thus to my

[78] In other words, an act of torture committed by an armed group fighting against the government would not qualify as torture under the Convention.

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> mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged act.

Although he did not refer expressly to the Convention, Lord Hutton seems to have taken a similar general approach:

> The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but 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 cannot employ in any circumstances whatsoever and has made it an international crime.

But, by the same token, this means that such a conclusion cannot be generalised for all crimes under customary international law.

The Lifting of the Senatorial Immunity in Chile

In Chile, it is well known that Pinochet took a series of measures in order to protect himself and those in power with him from prosecution after they left power. First, an Amnesty Law[79] was passed in 1978 deciding that 'all persons... who in their capacity as perpetrators, accomplices or accessories before or after the fact committed criminal acts during the operative period of the State of Siege, extending from 11 September 1973 until 10 March 1978' benefited from a broad amnesty and could therefore not be prosecuted. Then, as if this self-amnesty was not sufficient, Pinochet included, in 1980, another protection in the new constitution providing for himself and eight others to become 'senator for life' and therefore immune from prosecution because of parliamentary immunity. However, if the Amnesty Law and the parliamentary immunity could protect him in Chile, these texts had no extraterritorial effect and could well be disregarded by the courts of other countries.

It is well known that the court of Santiago first, on 23 May 2000, and the Chilean Supreme Court afterwards, on 8 August 2000, lifted the parliamentary immunity. Parliamentary immunity is not granted in order to ensure impunity for the members of Parliament, but only in order to avoid unfounded prosecutions. Therefore three conditions are to be met for a parliamentary immunity to be lifted according to the Chilean Code: that the judge has jurisdiction, that the crimes are defined by the law and that there is a prima facie responsibility of the accused. Moreover, the suggestion has been made before the Chilean court that the Amnesty Law should be set aside because it violates international law, this point having been discussed earlier.[80]

[79] Decree Law 2191, adopted on 19 April 1978.

[80] For the cases of disappearances, it has been considered that they are continuous offences, and therefore their prosecution is not barred by the Amnesty Law. For this analysis, see UN Declaration on the Protection from Enforced Disappearances, adopted by the UN General Assembly in Resolution 47/133, 18 Dec 1992. See also ch 14.

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The Lesson of the *Pinochet* Case

Whatever the restrictions in the reasoning used by the Lords, it seemed that what emerged is that *'international crimes in the highest sense' cannot per se be considered as official acts*, just as commercial acts have been distinguished from sovereign acts according to their finality. Gross human rights violations cannot be qualified as sovereign acts. This is a consequence of the inderogable character of the international rule prohibiting torture and crimes against humanity.

Finally the position adopted by the House of Lords, in spite of its many ambiguities, seemed to indicate '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'.[81] A huge step has been made towards combating impunity. In the *Pinochet* case, it has been accepted that a former head of state cannot hide behind his immunities, whatever their name, in order to escape his responsibility, if he has committed a crime under international law.

As stated by Christine Chinkin,

> (t)he challenge to the immunity *ratione materiae* claimed by a former head of state for official acts of torture represented a choice between two visions of international law: a horizontal system based upon the sovereign equality of states and a vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights.[82]

The decisions of the House of Lords undoubtedly mark progress. But some questions remain. If the solution is based on the *jus cogens* nature of the prohibition of a crime that overrides any other rule, it is hard to explain why it should not apply also to heads of state in office, unless their absolute immunity is also considered as a *jus cogens* rule.[83] Of course, the regression of impunity must be welcomed, but maybe not at any price. Personally, I think that the next step, called for by some NGOs, allowing prosecution of acting heads of state in any national court should not be admitted. The example of a Belgrade court condemning, on the 21 September 2000, fourteen Western leaders, among them Bill Clinton, Tony Blair and Jacques Chirac, to 20 years imprisonment for the

[81] Andréa Bianchi, 'Immunity v Human Rights: The Pinochet Case', (1999-2), *EJIL*, 238.

[82] 'International Decisions', (1999), *AJIL* 3 703, at 711; see also for a similar conclusion, Andréa Bianchi, above n 81, at 240: 'The divide between the Law Lords sitting in the First Appellate Committee is evidence of the sense of uncertainty over which values and principles should be accorded priority in contemporary international law. The two opposite poles of the spectrum are evident. On the one hand, stands the principle of sovereignty with its many corollaries including immunity, on the other, the notion that fundamental human rights should be respected and that particular heinous violations, be they committed by states or individuals, should be punished. While the first principle is the most obvious expression and ultimate guarantee of a horizontally-organised community of equal and independent states, the second view represents the emergence of values and interests common to the international community as a whole which deeply cuts across traditional precepts of state sovereignty and non interference in the internal affairs of other states.'

[83] This position was adopted by Lord Hope, see n 73. However it is difficult to admit that the rules on immunities are *jus cogens* rules, as they can be set aside, which a *jus cogens* rule cannot.

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actions of NATO in Yugoslavia shows some of the possible counterproductive effects of opening the door too broadly.

However, the risk currently might not be to open the door too broadly, but to close the door, as could well result from the decision of the ICJ in the *DRC v Belgium* case.

THE QUESTION OF IMMUNITY IN THE *DRC v BELGIUM* CASE

In the recent *DRC v Belgium* case,[84] the International Court of Justice has found that not only acting heads of state but also incumbent ministers for foreign affairs benefit under international law from a complete immunity from criminal jurisdiction in foreign courts.[85]

The positions of the two parties were quite opposite. For the Congo, there exists an inviolability and immunity from criminal process that is 'absolute or complete': in its terms 'the immunity accorded to Ministers for Foreign Affairs when in office cover all their acts, including any committed before they took office, and ... it is irrelevant whether the acts done whilst in office may be characterised or not as official acts'.[86] Belgium on the contrary adopted a position closer to the one of NGOs acting against impunity, and stated that 'while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when acting otherwise than in the performance of their official functions'.[87]

The ICJ considered implicitly that the immunities of the minister for foreign affairs in office were the same as the ones benefiting an acting head of state,[88] as it declared 'that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability'. And to make things

[84] For a full discussion of this case, see ch 12. See also Brigitte Stern, 'Les dits et les non dits de la Cour internationale de Justice dans l'affaire RDC contre Belgique', *International Law FORUM du droit international*, (2002)102; see also, Antonio Cassese. 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', *EJIL*, (2002) 853; Marina Spinedi, 'State Responsibility v Individual Resposibility for International Crimes: *Tertium Non Datur? ELIL*, (2002) 895. Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case, *EJIL* (2002) 877. Sir Stephen Jennings, 'Jurisdiction and Immunity in the ICJ Decision in the *Yerodia* Case, *International Law FORUM du droit international*, (2002) 99; Christophe Schreur and Stephan Wittich, 'Immunity and Accountability: the ICJ's Judgment in the *Yerodia* Case', *International Law FORUM du droit international*, (2002) 117.

[85] *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, 14 Feb 2002, General List 121.

[86] Para 47 of the judgment.

[87] Para 49 of the judgment.

[88] It must be noticed that in its original form, the Draft Resolution of the Institute of International Law adopted the same assimilation, but that in its final form the Resolution on 'The Immunities from Jurisdiction and Execution of Heads of States and Heads of Government in International Law' adopted by the Institute on 26 Aug 2001 limited the beneficiary of the Resolution

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crystal clear, the Court added : 'In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office'.[89]

Moreover, on the situation of a former minister for foreign affairs, the ICJ has adopted a 'regressive' position compared to the position adopted in the *Pinochet* case. The decision is naturally also important for heads of state, as it is quite clear that if an international crime does not imply a suppression of the immunities of a former minister for foreign affairs, it will even less have this effect for a former head of state, usually considered as the most protected public person in the state.

Having affirmed the existence of absolute immunity, the ICJ goes on to distinguish the granting of immunities and impunity:

> The Court emphasises, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity... the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.[90]

The Court endeavours then to list the four 'exceptions' to immunity. Let us first mention the exception that the ICJ mentions last, as this is not strictly speaking an exception to immunity, as formerly explained: according to the ICJ, '(f)ourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts'.[91] Then, if one looks at the two first exceptions, they do not appear to be very far reaching. The Court states that '(f)irst, such persons enjoy no criminal immunities under international law in their own countries';[92] this is absolutely true, but as seen earlier, quite often they benefit from extensive immunities in their own countries under national laws. Then the ICJ goes on with the second exception: 'Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity'.[93] This is indeed true too, but will probably only happen after a change of power and thus it is likely that this situation will only concern former ministers.

But it is in the statement concerning the third exception that the Court is the more disappointing:

> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other

to the central political figure.

[89] Paras 54 and 55 of the judgment.

[90] Paras 60 and 61 of the judgment (the Court's emphasis).

[91] Para 61 of the judgment.

[92] *Ibid.*

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> States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[94]

Not a word on acts that cannot be considered ever as part of the functions of a head of state, as acts considered as crimes under international law. This is why I share the regrets of the *ad hoc* Judge of Belgium, Mrs Van den Wyngaert, when she states:

> The Court's conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *in par parem* principle has become more and more restricted and deprived of its mystique, but also in the field of criminal law, when there are allegations of serious international crimes.[95]

CONCLUSION

Naturally a balance has to be found, and in the name of combating impunity, chaos should not be introduced. This does not mean that impunity should be favoured. Heads of state in office must definitely be answerable for their acts, but in order to avoid political bias as far as possible, this should be done before the International Criminal Court.

[93] *Ibid.*
[94] *Ibid.*
[95] Dissenting opinion, para 23.

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14 février 2002 a eu des répercussions directes sur les nouveaux développements du droit pénal international amorcés par la justice belge : dans l'affaire Sharon, la Cour d'appel de Bruxelles a suivi son Avocat général Pierre Morlet, qui lui recommandait de tenir compte de l'arrêt de la CIJ du 14 février 2002, et a invoqué l'immunité due à la qualité de Premier ministre de M. Sharon pour annuler les poursuites pénales engagées contre ce dernier.

On ne peut se satisfaire de l'argument (?) qu'en déclarant « l'inviolabilité et l'immunité totales » du ministre des affaires étrangères sans toutefois se prononcer sur la question de la compétence universelle (le Congo ayant abandonné ce moyen en cours de procédure), la Cour aurait réalisé un compromis acceptable par tous (54). La Cour n'avait pas à statuer en tant qu'instance arbitrale, ni *ex aequo et bono*; elle avait à trancher sur la base du droit international un différend d'ordre juridique dont elle a reconnu elle-même l'existence. Elle ne peut continuer à peindre des trompe-l'œil sur les murs de la justice internationale chaque fois qu'elle est confrontée à une question embarrassante à l'instar de l'affaire de la *Licéité de la menace ou de l'emploi d'armes nucléaires* (55). L'immunité ne devrait pas servir de bouclier à l'impunité.

(54) V. Opinion individuelle du Juge Koroma; et Philippe WECKEL, « Chronique de jurisprudence internationale », *R.G.D.I.P.*, 2002-2, p. 427.

(55) Avis consultatif du 8 juillet 1996, C.I.J., *Recueil*, 1996, p. 266, par. 105, E.

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QUELQUES RÉFLEXIONS SUR L'AFFAIRE RELATIVE AU *MANDAT D'ARRÊT DU 11 AVRIL 2000*

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Toute décision judiciaire peut être intéressante par ce qu'elle dit et, le cas échéant, par ce qu'elle tait. L'arrêt du 14 février 2002 ne fait pas exception à la règle. Ce qu'il dit porte sur l'immunité de juridiction dont peut se prévaloir, devant le tribunal d'un État étranger, un ministre des Affaires étrangères en exercice; le dit-pour-droit est important, car il est indiscutablement appelé à faire jurisprudence. Ce qu'il tait concerne la compétence universelle; il demeure difficile toutefois de tirer des silences de la Cour de grands enseignements, en dépit des réflexions exprimées par certains de ses membres à ce propos.

L'immunité ne constitue pas le seul point de droit qui soit tranché dans l'arrêt. Diverses « exceptions d'incompétence, de non-lieu et d'irrecevabilité » y sont également évoquées, de même que les modalités de la réparation due pour violation de la règle d'immunité. Ces questions ne sont pas sans intérêt. Il ne paraît toutefois pas justifié de s'y attarder plus que la Cour ne le fait elle-même. Les exceptions soulevées par la Belgique n'ont en particulier guère retenu l'attention des juges qui les ont balayées du revers de la main, le juge Oda seul faisant dissidence sur ce point.

L'arrêt du 14 février 2002 est, dans l'ensemble, court et clair. Le fait mérite d'être signalé, car il est loin de se vérifier dans toutes les affaires qui ont été portées à la connaissance de la Cour internationale de justice. Que les règles relatives à l'immunité de juridiction et à l'inviolabilité pénales d'un ministre des Affaires étrangères en exercice aient fait l'objet d'un très large accord entre ses membres n'y est certainement pas étranger. Seuls deux juges en effet se dissocient sur ce point de la majorité.

Il n'est pas vraiment surprenant que le juge *ad hoc* désigné par la Belgique n'ait point en l'occurrence suivi ses collègues, ce qui ne change rien au fait qu'il statue en pleine indépendance sans être aucunement tenu de partager — même s'il lui appartient de les faire comprendre — les thèses de l'État auquel il doit son siège au sein de la Cour. M^me^ Van den Wyngaert considère que « rien ne vient étayer » la « thèse » selon laquelle « des immunités » sont coutumièrement dues aux ministres des Affaires étrangères dans

la pratique internationale, ce qui ne préjuge pas de la courtoisie qui peut inciter à leur en accorder, et qu'en outre ceux-ci ne bénéficient d'aucune immunité de juridiction lorsqu'ils sont accusés de crimes de guerre et de crimes contre l'humanité. A dire vrai, on ne comprend pas bien comment il pourrait être dérogé dans ces deux hypothèses à une immunité dont il est dit qu'elle n'existe pas. Cela étant, il est certain que l'existence d'une coutume peut aisément prêter à contestation. Le juge Awn Al Khasawneh estime à ce propos que si ces ministres peuvent se prévaloir d'une « functional immunity from enforcement when on official mission », aucune immunité « absolue » de juridiction ou d'exécution ne leur est reconnue. Et il souligne que l'immunité doit être interprétée restrictivement dès lors qu'elle constitue « by definition an exception from the general rule that man is responsible legally a morally for his actions ». On peut partager ce souci de ne pas étendre indûment l'immunité, mais c'est à la compétence du juge qu'elle déroge, sans restreindre d'aucune manière la responsabilité (pénale) de la personne qui s'en prévaut devant lui.

Nul ne contestera qu'en l'occurrence la pratique sur laquelle doit reposer une règle coutumière ne soit pas très explicite. Le fait demeure toutefois que l'on ne connaît pas de cas dans lequel un ministre des Affaires étrangères ait été pénalement poursuivi et jugé à l'étranger, que dans les quelques cas connus où d'aucuns s'y sont essayés, une immunité de juridiction lui a été sans ambiguïté reconnue et que, dans sa très grande majorité, la doctrine atteste de son existence. Le fait est aussi que l'exercice des responsabilités d'un ministre des Affaires étrangères risquerait d'être singulièrement compromis s'il pouvait à tout moment faire l'objet à l'étranger de poursuites pénales. Il n'y a pas à s'étonner dès lors que la Cour n'ait pas contesté en principe son immunité de juridiction, ce sans quoi il n'y a pas d'intérêt à s'interroger sur les exceptions que celle-ci pourrait connaître. D'aucuns estimeront peut être que la Cour aurait pu fournir plus de « justifications ». Peut-être. Il ne faut cependant pas se tromper. La Cour « dit le droit », à tout le moins général; elle n'a pas à le « prouver ». Il lui est loisible d'en offrir les illustrations ou les applications qu'elle juge opportunes dans un souci « pédagogique »; il ne lui incombe pas d'en fournir la « preuve » à qui que ce soit. Il n'y aurait dès lors pas de sens pour elle à rejeter une demande au seul motif que la règle — générale — sur laquelle elle s'appuie n'a pas été établie à suffisance de droit.

Ce sont clairement les besoins de sa fonction qui expliquent les immunités reconnues au ministre des Affaires étrangères, lesquelles « ne lui sont pas accordées pour son avantage personnel » (1). La Cour est très explicite sur ce point, même si elle met aussi en lumière le caractère « représentatif » du ministre concerné. Nul ne sera surpris que cette immunité lui soit reconnue pour toute la durée de sa charge. Le contraire serait contradictoire

(1) Par. 53 de l'arrêt.

est plus intéressant de relever que, selon la Cour, l'immunité de juridiction pénale et l'inviolabilité sont « totales » (2) : il importe dès lors peu que l'acte litigieux ait été privé plutôt que « public », qu'il ait été accompli avant plutôt qu'après l'entrée en fonction ou qu'il le fût lors d'une visite privée plutôt qu'« officielle ». Sauf à contester le principe même de l'immunité, on voit mal comment il pourrait en aller autrement, les exigences de la fonction étant déterminantes. Rien n'empêche certes que des exceptions — qui devraient être d'interprétation restrictive — soient le cas échéant admises. La Belgique soutenait à cet égard que l'immunité doit être écartée lorsque le ministre est soupçonné d'avoir commis des crimes de guerre ou des crimes contre l'humanité. La thèse trouve un certain écho dans la doctrine. Elle est clairement infirmée par la Cour. Une fois de plus, ce n'est pas pour surprendre, en l'absence de tout précédent sérieux dans la pratique internationale.

L'intéressant est que la Cour a parfaitement conscience du malaise que suscitent dans l'opinion publique des immunités qui paraissent plus d'une fois permettre à des personnes accusées de crimes particulièrement graves de se soustraire à toute poursuite. C'est la raison pour laquelle elle souligne que « *l'immunité* de juridiction dont bénéficie un ministre des Affaires étrangères en exercice ne signifie pas qu'il bénéficie d'une *impunité* au titre des crimes qu'il aurait pu commettre » (3). Et elle va jusqu'à préciser les quatre possibilités qui existent de le soumettre à jugement (4). Il n'y a là en soi rien que de très banal. L'étonnant est seulement que la Cour s'y attarde. Ce n'est pas qu'elle craigne sérieusement que le défendeur — ou le demandeur — n'en soit pas averti. C'est bien plutôt qu'elle s'adresse derrière lui à une opinion moins bien informée, qui n'aurait de l'immunité qu'une perception caricaturale.

Ce souci didactique est en soi très remarquable et très révélateur de l'importance qu'a aujourd'hui prise — mais aussi des excès auxquels expose — un fort sentiment « populaire » de justice. On peut juger les possibilités évoquées par la Cour quelque peu dérisoires. Ce serait une erreur, même s'il est vrai que l'immunité ne facilite pas la répression effective de comportements criminels. La « justice » peut en souffrir. Cela ne suffit pas à condamner l'immunité de juridiction pénale et l'inviolabilité du ministre des Affaires étrangères ou, *mutatis mutandis*, du chef d'État ou de gouvernement. Le bon exercice des relations internationales d'un État serait gravement compromis s'il suffisait d'alléguer que ses responsables ont commis un crime « de droit international » pour les poursuivre devant un tribunal étranger. Il ne faut pas sur ce point se méprendre : ce n'est pas seulement l'intérêt de l'État dont le ministre est poursuivi; c'est aussi — et tout autant — l'in-

(2) Par. 54 de l'arrêt.
(3) Par. 60 de l'arrêt.
(4) Par. 61 de l'arrêt.

térêt bien compris de la « communauté » internationale dont cet État membre. A une époque où, la mondialisation aidant, les déplacements devenus quotidiens, la coexistence paisible des États et la bonne gestion rapports internationaux commandent impérativement que les per qui en ont la charge dans chaque État puissent exercer leurs responsabi sans être exposées aux poursuites d'une autorité « étrangère ». Ce n'est de soi moins important que de juger les personnes qui sont accusées comportements criminels, si odieux soient-ils.

Selon la Cour, l'immunité pénale et l'inviolabilité « protègent l'inté contre tout acte d'autorité de la part d'un autre État qui ferait obstac l'exercice de ses fonctions » (5).

On peut être tenté, pour restreindre le champ d'application de ces im nités, de réduire ces actes d'autorité à des actes de contrainte sur les pe sonnes ou sur les biens du ministre des Affaires étrangères. C'est ce sous-entend l'argument de la Belgique selon lequel il n'est pas po atteinte à l'immunité ou à l'inviolabilité tant que le mandat d'arrêt pas mis à exécution. Ce qui est assurément un peu court... La raison d de l'immunité ou de l'inviolabilité commande que celles-ci soient recon dès l'instant où leur défaut pourrait compromettre le bon exercice des fo tions qui en justifient l'octroi. S'il en allait autrement, son bénéfici pourrait en effet être « dissuad[é] » de se déplacer à l'étranger alors mê que les devoirs de sa fonction le lui commandent. La Cour est sur ce po très claire, qui souligne que le seul fait de l'« expose[r] à une procédure ju ciaire », avant même qu'aucune mesure de contrainte ne soit prise à égard, méconnaît le statut privilégié dont jouit le ministre des Affa étrangères. Et elle précise, s'agissant de la diffusion du mandat d'arr qu'il importe peu que celle-ci « ait ou non entravé en fait l'activité diplom tique de Mr. Yerodia » (6); il suffit qu'elle puisse avoir une telle con quence pour que soit méconnue l'immunité accordée par le droit interna nal.

Il résulte de cette motivation que toute ouverture officielle d'une proc dure pénale à l'encontre du ministre des Affaires étrangères d'un É étranger est en principe contraire au droit international. Il importe p que, dans un premier temps, il ne soit procédé qu'à des devoirs d'infor tion ou à des mesures d'instruction. La conclusion est sage. Elle est d leurs admise de longue date dans le droit diplomatique.

Dans l'affaire Yerodia, la question de l'immunité n'a été soulevée q parce que le juge belge disposait en l'occurrence d'une compétence dite u verselle, dont l'exercice est indépendant de tout rattachement quelcon de l'infraction, de ses auteurs ou de ses victimes avec la Belgique et l'ord

(5) Par. 54 de l'arrêt.
(6) Par. 71 de l'arrêt.

juridique belge. Point n'est besoin d'y revenir. Ce type de compétence est aujourd'hui fort en vogue, du moins dans certains cercles qui cherchent, non sans raison, à renforcer le respect du droit international humanitaire et la sanction de ses violations. Certaines ONG, en particulier, sont très actives en ce domaine. Cela a contribué à porter sur la place publique les discussions, habituellement plus « discrètes » qui entourent de longue date les limites que fixe(rait) le droit international à l'exercice par un État de ses compétences souveraines, notamment répressives.

Il y a là des questions difficiles et des enjeux importants. Il serait dès lors très utile que la Cour se prononçât sur ce point. C'est ce que la requête du Congo lui demandait de faire. Le point a toutefois été omis dans les conclusions finales du demandeur. La Cour a partant jugé qu'il ne lui appartenait pas d'en décider, ce qui est parfaitement conforme à sa jurisprudence. Mais cela ne saurait l'empêcher, comme elle le précise expressément, « d'aborder certains points de droit dans sa motivation » (7), dès lors que cela ne revient aucunement à statuer *ultra petita*. Force est cependant de constater que la Cour ne dit pratiquement rien de la compétence universelle. Pourquoi ? On n'en sait rien, même s'il est possible qu'elle ait craint de se compliquer inutilement la tâche. A dire vrai, on voit mal comment il pourrait en aller autrement. La compétence universelle soulève d'évidence des problèmes difficiles et elle n'a été que très partiellement évoquée par les parties durant l'instance. On voit mal dès lors comment ceux-ci pourraient être sérieusement réglés par la voie d'*obiter dicta*. Il suffit que des juges aient sur ce point exprimé leur « sentiment », en témoignant d'ailleurs d'approches sensiblement différentes. Ce qui contribue heureusement à éclaircir des problèmes sans aucunement les résoudre.

Cela dit, la Cour n'est pas totalement muette sur la compétence universelle. A trois reprises, elle fait expressément référence à la légalité au regard du droit international de la compétence qui est accordée par la loi à un tribunal; « à condition d'être compétent selon le droit international, le tribunal d'un État peut juger un ancien ministre... », est-il par exemple écrit au paragraphe 61 de l'arrêt du 14 février 2002. Quelles sont les conditions que le droit international impose ? La Cour n'en dit rien. On voit mal toutefois que la compétence universelle puisse se concilier avec l'existence même de « conditions », à tout le moins sous la forme radicale que lui confère la loi du 10 février 1999... puisqu'en ce cas il n'en existe aucune. Sauf à considérer qu'il suffit en l'occurrence que le crime soit « international », il paraît bien dès lors que le respect du droit international implique, dans l'intention de la Cour, quelque rattachement minimal de la personne poursuivie avec l'État poursuivant, conformément à une perspective classique.

(7) Par. 43 de l'arrêt.

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Il n'y a assurément pas à conclure ce bref commentaire. D'aucuns jugeront peut-être que l'attachement de la Cour à l'immunité et sa réticence — tout implicite — à l'égard de la compétence universelle témoignent d'un conservatisme de mauvais aloi! Ce serait une erreur. Il est certain que le droit, notamment international, devrait, si tout va bien, connaître de sérieuses retouches dans un avenir que l'on espère pas trop lointain. Dans l'immédiat, il demeure que ce n'est pas à un juge qu'il appartient d'y procéder, tout créatif qu'il puisse — ou doive — être dans l'interprétation et l'application du droit. Et, quelles que soient en la matière ses responsabilités, il conviendrait que l'on s'entende préalablement sur les objectifs nouveaux à atteindre. Le discrédit jeté sur l'immunité tout comme l'apologie de la compétence universelle laissent à cet égard entrevoir la réalisation d'un espace sans frontières où chacun — c'est-à-dire certains! — ferait régner l'idée qui est la sienne de la justice pour tous. C'est un avenir possible. Il ne séduira pas tout le monde. Dans un contexte « mondialisé », il est plus que jamais indispensable de préserver l'autonomie de chacune des composantes de la « communauté internationale », ce qui ne peut que renforcer la nécessité de reconnaître à leurs responsables politiques certaines immunités. Et, pour que la justice y soit réalisée, il importe plus que jamais que les conditions dans lesquelles chacune d'elles y exerce la répression pénale fassent l'objet d'une harmonisation et d'une coordination étroites, dont la compétence universelle n'offre qu'une caricature grossière. Il est heureux partant que le principe d'immunité ait été fermement rappelé par la Cour dans son arrêt du 14 février 2002. Et il faut espérer qu'il lui appartienne de préciser demain les conditions acceptables d'une universalisation du pouvoir de punir, si les États s'avèrent impuissants à les définir.

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WHAT IS THE ICJ FOR?

BY

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The judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (2) has attracted considerable attention. It touches on issues of great importance for scholars and practitioners, for governments and non-governmental organisations, for lawyers and non-lawyers. It has implications for one of the major challenges for present day international society, how to strike an appropriate balance between stability in international relations and effective international intercourse, on the one hand, and guaranteeing respect for fundamental human rights, on the other hand (3). Whilst the approach taken may not be followed in other cases involving other facts, it indicates a view of the International Court on the nature and objects of the international legal order, and on the proper balance to be achieved between the interests of States and individuals.

The issues before the Court — the circumstances (if any) in which a State (and its courts) may claim and then exercise jurisdiction over a non-national (holding high government office) accused of having committed an international crime outside the territory of that State and against other non-nationals — are not new. But they were before the Court at a time of unparalleled interest in these issues. In the space of little more than a year — between July 1998 and the autumn of 1999 — the international community adopted a Statute for a new International Criminal Court, Senator Pinochet was arrested in London pursuant to an extradition request from Spain, and President Slobodan Milosevic of the Federal Republic of Yugoslavia was publicly indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. These and other matters raised complex issues on the exercise of criminal jurisdiction, on immunities from such jurisdiction, and on the roles of national and international courts (and their interrelationship).

(1) I am grateful to my colleague Ralph Wilde for his insightful comments, and to other colleagues for their review. Views expressed remain those of the author only.
(2) Judgment of 14 February 2002.
(3) See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 5.

When May Senior State Officials Be Tried for International Crimes? Some Comments on *The Congo* v. *Belgium* Case

Antonio Cassese*

Abstract

The recent judgment of the ICJ has indubitably shed light on a rather obscure area of international law; that is, the legal regulation of the personal immunities of foreign ministers. However, one can express serious misgivings about some of the Court's conclusions. In particular, the Court, besides omitting to pronounce upon the admissibility of universal criminal jurisdiction, failed to distinguish between so-called functional immunities (inuring to foreign ministers and, more generally, to all state agents with respect to acts performed in their official capacity), and personal immunities. It follows that, in the opinion of the Court, foreign ministers (and other state officials), after leaving office, may be prosecuted and punished for international crimes perpetrated while in office only if such crimes are regarded as acts committed in their ' private capacity', a conclusion that is hardly consistent with the current pattern of international criminality and surely does not meet the demands of international criminal justice.

1. Introduction

The recent judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000* (the Congo v. Belgium), delivered on 14 February 2002, confirms the tendency of the Court to be seized and deal with topical issues confronting the international community. States, particularly developing countries, increasingly turn to the Court for the settlement of disputes that touch upon sensitive questions arising in their international dealings.

In this case the Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office, breached international law. In particular, according to the Congo, Belgium violated the 'principle that a state may not exercise its authority on the territory of another state', the principle of

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sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the minister for foreign affairs of a sovereign state. Belgium contended, instead, that there had been no breach of international law, as the foreign minister concerned enjoyed immunity from prosecution while on official visits to Belgium; he was only liable for criminal prosecution during visits in a private capacity to Belgium.

Clearly, the question underlying this dispute belongs in the range of crucial issues facing the current international community: the tension between the need to safeguard major prerogatives of sovereign states and the demands of emerging universal values which may undermine those prerogatives. On the one hand, states cling to the notion that, when it comes to the exercise of criminal jurisdiction, it is up to the territorial or national state to prosecute and punish criminal offences. On the other hand, faced with the failure of territorial or national states to punish odious international crimes, there is a tendency to shift from erritoriality or nationality: states other than the territorial or national state claim the right to exercise extraterritorial criminal jurisdiction over those crimes. Similarly, international criminal tribunals or courts are set up, precisely to substitute for states unable or unwilling to prosecute and try alleged authors of international crimes.

The Court has handed down a judgment that is remarkable for its brevity: it is both concise and stringent. The Court has pronounced only upon the scope of immunities accruing to foreign ministers and ruled that Belgium violated international law, as those immunities cover all acts performed abroad by incumbent foreign ministers, designed as they are to ensure the effective performance of their functions on behalf of their respective states. According to the Court, a foreign minister enjoys immunities from foreign criminal jurisdiction and inviolability, whether the minister is on foreign territory on an official mission or in a private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity. The Court has, however, excluded that the granting of such immunities could imply impunity in respect of any crime that a foreign minister may have committed. In an important passage of the judgment, the Court has envisaged four exceptions in this regard,[1] none of which was present in the case at issue.

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2. The Court's Spelling Out of the Law on the Personal Immunities Accruing to Foreign Ministers

[1] See the Judgment, at para. 61; see *infra*.

The judgment under discussion makes an important contribution to a clarification of the law of (what one ought to correctly term) *personal* immunities (including inviolability) of foreign ministers. This is an area where state practice and case law are lacking. To make its legal findings, the Court, therefore, did not have to establish the possible content of customary law. Rather, it logically inferred from the rationale behind the rules on personal immunities of senior state officials, such as heads of states or government (or diplomatic agents), that such immunities must perforce prevent any prejudice to the 'effective performance' of their functions. They therefore bar any possible interference with the official activity of foreign ministers. It follows that an incumbent foreign minister is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of a foreign minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts as a foreign minister.

By and large, this conclusion is convincing, despite the powerful objections raised by Judge Al-Khasawneh in his important Dissenting Opinion.[2] The Court must be commended for elucidating and spelling out an obscure issue of existing law. In so doing it has considerably expanded the protection afforded by international law to foreign ministers. It has thus given priority to the need for foreign relations to be conducted unimpaired.

In contrast, one ought to express misgivings on two issues. First, the Court's failure to rule, prior to tackling the question of immunity from jurisdiction, on whether states are authorized by international law to exercise extraterritorial criminal jurisdiction. Second, the Court's failure to distinguish between immunities inuring to state officials with respect to acts they perform in their official capacity (so-called functional or *ratione materiae* immunities) and immunities from which some categories of state officials benefit not only for their private life but also, more generally, for any act and transaction while in office (so-called personal immunities). This second flaw involves, as we shall see, legal consequences that prove extremely questionable.

3. The Court's Failure to Pronounce on Belgium's Assertion of Absolute Universal Jurisdiction

[2] See Dissenting Opinion, paras 1-2.

It would have been logical for the Court to first address the question of whether Belgium could legitimately invoke universal jurisdiction and then, in case of an affirmative answer to this question, decide upon the question of whether the Congolese foreign minister was entitled to immunity from prosecution and punishment. That the Court should have proceeded in this manner has been cogently argued by a number of Judges in their Separate Opinions (President Guillaume, Judges Ranjeva, Higgins, Kooijmans, Buergenthal, Rezek)[3] as well as by Judge ad hoc van den Wyngaert in her Dissenting Opinion. It is therefore not necessary to dwell on the matter. Suffice it to point out that the Court has thus missed a golden opportunity to cast light on a difficult and topical legal issue.

Fortunately, some Judges deemed it necessary to discuss the point in their Separate Opinions; they have thus made a significant contribution to elucidating existing law. For instance, some of these Separate Opinions clarify terminology. President Guillaume distinguishes between universal jurisdiction (*compétence universelle*) denoting jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum state, and universal jurisdiction by default (*compétence universelle par défaut*), that is, jurisdiction asserted by a state without any link with the crime or the defendant, not even his presence on the territory, when that jurisdiction is first exercised (by initiating investigations, issuing an arrest warrant, etc.).[4] Judges Higgins, Kooijmans and Buergenthal distinguish instead between 'universal jurisdiction properly so called', that is jurisdiction over crimes committed abroad by foreigners against foreigners, without the accused being in the territory of the forum state, and 'territorial jurisdiction over persons for extraterritorial events', that is jurisdiction over persons present in the forum state who have allegedly committed crimes abroad.[5] Perhaps, in order to emphasize the 'meta-national' dimension of the jurisdiction, one should speak of 'absolute universal jurisdiction' (that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the territory), and 'conditional universal jurisdiction' (which is instead contingent upon the presence of the suspect in the forum state).

As to the question of whether either category of jurisdiction is authorized by international law, President Guillaume answers in the negative, holding the view that international law only authorizes, at customary level, universal jurisdiction by default for

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[3] See President Guillaume's Separate Opinion, paras 1-17; Judge Ranjeva's Opinion, paras 1-12; Judges Higgins, Kooijmans, Buergenthal's Joint Separate Opinion, paras 2-18; Judge Rezek's Opinion, paras 3-11; Ad hoc Judge van den Wyngaert, paras 4 and 7.

[4] See paras 5, 9.

[5] See paras 31-52.

piracy, whereas treaties may, and indeed do, oblige contracting parties to exercise universal jurisdiction proper.[6] Judge Rezek takes a similar view.[7]

In contrast, Judges Higgins, Kooijmans and Buergenthal maintain that international customary law, in addition to authorizing 'universal jurisdiction properly so called' over piracy, does not prohibit such jurisdiction for other offences, subject to a set of conditions they carefully set out.[8] The enunciation of these conditions – whether or not one can fully subscribe to all of them[9] – indubitably constitutes a significant and commendable contribution to the careful delineation of general legal principles on the question of universal jurisdiction. It seems correct to hold the view that universal jurisdiction properly so called (or, according to the terminology I would prefer, absolute universal jurisdiction) is *permitted* by general international law, subject to the conditions set out by these three distinguished Judges – regardless of whether or not, as a matter of legal policy, the upholding of absolute

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[6] See paras 5-9, 12-13.

[7] See para. 6.

[8] These conditions are as follows: (i) the state intending to prosecute a person must first 'offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (head of state, or diplomatic agent) in office; after he leaves office, it may be exercised over 'private acts' (see paras 59-60 and 79-85).

[9] Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that 'the national state of the prospective accused' be 'offered' the opportunity to act upon the charges. Why should one leave aside the territorial state (normally the *forum conveniens*) or the state of which the victim is a national? In addition, why should one envisage that the state exercising universal jurisdiction should 'offer' to another state the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the court intending to exercise jurisdiction should first establish whether courts of the territorial or national state have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.

universal jurisdiction is considered *inadvisable* in current international relations[10] or even likely to lead to the eventual substitution of 'the tyranny of judges for that of governments'.[11]

An issue on which most judges seem to agree and is perhaps in need of some clarification is the view that under customary law *piracy* constitutes the only case where states are undoubtedly authorized to exercise 'universal jurisdiction properly so called' (or absolute universal jurisdiction). With respect, it may be contended that in fact the exercise of 'universal jurisdiction' by states over pirates belongs to the category of 'territorial jurisdiction over persons for extraterritorial events' (or conditional universal jurisdiction); in other words, it is predicated on the presence of the accused on the territory of the forum state. States *may try pirates only after apprehending them,* hence only when the pirates are on their territory or at any rate under their physical control: this is a typical application of the well-known maxim *ubi te invenero, ibi te judicabo.* One of the reasons most likely motivating this legal regulation is that, at a time when piracy was rife and all states of the world were therefore eager to capture persons engaging in this crime, potentially innumerable 'positive conflicts of jurisdiction' were in this way settled. Indeed, if all states had been entitled to claim jurisdiction over pirates wherever they were, very many positive conflicts would have ensued; instead, granting jurisdiction to the state apprehending the pirates neatly resolved the matter. Furthermore, had the universal jurisdiction over pirates been absolute (or 'universal properly so called'), any state of the world could have issued arrest warrants against pirates. State practice, however, does not show any such trend, and this bears out the 'conditional' nature of such category of universal jurisdiction. True, under customary law, restated in Article 105 of the 1982 Convention on the Law of the Sea, 'on the high seas, or in any other place outside the jurisdiction of any State', every state may seize a pirate ship (or aircraft) and arrest the pirates. It would seem, however, that this action does not constitute an exercise of jurisdiction in the sense used by the various Judges in their Opinions, that is, *judicial jurisdiction.* It only constitutes an exceptionally authorized use of enforcement powers over private ships not belonging to the capturing state (*executive jurisdiction*). Jurisdiction, in the sense of exercise of judicial power by courts, will follow. It is the state that has the alleged

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[10] I, for one, have expressed doubts about the expediency of upholding 'absolute universality' rather than 'conditional universality', at least with regard to persons having the status of senior state officials, in my paper 'Souveraineté et justice pénale internationale', in A. Cassese and M. Delmas-Marty (eds), *Juridictions internationales et crimes internationaux* (2002, forthcoming).

[11] See Kissinger, 'The Pitfalls of Universal Jurisdiction', 80 *Foreign Affairs* (2001), at 86 (and see 86-92).

pirates in its hands that will exercise jurisdiction: as Article 105 provides, 'The courts of the State which carried out the seizure may decide upon the penalties to be imposed.'[12]

Probably, the twofold significance of the word 'jurisdiction' accounts for the questionable language one can find in some of the Separate Opinions. It is well known that 'jurisdiction' means, depending on the context, *either* effective authority or control by a state, or state officials, over persons or territory (*executive* jurisdiction), *or* exercise of judicial authority by courts of law (*judicial* jurisdiction). The two notions ought to be distinguished. It would seem that when speaking of piracy and stating that jurisdiction over pirates is 'universal' or 'universal properly so called' the Judges in question referred to the second meaning.

4. Is Absolute Universal Jurisdiction Admissible?

Let us return to a major legal issue, namely the view set out by the three Judges referred to above, that absolute universal jurisdiction is legally admissible under international law. It seems appropriate to make a few points, which are all intended to bear out and fortify this view.

First, one should not be misled by the fact that in the case at issue and in other similarly striking cases, the person accused held a high position in government. Universal jurisdiction may also be, and indeed is, envisaged for cases involving *lower-rank* officers or state agents, or even *civilians*, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to understand why, if the national or territorial state fails to take proceedings, another state should not be entitled to prosecute and try them in the interest of the whole international community. With regard to these persons, the initiation of criminal proceedings in their absence, the gathering of evidence and the issuance of an arrest warrant would have the advantage of making their subsequent arrest and trial possible; normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or heads of state. Hence the only way of bringing them to trial is to issue arrest warrants so that they are at some stage apprehended and handed over to the competent state.

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[12] In the Comment on the 'Draft Convention, with Comment' prepared in 1935 by the 'Research in International Law of the Harvard Law School', it is stated that in the case of the crime of piracy 'the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence' (29 *AJIL* (1935), Supplement, at 564; see also 565).

Secondly, it is commonly admitted that under *traditional* international law states are allowed to act upon the so-called protective principle, that is, for the safeguard of national interests, and can thus prosecute foreigners who commit crimes abroad (for instance, counterfeiting of national currency). In other words, states are authorized to take proceedings with regard to extraterritorial acts whose link with the forum state exclusively lies in the infringement by these acts of a *national interest* of that state. If this is so, it would seem warranted to hold that in the *present world community*, where *universal values* have emerged that are shared by all states and non-state entities, states should be similarly authorized to act upon such values. To put it differently, it would seem that any state is currently authorized to try foreigners who perpetrate abroad criminal offences which have no personal or territorial link with that state, but which attack and seriously infringe upon those universal values; in so doing, the state acts not to protect a national interest but with a view to safeguarding values of importance for the entire world community.

Thirdly, it is a fact that United States courts have for many years asserted universal jurisdiction by default, admittedly in *civil* proceedings, over serious violations of international law perpetrated by foreigners abroad.[13] Although civil jurisdiction is less intrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking state officials), it nevertheless amounts to interference with the internal organization of foreign states. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other states. This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, in case of serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfilment of some fundamental requirements, such as ensurance of a fair trial.

Fourthly, for the purpose of confirming that customary international law or general principles of international law do indeed authorize – subject to the conditions set out by the Judges at issue, or to similar conditions[14]– the exercise of absolute universal jurisdiction, one ought to also take into account some significant elements of state practice. I will briefly recall some of these elements.

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13 See, e.g., Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *HR* (1997), at 161-167.

14 See my remarks in *supra* note 9.

Article 23(4) of the Spanish law of 1985 as amended in 1999[15] provided for absolute universal jurisdiction even in advance of the Belgian law. Furthermore, the relevant Spanish case law is worthy of mention (in addition to a judgment of the Constitutional Court,[16] the decisions of the *Audiencia Nacional* in *Pinochet,*[17] *Scilingo*[18] and *Fidel Castro*[19] should be

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[15] Under Article 23 para. 4 that Spanish jurisdiction also extends to 'facts committed by Spaniards or foreigners abroad and liable to be considered, under Spanish law, as one of the following crimes: (a) Genocide; (b) Terrorism .... (g) any other crime that, pursuant to international treaties or conventions, must be prosecuted in Spain'.

[16] See the judgment of 10 February 1997 (no. 1997/56). The ship of the accused (flying Panama's flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an *obiter dictum* that Article 23 para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had 'conferred a universal scope (*un alcance universal*) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection' (Legal Ground 3 A). Spanish text on CD Rom on Spanish Legislation and case law, EL DERECHO, 2002, Constitutional decisions.

[17] See, in particular, the Order (*auto*) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (*Audiencia nacional*) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23 (4) (g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that 'Spain has jurisdiction to judge the acts (*conocer de los hechos*), based on the principle of universal prosecution of certain crimes ... enshrined in our domestic law. It also has a legitimate interest (*interés legítimo*) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders' (Legal Ground no. 9). In other words, as is apparent both from the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a 'legitimate interest' of Spain in the exercise of universal jurisdiction.This order was confirmed by the decision of the *Audiencia Nacional* of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had iurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism and torture (Legal Grounds 1 and 10-12), and also stated that Pinochet could not invoke the immunities pertaining to heads of states, for he no longer held this status (Legal Ground no. 3)For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD Rom, EL DERECHO, 2002, Criminal jurisprudence, as well as on line: http:// www.derechos.org/nizkor/espana.

[18] See the Order (*auto*) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to in *supra* note 17.

[19] See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia Nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of states, ambassadors etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in

recalled). In particular, *Fidel Castro* bears underlining. This case was material to the matter submitted to the Court, for it dealt with charges laid against an incumbent head of state; the Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985. In addition, it is worth considering a recent German case, *Sokolović*, where the *Bundesgerichtshof* ruled that when the jurisdiction of German courts is provided for in an international treaty, those courts are entitled to try genocide and other international crimes even absent any link between the crime, or the offender, or the victim, and Germany.[20] Also worthy of note is that in the course of the drafting process of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.[21] In line with this

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rules of public international law'). See Legal Grounds nos. 1-4.The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a former head of state, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD Rom, EL DERECHO, 2002, Criminal case law.

[20] The German Criminal Code contains a provision (Section 6 §1), whereby 'Regardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: §1. Genocide' (whereas Section 6 §9 refers to 'Acts committed abroad which are made punishable by the terms of an international treaty binding in the Federal Republic of Germany').While in the past courts tended to interpret Sections 6§1 and 9 to the effect that in any case a link was required with Germany for German courts to exercise jurisdiction (see thereon Ambos and Wirth, 'Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts', in H. Fischer, C. Kress and S. Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law* (2001), 778), in *Sokolovic* the Federal Supreme Court held that a factual link was not required. The Court noted that in its decision of 29 November 1999 the Court of Appeal (*Oberlandsgericht Düsseldorf)*, following the traditional German case law, had held that a factual link was required by law (*legitimierender Anknüpfungspunkt*) for a German court to exercise jurisdiction over crimes committed abroad by foreigners (in the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia). The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: 'The Court however inclines, in any case under Article 6 para. 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction ... Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention' (Judgment of 21 February 2001, 3 StR 372/00, still unreported, at 19-21 of the typescript in German).

[21] In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: 'Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war

view, Article 1 of the bill on international criminal law proposed by the German government and now pending before the German *Bundesrat* (Senate), namely the *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches,* provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.[22]

All of these elements of state practice, in addition to showing that states tend increasingly to resort to absolute universal jurisdiction for the purpose of safeguarding universal values, also point to the gradually increasing diffusion and acceptance of the notion that this form of jurisdiction is regarded as admissible under international law.

5. The Court's Failure to Distinguish between Immunities *Ratione Materiae* (or Functional Immunities) and Immunities *Ratione Personae* (or Personal Immunities)

Let us move on to the second issue on which one can respectfully disagree with the Court, namely its failure to draw a distinction between two different categories of immunities from foreign jurisdiction: (i) those which a foreign minister, *like any state official*, enjoys for any official act (so-called functional, or *ratione materiae*, or organic immunities), and (ii) those which instead are intended to cover any act that *some classes* of state officials perform while in office (so-called personal or, with regard to diplomatic agents, diplomatic immunities).[23]

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crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice.' (UN Doc.A/AC.249/1998/DP.2, 23 March 1998).

[22] *'Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist.'* (see Bundesrat, *Drucksache 29/02*, 18 January 2002, *Gesetzentwurf der Bundesregierung,* at 3; German text on line at http://www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

[23] Perhaps the Court hinted at this distinction in para. 60 of its judgment, when it stated that 'Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibilities'. However, what the Court states both before and after these propositions would seem to disregard the fundamental importance of the distinction referred to above.

The first category is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state. The second category is predicated on the notion that any activity of a head of state or government, or diplomatic agent[24] or foreign minister must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act (*ne impediatur legatio*). This distinction, oddly denied by Belgium in its Counter-Memorial,[25] is made in the legal literature,[26] and is based on state practice. With regard to the first class of immunities, suffice it to refer to the famous *McLeod* incident and the *Rainbow Warrior* case[27] as well as some recent judicial decisions (one can

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[24] However, as is well known, international rules provide for exceptions to immunities of diplomatic agents for private acts (see Article 31 para. 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961.

[25] See Counter-Memorial of the Kingdom of Belgium, of 28 September 2001, at 33, para 3.5.141.

[26] See, e.g., G. Morelli, *Nozioni di diritto internazionale* (1943, 7th ed., 1967), at 215-216; Niboyet, 'Immunité de juridiction et incompétence d'attribution', 39 *RCDIP* (1950), 139; H. Kelsen, *Principles of International Law* (1952), at 236-237 (according to Kelsen, 'the principle that no state has jurisdiction over another state excludes individual – civil or criminal – responsibility for acts of state'); G. Dahm, *Völkerrecht,* vol. I, (1958), at 225, 237, 303-305, 338-339 (also for Dahm the immunity of state organs for officials acts is a consequence of state immunity); G. Sperduti, *Lezioni di diritto internazionale* (1958), at 117-121; Giuliano, 'Les relations et immunités diplomatiques', in 100 *HR* (1960-II), at 166-180 (only with reference to the functions of diplomatic agents); van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ* (1964), 1193, at 1205-1208; Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations', 14 *ICLQ* (1965), 31-82 and 493-527, at 33-43; Dinstein, 'Diplomatic Immunity from Jurisdiction *ratione materiae*' 15 *ICLQ* (1966), at 76-89; Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', in 31 *Zeit. fusl. Öff. Recht Völk* (1971) 246; Akehurst, 'Jurisdiction in International Law' 46 *BYbIL* (1972-3), 240-244; A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), at 773-774 (para. 1177); R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol. I (9th ed., 1992), at 346; I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 361-362; P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996), esp. at 109-250; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 122; A. Cassese, *International Law* (2001), at 93-96; Zappalà, 'Do Heads of States in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', 12 *EJIL* (2001), 595; Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta and J. Jones (eds), *The ICC Statute – A Commentary* (2002, forthcoming).

[27] For the *McLeod* case, see *British and Foreign Papers*, vol. 29, at 1139, as well as Jennings, 'The *Caroline* and *McLeod* Cases', 32 *AJIL* (1938), at 92-99; for the *Rainbow Warrior* case, see *UN Reports of International Arbitral Awards,* XIX, at 213. See also the *Governor Collot* case, in J. B. Moore, *A Digest of International Law,* vol. II (1906), at 23.

mention the judgment rendered by the Supreme Court of Israel in *Eichmann*[28] and that delivered by the ICTY Appeals Chamber in *Blaskić (subpoena)*[29]).

The distinction is relevant, for the *first class of immunity* (i) relates to substantive law, that is, it is a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country, if he breaches national or international law, this violation is not legally imputable to him but to his state; in other words, *individual* criminal or civil liability does not even arise); (ii) covers official acts of any *de jure* or *de facto* state agent; (iii) does not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) is *erga omnes*, that is, may be invoked towards any other state. In contrast, the *second class of immunities* (i) relates to procedural law, that is, it renders the state official immune from civil or criminal jurisdiction (it is a procedural defence); (ii) covers official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, assures total inviolability; (iii) is intended to protect only *some categories* of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet; (iv) comes to an end after cessation of the official functions of the state agent; (v) may not be *erga omnes* (in the case of diplomatic agents it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country: so called *jus transitus innoxii*).

6. The Distinction between the two Classes of Immunities and the Coming into Operation of the Rule Removing Functional Immunities for International Crimes

The above distinction is important. It allows us to realize that the two classes of immunity *coexist* and somewhat *overlap* as long as the foreign minister (or any state official who may also invoke personal or diplomatic immunities) is in office. While he is discharging his official functions, he always enjoys functional immunity, subject to one *exception* that we

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[28] Judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277-342, at308-309.

[29] See *Blaskic (subpoena)*, ICTY Appeals Chamber's judgment of 29 October 1997, at paras 38 and 41. For other cases see in particular Bothe, *supra* note 26, at 248-253.

shall soon see, namely in the case of perpetration of international crimes. Nevertheless, even when one is faced with that exception, the foreign minister is inviolable and immune from prosecution on the strength of the international rules on *personal* immunities. This proposition is supported by some case law (for instance, *Pinochet*[30] and *Fidel Castro*,[31] which relate respectively to a former and an incumbent head of state), and is authoritatively borne out by the Court's judgment under discussion. In contrast, as soon as the foreign minister leaves office, he may no longer enjoy personal immunities and, in addition, he becomes liable for prosecution for any international crime he may have perpetrated while in office. This is rendered possible by a customary international rule on international crimes that has evolved in the international community. The rule provides that, in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture (and I would add serious crimes of international, state-sponsored terrorism), such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability.

That such a rule has crystallized in the world community is evidenced by a whole range of elements: not only the provisions of the various treaties or other international instruments on international tribunals, but also international and national case law (see below). The Court has instead taken a rather ambiguous stand on the existence and purport of this rule. Addressing the Belgian contention that immunities accorded to *incumbent* foreign ministers do not protect them when they are suspected of international crimes, and the contrary submission of the Congo, the Court first excluded the existence a specific customary rule lifting immunity from criminal jurisdiction for incumbent foreign ministers accused of those crimes; it then considered the provisions of the various international tribunals, whereby the official position of defendants does not free them from criminal responsibility; it concluded that 'rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals' only apply to such tribunals. No 'such an exception exists in customary international law in regard to national courts'.[32]

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30 See references *infra*, in note 37.

31 See reference *supra* in note 19.

32 Para. 58 of the judgment. It should be stressed that the clear wording of the Court's holding (in the second paragraph of para. 58 of the judgment) excludes that such holding is *only* intended to apply to foreign ministers. In other words, it seems clear that the Court has

Although the Court's proposition is very sweeping, the context of the Court's ruling would seem to indicate that the Court did not intend to deny the possible existence of a customary rule lifting functional immunities for state officials in the case of international crimes. In fact, it did not take any stand on such a customary rule. What it intended to state was that in any case such a rule, assuming it existed, did not remove that immunity for *incumbent* senior state officials.

If this is so, it is respectfully submitted that the Court's proposition is questionable. It seems warranted to argue that the customary rule at issue (on whose existence and purport I shall come back to below) has a broad scope and importance and does not distinguish between *incumbent* and *former* state officials. The treaty provisions that are at the origin of this customary rule point in this direction. Article 7 of the Charter of the Nuremberg International Military Tribunal and all the subsequent treaties or at any rate written stipulations providing in this regard clearly intended to remove the substantial defence based on the official status of the accused with regard both to *incumbent* and *former* state agents. Actually, given the historical circumstances in which those provisions were adopted, it can be said that they were primarily intended to cover persons who were state officials when they committed the alleged crime, but *no longer* had such status when brought to trial.

Should one consequently conclude that under customary international law the lifting of functional immunities in case of international crimes, brought about by this rule, entails that an *incumbent* foreign minister may be brought to trial before a national court for such alleged crimes? The answer is no. However, this is so only because that minister is protected by the general rules on *personal* immunities, as long as he is in office of course. In this respect the Court may be right in pointing to a difference between the provisions of statutes of international tribunals and the customary rule (at least, the Court is right with regard to the practice of the ICTY[33] and the text of the ICC Statute[34]). Under customary law the rule we are discussing must be applied *in conjunction with, and in the light of, customary rules on personal immunities*, whereas the statutes of international criminal tribunals and courts (other than the ICC, where the text is clear) may perhaps be construed as removing, at treaty level, *even* personal immunities.

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ruled out the existence of a customary rule concerning *any* state official, not solely foreign ministers.

[33] See the indictment made by the chief Prosecutor against Milosevic when he was an incumbent head of state. The indictment was confirmed by a Judge and did not give rise to any objection from other states.

[34] See Articles 27 and 98 of the ICC Statute.

The above propositions are borne out by some recent cases, such as the decision mentioned above of the Spanish *Audiencia nacional* in *Fidel Castro*,[35] by the French Court of Cassation on 13 March 2001 in *Ghadafi*, or the decision of the House of Lords in *Pinochet*. In *Fidel Castro*, the Spanish court clearly stated that as long as the Cuban head of state was in office, no prosecution could be initiated against him, on account of his entitlement to enjoy personal immunities. In *Ghadafi* the French Court held that *'la coutume internationale s'oppose à ce que les chefs d'Etats en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger'*.[36] This view is absolutely compatible with the rule whereby state officials accused of international crimes may not plead as a defence, before national or international courts, their having acted in an official capacity. Indeed, as stated above, under customary international law this rule only becomes operational *after the state official's cessation of functions*. The shield protecting state agents from criminal jurisdiction is only removed *after* that moment. The same holds true for *Pinochet*, where their Lordships held that he would have enjoyed immunities were he still in office as head of state, but that, having left office, he no longer enjoyed such (personal) immunities.[37]

7. The Court's Ruling on the Immunity of *Former* Foreign Ministers from Criminal Jurisdiction

A. The Questionable Resort to the Distinction between Private and Official Acts

The Court has admittedly recognized that personal or diplomatic immunities are only procedural in nature. Thus, it states in paragraph 60 of its judgment that 'the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar

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35 See *supra* note 19

36 See text in 105 *RGDIP* (2001), at 474.

37 See, e.g., the opinion of Lord Browne-Wilkinson, in *R.* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, House of Lords, Judgment of 24 March 1999, in [1999] 2 All E.R. 97 *et seq.* See also text in 38 ILR (1999), at 592-595, as well as that of Lord Hutton , at 637-638.

prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.

This proposition is absolutely sound and must be subscribed to. However, in the following paragraph of its judgment the Court infers from that proposition (paragraph 61 starts with 'Accordingly') that the immunities enjoyed under international law by an incumbent foreign minister *do not represent a bar to criminal prosecution* in *four different circumstances* that, as it would seem from the text of the judgment, are given as an exhaustive enumeration:[38] (i) when the national state institutes proceedings against its state official; (ii) when the national state (or the state for which the person acts as an agent) waives the immunities; (iii) when the person has ceased to discharge his official functions; at that stage '[p]rovided that it has jurisdiction under international law, a court of one state may try a former Minister for Foreign Affairs of another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'; (iv) when an incumbent or former foreign minister may be subject to criminal proceedings before an international criminal court.

In this paper I shall concentrate on the third hypothesis (some of the Judges to the case set forth cogent misgivings on the first two in their Joint Separate Opinion,[39] while the fourth hypothesis obviously becomes relevant when treaty law or binding international instruments such as Security Council resolutions taken under Chapter VII are at stake). One can raise two important objections to the Court's holding concerning this third hypothesis.

First, the Court wrongly resorted, in the context of alleged international crimes, to the distinction between acts performed 'in a private capacity' and 'official acts', a distinction that, within this context, proves ambiguous and indeed untenable. Second, the Court failed to apply, or at least to refer to, the customary rule lifting functional immunities for international crimes allegedly committed by state agents, a rule that becomes operational as soon as the rules on personal immunities are no longer applicable (or in other words, as soon as state agents enjoying personal immunities are no longer in office).

Let me expound the first objection. For this purpose, it may prove helpful to envisage four different hypothetical cases: (i) a foreign minister orders, aids and abets or willingly participates in, genocide or crimes against humanity before assuming his official functions of

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[38] Curiously, in a Press Statement of 14 February 2002, President Guillaume, in summarizing the Court's judgment, stated that the Court 'also pointed out that immunity from jurisdiction and individual criminal responsibility are two separate concepts' and went on to say '*By way of example,* the Court emphasized that Ministers for Foreign Affairs' did not enjoy immunity in the cases mentioned by the Court (emphasis added).

[39] See Joint Separate Opinion, *supra* note 3, at para. 78.

foreign minister (for example, when he was a senior member of the military); (ii) a foreign minister orders or aids and abets or willingly participates in the commission of genocide or crimes against humanity while acting as foreign minister; (iii) a person steals goods or bribes state officials before becoming foreign minister; (iv) a foreign minister, while in office, kills his servant in a fit of rage.

Under the Court's proposition, once the foreign minister has terminated his ministerial functions, he may be brought to trial before a foreign court having jurisdiction under international law for acts perpetrated *prior* to his taking office (cases sub (i) and (iii)); instead, if he engages in criminal offences *while in office*, he may be prosecuted and punished only if those acts are considered as being performed 'in a private capacity' (*'à titre privé'*). If this is so, it would follow that he could only be prosecuted for the murder of his servant (case sub (iv)). What about international crimes? Can international crimes such as genocide or crimes against humanity be regarded as being committed 'in a private capacity'?

It would seem warranted to infer from the holding of the Court that, as crimes are not normally committed 'in a private capacity', state agents do enjoy immunity for these crimes, even if they have terminated their official functions. That international crimes are not as a rule 'private acts' seems evident. These crimes are *seldom* perpetrated in such capacity. Admittedly, a civilian or a serviceman acting in a private capacity may indeed commit war crimes (think for instance of the rape or torture of an enemy civilian). It is however hardly imaginable that a foreign minister may perpetrate or participate in the perpetration of an international crime 'in a private capacity'. Indeed, individuals commit such crimes by making use (or abuse) of their official status. It is primarily through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions. In the case of torture (not as a war crime or a crime against humanity), the 'instigation or consent or acquiescence of a public official or other person acting in an official capacity' is one of the objective requirements of the crime (see Article 1 of the 1984 Convention against Torture).

Hence, if one construes the legal propositions of the Court literally, it would follow that foreign ministers could never, or in any event rarely, be prosecuted for international crimes perpetrated *while in office*. However, a more radical question to be raised is as follows: *why* should one confine trials by foreign courts to acts performed 'in a private capacity'? *Which international rules* would exclude official acts?

In fact, the distinction between 'private' and 'official' acts made by the Court with regard to international crimes that may have been committed by a foreign minister while in

office is but the *transposition* to the area of immunities of foreign ministers of the well-established distinction, applicable to *diplomatic agents*, between their private and their official acts (the latter being, pursuant to Article 39(2) of the Vienna Convention on diplomatic immunities, the 'acts performed by such a person [i.e. a diplomatic agent] in the exercise of his functions as a member of the mission').[40] This distinction, however, in addition to being of rather complex application,[41] only applies, even in relation to diplomatic agents, *as long as* the customary rule removing functional immunities of state agents in the case of international crimes does not come into operation. *A fortiori* the distinction evaporates as a result of that customary rule when it is the acts of foreign ministers that may amount to international crimes that is at stake.

It should be noted that three Judges were aware of the possible consequences of the Court's proposition. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal try to square the circle by propounding (or at any rate endorsing) the view that international crimes may not be regarded as 'official acts' 'because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform' (para. 85). In other words, international crimes must be considered as 'private acts', hence amenable to judicial process. The artificiality of this legal construct is evident. This would mean, for example, that the crimes for which Joachim von Ribbentrop (Reich Minister for Foreign Affairs from 1938 to 1945) was sentenced to death, namely crimes against peace,

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[40] It seems less probable that the distinction under discussion is a transposition of, or grounded on, the old distinction between acts performed by states *jure gestionis* (that is, acts of a commercial nature), and acts done *jure imperii*. As is well known, this is a relatively outmoded distinction made in recent international law with regard to acts of *states* and aimed at establishing when a state enjoys immunity from the *civil* (not criminal) jurisdiction of foreign states. While this distinction makes sense with regard to privileges and immunities of foreign states, it does not hold water with regard to functional (or organic) immunity of *state officials*. Let me give an example: if a foreign minister signs abroad, on behalf of his state, a contract for the purchase of a building to house the state's embassy, and then fails to pay, he may not be sued, for he is covered by functional and personal immunities (on account of the former he may not be sued even after leaving office), whereas the state may be (under the restrictive doctrine of state immunity). If, in contrast, the foreign minister, after participating in a cabinet decision for the expulsion of nationals of a particular country, contrary to treaty provisions, is sued before the courts of that country for compensation, he again is sheltered by functional and personal immunity; in addition, the state enjoys immunity from jurisdiction for the act was clearly done *jure imperii*, with the consequence that the matter may only be settled at a diplomatic or political level. As is clear from these examples, the distinction at issue may be germane to acts of states, but is irrelevant to acts performed by state officials.

[41] As Brownlie, *supra* note 26, points out (at 361), 'The definition of official acts is by no means self-evident'

war crimes and crimes against humanity, should be regarded as 'private acts';[42] or that the crime of having failed 'to secure observance of and prevent breaches of the laws of war', for which Mamoro Shigemitsu (Japanese Foreign Minister from 1943 to 1945) was sentenced to seven years' imprisonment, should be considered 'private acts'.[43]

B. The Court's Failure to Refer to the Customary Rule Lifting Functional Immunities for State Officials Accused of International Crimes

Let me now move on to my second objection to the Court's decision. On the question of the amenability to trial of former state agents accused of committing international crimes while in office, the Court, instead of relying upon the questionable distinction between private and official acts, should clearly have adverted to the customary rule that removes functional mmunity.

National case law proves that a customary rule with such content does in fact exist. Many cases where state military officials were brought to trial demonstrate that state agents accused of *war crimes, crimes against humanity* or *genocide* may not invoke before national courts, as a valid defence, their official capacity (leaving aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10: one can recall, for instance, *Eichmann* in Israel,[44] *Barbie* in France,[45] *Kappler* and *Priebke* in Italy,[46] *Rauter, Albrecht* and *Bouterse* in the Netherlands,[47] *Kesserling* before a British Military Court sitting in Venice and *von Lewinski* (called *von Manstein*) before a British Military

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[42] For the charges against him see *Trial of the Major War Criminals before the nternational Military Tribunal – Nuremberg 14 November 1945-1 October 1946*, Nuremberg 1947, I, at 69; for the Judgment see *ibid.*, at 285-288.

[43] For the judgement of the IMTFE concerning Shigemitsu, see B. V. A. Röling and C. F. Rüter (eds), *The Tokyo Judgment* vol. I (1977), at 457-458.

[44] See judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277-342.

[45] See the various judgments in 78 ILR, 125 *et seq*, and 100 ILR 331 *et seq*.

[46] For *Kappler*, see the Judgment delivered on 25 October 1952 by the *Tribunal Supremo Militare*, in 36 *Rivista di diritto internazionale* (1953) 193-199; as for *Priebke* see the decision of the Rome Military Court of Appeal of 7 March 1998, in *L'Indice Penale* (1999), 959 *et seq*.

[47] For *Rauter* see the decision of the Special Court of Cassation of 12 January 1949, in *Annual Digest 1949*, 526-548; for *Albrecht* see the judgment of the Special Court of Cassation of 11 April 1949 in *Nederlandse Jurisprudentie 1949*, 747-751 (in Dutch), summarized in *Annual Digest 1949*, 397-398; for *Bouterse*, see the decision of 20 November 2000 of the Amsterdam Court of Appeal on line, at http://www.icj. org/objectives/decision. html

Court in Hamburg,[48] *Pinochet* in the UK,[49] *Yamashita* in the US,[50] *Buhler* before the Supreme National Tribunal of Poland,[51] *Pinochet* and *Scilingo* in Spain,[52] *Miguel Cavallo* in Mexico[53]). True, most of theses cases deal with *military* officers. However, it would be untenable to infer from that that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes. Besides, it is notable that the Supreme Court of Israel in *Eichmann*[54] and more recently various Trial Chambers of the ICTY have held that the provision of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to *any person* accused of one of the crimes provided for in the respective Statutes) 'reflect[s] a rule of customary international law' (see *Karadzic and others*,[55] *Furundžija*,[56] and *Slobodan Milosevic (decision on preliminary motions)*.[57] Furthermore, Lords Millet and Phillips of Worth Matravers in the House of Lords' decision of 24 March 1999 in *Pinochet* took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes.[58]

In addition, important national Military Manuals, for instance those issued in 1956 in the United States and in 1958 in the United Kingdom, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.[59]

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48 See *von Lewiski* in *Annual Digest 1949*, 523-524; for *Kesserling* see *Law Reports of Trials of War Criminals* (1947), vol. 8, at 9 ff.

49 See references in note 37

50 See the judgment of the US Supreme Court in L. Friedman, *The Law of War, A Documentary History*, vol. II, (1972), at 1599 *et seq.*

51 See *Annual Digest 1948*, at 682.

52 See references in *supra* notes 17 and 18.

53 See the decision of 12 January 2001 delivered by the Judge Jesus Guadalupe Luna and authorizing the extradition of Ricardo Miguel Cavallo to Spain, text (in Spanish) on line in http://www.derechos.org/nizkor/arg/espana/mex. html

54 *Supra* note 28, at 311.

55 ICTY, Trial Chamber I, Decision of 16 May 1995, at para. 24.

56 ICTY, Trial Chamber II, Judgment of 10 December 1998, at para. 140.

57 ICTY, Trial Chamber III, Decision of 8 November 2001, at para. 28 and more generally paras 26-33.

58 See *supra* note 37 in 38 ILR (1999), at 645-649 (Lord Millet) and 660-661 (Lord Phillips of Worth Matravers).

59 See the US Department of the Army Field Manual, *The Law of Land Warfare* (July 1956). At para. 498 it states that: 'Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: *a.* Crimes against peace; *b.* Crimes against humanity; *c.* War crimes. Although this manual

One can also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it 'affirmed' 'the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. These principles include Principle III as formulated in 1950 by the UN International Law Commission.[60] All of these Principles, Israel's Supreme Court noted in *Eichmann*, 'have become part of the law of nations and must be regarded as having been rooted in it also in the past'.[61]

It also seems significant that, at least with regard to one of the crimes at issue, genocide, the International Court of Justice implicitly admitted that under *customary* law any official status does not relieve responsibility. In its Advisory Opinion on *Reservations to the Convention on Genocide*, the Court held that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[62] Among these principles one cannot but include the principle underlying Article IV, whereby 'Persons committing genocide ... shall be punished, whether they are constitutionally responsible rules, public officials or private individuals.' It is notable that the UN Secretary-General took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council,[63] and explicitly by a Trial Chamber of the ICTR in *Akayesu* and of the ICTY in *Krstic*.[64]

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings of the two states before the Court: the Congo and

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recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes".' At para. 510 it is stated that: 'The fact of a person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act.'

See also the British manual, *The Law of War on Land* (1958), at para. 632 ('Heads of States and their ministers enjoy no immunity from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of State officials except that the defence of superior orders is never open to Heads of States and is rarely open to ministers').

[60] Principle II provides as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law'. See *YbILC* (1950, II), at 192.

[61] *Supra* note 28, at 311.

[62] ICJ Reports (1951), at 24.

[63] See Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, at para. 45.

[64] ICTR, Trial Chamber I, judgment of 2 September 1998, at para 495; ICTY, Trial Chamber I, judgment of 2 August 2001, at para. 541.

Belgium. In its *Mémoire* of 15 May 2001, the Congo explicitly admitted the existence of a principle of international criminal law, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed while in office; the Congo also added that on this point there was no disagreement with Belgium.[65]

Arguably, while each of these elements of practice, on its own, cannot be regarded as indicative of the crystallization of customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although admittedly without producing compelling evidence concerning state or judicial practice,[66] and which the *Institut de droit international* has recently restated, at least with regard to heads of state or government).[67]

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by Justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals,[68] is in line with contemporary trends in

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[65] *Mémoire*, at 39, para. 60 (*«...la R.D.C. ne conteste pas qu'est un principe de droit international pénal, notamment forgé par les jurisprudences de Nuremberg et de Tokyo, la règle suivant laquelle la qualité officielle de l'accusé au moment des faits ne peut pas constituer une cause d'exonération de sa responsabilité pénale ou un motif de réduction de sa peine lorsqu'il est jugé, que ce soit par une juridiction interne ou une juridiction internationale. Sur ce point, aucune divergence existe avec l'Etat belge .»*)

[66] See, e.g., Glaser, 'L'Acte d'Etat et le problème de la responsabilité individuelle', *Revue de droit pénal et de criminologie* (1950), 1 *et seq*; S. Glaser, *Introduction à l'Etude du Droit International Pénal* (1954), at 71-76 ; G. Hoffmann, *Strafrechtliche Verantwortung im Völkerrecht - Zum gegenwärtigen Stand des Völkerrechtlichen Strafrechts* (1962), at 135-139 (only with regard to war crimes); Bothe, *supra* note 26, at 254-257; Akehurst, *supra,* note 26, at 241 ; Dinstein, 'International Criminal Law', in 5 *Israel Yearbook on Human Rights* (1975), at 82-83 ; De Sena, *supra* note 26, at 139-187 ; Malanczuk, *supra* note 26, at 122 ; Bianchi, 'Immunity versus Human Rights: The *Pinochet* Case', 10 *EJIL* (1999), at 269-270.

[67] See the Resolution on 'Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law' adopted at the Session of Vancouver (August 2001). At Article 13 (2) it is stated that, although a former head of state (or government) enjoys immunity in respect of acts performed in the exercise of official functions and related to the exercise thereof, he or she nevertheless may be prosecuted and tried 'when the acts alleged constitute a crime under international law'.

[68] In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals') illustrated as follows the first draft of Article 7 of the London Agreement (whereby 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'), contained in a US memorandum presented at San Francisco on 30 April 1945: 'Nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought

international law. At present, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why 'superior responsibility' has acquired, since *Yamashita* (1946), such importance. To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights. These last values require that all those who gravely attack human dignity and fundamental rights be prosecuted and punished.

To ignore or play down the customary rule in question may lead to ensuring impunity for the perpetrators as well as denying compensation to the victims, given that in such cases, although the state on whose behalf the authors of crimes acted formally incurs responsibility, in practice it is not held accountable by anybody. Furthermore, as no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, *only on account of their seniority.*

. **The Court's Balancing of the Requirements of State Sovereignty with the Demands of International Justice**

Finally, the Court's judgment lends itself to some general considerations. The Court of course had to strike a balance between two conflicting requirements, which were lucidly

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to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law"' (in *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945*, US Department of State, 1949, at 47).

expounded by Judges Higgins, Kooijmans and Buergenthal.[69] They are the requirements of smooth and unimpaired conduct of foreign relations, a traditional concern of sovereign states, on the one side, and the need to safeguard new community values, in particular the need to prosecute and punish the perpetrators of grave crimes seriously infringing fundamental rights of human beings, on the other side. In the event, the Court put greater weight on one scale of the balance and markedly favoured the former requirements. Absent any state practice or *opinio juris seu necessitatis*, it logically deduced from the whole system of the law of international immunities that foreign ministers enjoy a broad range of immunities while in office. However, by ambiguously excluding that state agents could be brought to trial, after leaving office, for acts other than 'private' ones performed while in office, the Court has arguably in the event left the demands of international justice unheeded. One might be tempted to recall what another international court had the opportunity to state in general terms, admittedly in a different context: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.'[70]

The holding of the Court is indeed striking, the more so because, it is submitted, the legal regulation that can be deduced from current international law manages to protect both sets of requirements in a balanced way. As stated above, as long as a foreign minister is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform. However, once he leaves office, he may continue to be shielded from foreign criminal or civil jurisdiction for the acts he performed in his official capacity (under the rules on functional immunities), but not (i) for his private acts and transactions; in addition, (ii) he may no longer take shelter behind personal (or functional) immunities, with respect to international crimes such as genocide, crimes against humanity, war crimes, torture, and serious international acts of terrorism. If he is accused of such crimes, whether they were committed prior to his taking office or while he was in office, he may legitimately be subject to foreign criminal jurisdiction.

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69 See Joint Separate Opinion, *supra* note 3 at paras 73-75.

70 ICTY, Appeals Chamber, *Tadić (Interlocutory Appeal)*, judgment of 2 October 1995, at 32, para. 58.

1 July 2003 2318

The Application of International Law Immunities in Prosecutions for International Crimes

*Dapo Akande**

1. Introduction

The tension between the protection of human rights and the demands of State sovereignty is reflected in the debate about whether State officials should be held responsible in external fora for international crimes committed whilst in office. This debate involves the interplay between two branches of international law. First of all there is the well established law of international immunities (State and diplomatic) which proceeds from notions of sovereign equality and is aimed at ensuring that States do not unduly interfere with other States and their agents. On the other hand, there are those newer principles of international law which are based on humanitarian values and define certain types of conduct as crimes under international law.[1] One of the challenges in this latter area has been the attempt to develop international and national mechanisms by which individuals who commit these crimes may be held responsible. Since States often fail to institute domestic prosecution of their own officials and agents alleged to have committed international crimes, renewed attention has been paid to the possibility of subjecting State agents to prosecution in foreign domestic courts or in international courts. For such prosecution in foreign domestic courts to take place it must be shown that those courts have jurisdiction over crimes committed abroad by foreigners against foreigners (i.e. universal or quasi universal jurisdiction) and that such jurisdiction extends to State agents (i.e that international law immunities are unavailable). Whilst there has been a very significant increase in recent years of attempts to institute these prosecutions[2] it has not been easy to overcome the two hurdles just identified. The view that States possess universal jurisdiction over international crimes committed abroad and that incumbent and former State officials are subject to foreign domestic prosecution for such crimes has not gone unchallenged.[3]

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1 For a survey of this body of law, see Cassese, *International Criminal Law* (2003), Cassese, "International Criminal Law", in Evans (ed.), *International Law*, 720 (2003).

2 For a survey of domestic prosecutions relying on universal jurisdiction, see Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives, (2003); *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, International Law Association, Committee on International Human Rights Law and Practice, *Report of the Sixty-Ninth Conference of the International Law Association*, (London, 2000), 403, 424 *et seq* (hereafter "*ILA Report on Universal Jurisdiction*").

3 In three recent ICJ proceedings, States have challenged both of these principles, see *Arrest Warrant of 11 April 2000* Case (Democratic Republic of the Congo v. Belgium), 2002; *Certain Criminal Proceedings in France* (Congo v. France),

As regards prosecutions in international tribunals, it may be thought that as long as jurisdictional obstacles may be overcome, the question of international immunities – which, afterall, are designed for the horizontal inter-State relationships -would hardly arise.[4] Such a sentiment may have been behind the International Court of Justice's (ICJ) pronouncement in the *Arrest Warrant Case* that:

> "the immunities enjoyed under international law . . . do not represent a bar to criminal prosecution in certain circumstances. . . . [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[5]

However, the view that immunity issues are irrelevant in proceedings instituted before international courts and tribunals is an oversimplification of the matter.[6] Whether or not those wanted for prosecution by the international criminal tribunals may rely on international law immunities to exempt themselves from the jurisdiction of the tribunal depends, firstly, on the provisions of the Statute establishing the international tribunal. Whilst these texts tend to include a general rule to the effect that official position of a defendant may not be relied on to bar prosecution,[7] it is important to pay attention to manner in which immunity is provided.[8] Secondly, the possibility of relying on international law immunities to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the State of the official sought to be tried is bound by the instrument establishing the tribunal. In this regard, there is a distinction between those tribunals established by United Nations Security Council Resolution (i.e the ICTY and ICTR) and those established by treaty. Because of the universal membership of the UN and because decisions of the Council are binding on all UN

(Provisional Measures Request), 2003; and Liberia's application instituting proceedings against Sierra Leone in respect of the indictment by the Special Court for Sierra Leone of the Liberian Head of State. See ICJ Press Release 2003/26 (5 Aug. 2003).

[4] See Gaeta, "Official Capacities and Immunities", in Cassese, Gaeta & Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 975, 991 (Vol I, Oxford University Press, 2002): "Strictly speaking, under international law individuals are only entitled to enjoy personal immunities vis-à-vis the authorities of the State where they are authorized to discharge official functions (the 'receiving or territorial State'). Clearly these immunities cannot be relied upon before the ICC; hence they cannot preclude the exercise of the Court's jurisdiction"

[5] *Arrest Warrant* case, n. 3 supra, para. 61.

[6] See Fox, *The Law of State Immunity*, 431 (2002); Gaeta, n. 4 supra, 991 *et seq.*

[7] See Art. 7, London Agreement for the International Military Tribunal at Nuremberg (1945); Art. 6, Charter of the International Military Tribunal for the Far East (1946); Art. 7(2), Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)(1993); Art. 6(2), Statute of the International Criminal Tribunal for Rwanda (ICTR)(1994); Art. 27 ICC Statute (1998); and Art. 6(2), Statute of the Special Court for Sierra Leone (2002).

[8] Because the decision was taken not to prosecute the Japanese Emperor after World War II, Art. 6 of the Charter of the Tokyo Tribunal (unlike Art. 7 of the Nuremberg Tribunal's Charter) does not explicitly provide that a person's position as Head of State may not be relied on as exempting individual responsibility. Also, whilst Art. 27 of the ICC Statute denies immunity, Art. 98 of the Statute preserves it for certain persons.

members,[9] the provisions of the Statutes of the ICTY and ICTR are capable of removing immunity with respect to practically all States.[10] On the other hand since treaties are only binding on the parties,[11] a treaty establishing an international tribunal is not capable of removing an immunity which international law grants to officials of States that are not party to the treaty. These immunities are rights belonging to the non-party States and those States may not be deprived of their rights by a treaty to which they are not party.[12]

This article primarily address the extent to which international law immunities may be relied on in order to prevent prosecution by the International Criminal Court (ICC). However, the article also considers whether international immunities bar arrests and prosecutions of international crimes in national courts. Consideration of the position in national jurisdictions is necessary because the ICC has no power of independent arrest but is dependent on States arresting and surrendering suspects. Where those suspects are serving or former State officials present in the territory of another State, they might be entitled under international law to immunity from the jurisdiction of the latter State. In such circumstances, the "host" State must examine whether that immunity prevents them from arresting and otherwise exercising jurisdiction over the suspect. Since the ICC is a treaty-based court, the discussion in the previous paragraph indicates that consideration of immunity issues will be especially important where the person sought to be arrested is an official of a State not party to the Rome Statute.

2. The ICC Statute and Immunity: The Tension between Arts. 27 and 98

As indicated above, the examination of whether State, diplomatic or other immunities are available in relation to the ICC must begin with an examination of the text of the ICC Statute.

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[9] Art. 25, UN Charter.

[10] It may be questioned whether the Security Council is able to override the immunities normally accruing to representatives of States that are not members of the UN. This is a question that may have been raised in 1999 when the ICTY indicted the then Head of State of the Federal Republic of Yugoslavia (FRY) - Slobodan Milosevic - and other senior members of FRY. At the time, there was some doubt as to whether the FRY was a member of the UN. To the extent that the FRY was not a UN member, it is arguable that an attempt by other States to execute the indictment and arrest warrant would have engaged the legal responsibility of the arresting State and/or even that of the UN. For an analysis of the status of FRY in the UN at the relevant time, see Blum "UN Membership of the 'New' Yugoslavia: Continuity or Break?", (1992) 86 *AJIL* 830; Scharf, "Musical Chairs: The Dissolution of States and Membership in the United Nations", (1995) 28 *Cornell Int'l L.J.* 29; Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties", (1997) 1 *Max Planck Yearbook of United Nations Law*, 231, 241-251; Craven, "The *Genocide* Case, The Law of Treaties and State Succession", (1997) 68 *BYIL* 127, 131-135; Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non Parties: Legal Basis and Limits", (2003) 1 *J Int. Crim. Justice (forthcoming)*.

[11] Art. 34 Vienna Convention on the Law of Treaties, 1969

[12] See, Liberia's challenge at the ICJ to the indictment by the Special Court for Sierra Leone of the Liberian Head of State. See ICJ Press Release 2003/26 (5 Aug. 2003). See also Romano & Nollkaemper, "The Arrest Warrant Against The Liberian President, Charles Taylor", *ASIL Insights*, June 2003 http://www.asil.org/insights/insigh110.htm

There are two provisions of the ICC Statute with a bearing on questions of immunity: Articles 27 and 98. Article 27 primarily addresses the position of the State officials in relation the ICC itself. Article 27(1) provides that:

> "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"

This provision has now become standard in the founding instruments of international criminal tribunals. Similar provisions were inserted into the relevant agreement for the Nuremberg and Tokyo tribunals after WWII as well as into the Statutes of the ICTY and the ICTR.[13] This provision primarily addresses the substantive responsibility of State officials for international crimes rather than questions of immunity. The main effect of this provision is to establish that official capacity of a person does not relieve him from individual criminal responsibility and the provision eliminates a substantive defence that may be put forward by State officials.[14]

It may be argued that Article 27(1) and similar provisions do not deal with immunity at all since the fact that a person may be legally responsible does not address whether that person is subject to the jurisdiction of a particular forum, i.e whether that responsibility may be determined in that forum. It is those jurisdictional issues that are addressed by the law on international immunities and the possession of immunity does not mean that person may not be legally responsible for the act in question. However, a deeper analysis shows that this provision does have the effect of removing at least some of immunities that State officials would otherwise be entitled to.[15] First of all, by providing that the Statute applies to State officials, Article 27(1) establishes that those officials are subject to prosecution by the ICC even when they have acted in their official capacity. Therefore, Article 27(1) is also jurisdictional in nature. Thus, not only does the second sentence implicitly exclude immunities based on the official nature of the act, the first sentence also implicitly establishes that the official status of defendants does not exclude them from the jurisdiction of the ICC. Secondly, questions of legal responsibility are not wholly separate from questions of immunity. As will be seen below, one of the reasons for which immunity in respect of official acts is conferred on State officials is that official acts are generally regarded as acts of States for which it is the State and not the official that ought to be held responsible. To the

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[13] See [redacted] supra.
[14] Fox, [redacted] supra, 429-430.

extent that it is established that the official himself may be held responsible for the act, that reason for immunity disappears.

Perhaps as a result of doubts as to whether Article 27(1) completely removes the possibility of reliance on immunities in proceedings before the ICC, Article 27(2) contains a more explicit removal of international and national law immunities. It provides that:

> "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."

This provision is new. It has no counterpart in the Nuremberg or Tokyo Tribunal agreements or in the ICTY and ICTR Statutes. Article 27(2) conclusively establishes that State officials are subject to prosecution by the ICC and must be regarded as a waiver by State parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.

However, the removal of immunity vis-à-vis the ICC by Article 27 is not the end of the matter. Because the Court does not have independent powers of arrest and must rely on States to arrest and surrender persons wanted by the Court,[16] the immunities of State officials in national jurisdictions becomes important. To the extent that the Court is seeking arrest and surrender from the State of the official concerned, Article 27 constitutes a waiver of national law immunities by parties to the Statute. State parties are therefore obliged to arrest and surrender their officials even if those officials would otherwise be entitled to immunity under national law.[17] However, where an official outside his or her State is entitled under international law to immunity from arrest and criminal process in the State they are in, the matter is more complicated. In order to deal with this issue Art. 98(1) of the ICC Statute provides that:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."[18]

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[15] See Cassese, *International Criminal* Law, 267 *et seq.* (2003); *Arrest Warrant Case*, n. 3 supra, para 58; Gaeta, n. 4 supra, 981-2.

[16] States parties have an obligation to cooperate with the ICC with regard to arrest and surrender of wanted persons. See Arts. 86 & 89 ICC Statute.

[17] See Gaeta, n. 4 supra, 996-1000; Broomhall, "International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law", 139-141 (2003).

[18] In addition, Art. 98(2) provides that: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

Thus, whilst Article 27 provides that the fact that a person has international immunities shall not bar *the ICC* from exercising jurisdiction over State officials, Article 98 ensures that the international law obligations *of States* to accord immunity to foreign officials are respected.[19]

Since non-parties to the ICC Statute have no obligation to surrender their nationals or officials to the ICC and because parties, may, in breach of their obligations, be unwilling to handover their own officials,[20] it may well be that the primary way in which the ICC can gain custody of indicted persons is through the cooperation of States on whose territory the official of another State happens to be. At the extreme, the denial of immunity for officials provided for in Article 27 may be undermined by the fact that such persons may be entitled to rely on international immunities in order to prevent States from arresting them. Whether or not this proves to be a significant barrier to the exercise of the ICC's jurisdiction will depend on the interpretation given to Article 98(1). The rest of this paper, examines a number of interpretative problems regarding Article 98. Section 3 considers who may benefit from Article 98. That section begins by considering the position of officials and diplomats of non-parties to the ICC Statute and that of officials and diplomats of ICC parties. The section then examines whether or not the ICC is entitled to request the arrest and surrender of officials of international organizations. Finally, section 3 examines whether it is the ICC or a State on whose territory a foreign official is present that decides on whether that person may benefit from international law immunities. Section 4 then examines the more general question whether State or diplomatic immunity is available in cases in which the official or diplomat is accused of a crime under international law.

3. Who May Benefit from Article 98 and Who Decides?

The Position under Article 98 of Officials and Diplomats of States not Party to the ICC Statute

Although the ICC is entitled to exercise jurisdiction over officials of States not party to the ICC Statute,[21] it is clear that nothing in the ICC Statute can operate to remove the immunities that

[19] Broomhall, n. 1 supra, 141.

[20] The risk of this happening is quite high, since the principle of complementarity adopted in the ICC Statute means that the ICC will only exercise its jurisdiction in cases in which the national State has failed to genuinely exercise its jurisdiction. See Broomhall, n. 1 supra, 143-4.

[21] See Akande, n. 10 above, Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position", (2001) *Law & Contemp. Problems* 67; Danilenko, "ICC Statute and Third States", in Cassese, Gaeta & Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press, 2002), 1871; Paust, "The Reach of ICC Jurisdiction Over Non-Signatory Nationals", (2000) 11 *Vanderbilt J. Trans'l L.* 1.

officials of non-parties to the Statute would ordinarily possess under international law.[22] Thus, whilst parties to the ICC Statute have an obligation under Part 9 to cooperate with requests for arrest and surrender of persons on their territory, where such persons are officials of non parties who enjoy immunity from arrest and prosecution for international crimes,[23] State parties would be in breach of their international obligations to that non party if they gave effect to a request for arrest and surrender emanating from the ICC. In these circumstances, Article 98(1) by directing the Court not to proceed with a request for arrest, ensures that ICC parties are not placed in the position of having competing legal obligations to the ICC and to other States. Indeed, since the ICC is operating in effect by delegation from its State parties,[24] such immunity as officials of non-parties may possess operates not only in relation to State parties but also in relation to the ICC itself. Thus, the ICC would itself be prevented from taking steps which amount to a violation of those immunities. In particular, the ICC would itself be prevented from even issuing an arrest warrant under Article 58 of the Statute.[25] This follows from the decision of the ICJ in the *Arrest Warrant Case*, that the issuance and circulation of an arrest warrant in relation to a person entitled to immunity is a violation of that immunity even where no subsequent steps are taken.[26]

The Position under Article 98 (1) of Officials and Diplomats of Paries to the ICC Statute

Although it is clear that Article 98(1) applies to immunities enjoyed by officials of non-parties, it is less clear whether that provision also refers to immunities ordinarily enjoyed by officials of ICC parties. The question is whether Article 98(1) prevents the Court from requesting that a State party surrender the official of another State party present on the territory of the first, where the official would normally have immunity under international law. The answer to this question depends on the relationship between Articles 27 and 98, particularly on whether the waiver of immunity contained in the former provision is a waiver not only in relation to the ICC but in relation to the exercise of authority by other parties, where those other parties are acting in support of the exercise of ICC jurisdiction. The view that Article 98(1) only applies to officials of

[22] See the texts at fn. 11 and 12 supra. Whilst the provisions of Statute may eventually influence the development of customary law so that international law immunities are never available in cases of international crimes, it is clear that this is some way from the present position.

[23] See Section 4 below for a discussion of whether international law immunities are available where a person is accused of committing an international crime.

[24] See Akande, n. 10 supra

[25] It appears that the arrest warrant issued under Art. 58(1) by the Pre-Trial Chamber after the conclusion of investigations by the Prosecutor is preliminary to and different from the request for arrest to which Art. 98(1) relates. The latter is provided for in Part 9 of the ICC Statute (specifically Art. 89-92). The fact that there is a difference is implicit in the requirement that a request for arrest under Art. 91 must be supported by a copy of the arrest warrant.

[26] n. 3 above, paras. 70-71.

non-parties has been taken by scholars[27] and by some ICC parties.[28] This view is reflected in Section 23(1) of the United Kingdom's International Criminal Court Act 2001 which provides that "any State or diplomatic immunity attaching to a person by reason of a connection with a State party to the ICC Statute" does not prevent their arrest in Britain or surrender to the Court. However, where the State or diplomatic immunity attaches by reason of a connection to a non-State party, Section 23(2) in effect provides that proceedings for arrest or surrender may only continue where there has been a waiver of immunity by that non party. The effect of this provision is that a serving head of State of an ICC party who is on an official visit to the UK or a serving diplomat of an ICC party accredited to the UK may be arrested and surrendered to the Court, if the ICC requests such surrender. The immunities *ratione personae* that would ordinarily apply to such persons[29] would therefore not apply. Because this is a far reaching conclusion which goes beyond anything in current international law, it is imperative that it is supported by cogent and compelling reasoning.

It is likely that the cases in which the ICC will wish to direct a request for surrender of a State official to another State are those cases in which the official's own State, perhaps in breach of its obligations, has refused to surrender the accused person.[30] Thus, the effectiveness of the Statute may well be best served by an interpretation which also permits the Court to direct its requests for surrender of officials of State parties to other States.[31] However, given that any interference with the immunity that international law accords to serving senior State officials and diplomats constitutes an extremely serious interference with the State concerned and with its international relations, the fact that that a denial of immunity may be desirable to make the ICC more efficacious is not a sufficient reason to imply such a waiver of immunity. On the contrary it must be shown that such a waiver of immunity is either express in the Statute or must necessarily be implied from its provisions.

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[27] Broomhall, n. 17 supra, 145; Gaeta, n. 4 supra, 993-6; Wirth "Immunities, Related Problems, and Article 98 of the *Rome Statute*", (2001) 12 *Crim. L. Forum* 429, 452-454; Schabas, *An Introduction to the International Criminal Court* 92 (2001).

[28] During the drafting of the ICC's Rules of Procedure and Evidence at the July-Aug. 1999 session of the ICC Preparatory Commission, Canada and the United Kingdom circulated a paper in which they stated that: "The interpretation which should be given to Article 98 is as follows. Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party." Text reproduced in Broomhall, n. 17 supra, 144.

[29] See Section 4 below for a discussion of the immunities available to State officials in cases in which they are accused of committing international crimes.

[30] See n. 20 supra.

[31] Broomhall, n. 17 supra, 145

On one view, the text of Article 98(1) itself resolves the question whether it extends to officials of State parties since that provision refers to the "immunity of a person . . . of a *third State*." According to this view, the expression "third State" when used in the law of treaties is usually used to refer to States not party to the relevant treaty,[32] and therefore refers in Article 98(1) to States that are not party to the ICC Statute. However, this argument is neither compelling nor decisive. The fact that the Article 98(1) speaks of "third States" does not necessarily mean that it excludes State parties. Third State in that provision may have been used to refer not to non-parties but rather to a State other than that which has custody of the suspect. As Gaeta has noted, in other parts of the Statute where reference is made to States not party to the Statute, it is not the term "third State" that is used but terms such as "non-contracting States" or "States not parties."[33] Significantly, it is unlikely that the other uses of the terms "third State" in the ICC Statute refer only to non-parties to the Statute. Thus, when Article 108 prohibits the extradition from States that have custody of persons sentenced by the ICC to a third State there is no reason to think that this prohibition extends only to non-parties. Likewise, when the Statute uses the term "third party" in connection with requests by the ICC to State parties to provide documents or information disclosed in confidence by a third party, that term is explicitly used as including State parties as well as non parties.[34]

A more compelling argument that may be made in support of the view that Article 98(1) only benefits non-parties is that an interpretation that allows officials of State parties to rely on international law immunities when they are in other States will deprive Article 27of its intended object and purpose. According to this argument, in cases in which the ICC seeks to exercise jurisdiction over officials of a party to the ICC Statute, Article 27 constitutes a waiver by that party of any international law immunities the official would otherwise be entitled to enjoy. It is argued that this waiver would be negated if Article 98(1) were interpreted as allowing parties to rely on the same immunities to prevent surrender of their officials by other States to the court.[35] In support of the argument that waiver of immunity in Article 27 applies not only in relation to the ICC itself but also in relation to States acting in support of the ICC is the fact that, as discussed above, that waiver is not only contained in Article 27(2) – which stipulates that immunities are not to bar the *ICC* from exercising jurisdiction – but also in 27(1). Wirth has

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[32] See Arts. 34-38 of the Vienna Convention on the Law of Treaties 1969.

[33] Gaeta, [redacted], 993. See, for example, Art. 90(4) ICC Statute.

[34] Art. 73, ICC Statute. See also Art. 93(9)(b) which provides that where a request for assistance from the Court "concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization."

pointed out that when the parties agreed in the first sentence of Article 27(1) that the Statute applies to their officials, they thereby agreed that all parts of the Statute, including the cooperation regime in Part 9 applies to those officials.[36] Since the international law immunities of officials of State parties are waived in the Statute, another State on whose territory such an official is present would not be acting "inconsistently with its obligations under international law"[37] by arresting and surrendering such officials to the ICC.

In response to the arguments just set out, it may be argued that an interpretation of Article 98(1) which extends its application to officials of ICC parties does not totally deprive Article 27 of all meaning. Even with such an interpretation of Article 98, Article 27 would allow the ICC to investigate and even issue an arrest warrant under Article 58 in relation to persons who would otherwise be immune.[38] Furthermore, Article 27 would bar any reliance on immunity pleas once an accused person connected with a State party is in the custody of the ICC.[39] On this view, Article 27 is directed solely to the position of State officials vis-à-vis the Court and does not affect the immunity that those officials possess from the jurisdiction of other States. Rather than those latter immunities having been waived by Article 27, this view considers them to be expressly preserved by Article 98(1). Thus, Article 98(1) would prevent the Court from requesting the arrest and surrender of a person entitled to international law immunities from another State, whilst leaving the Court free to request the surrender from the State of the official which has an obligation under Part 9 of the ICC Statute to cooperate with the Court in the execution of the request.

Whilst it is true that interpreting Article 98(1) as applying also to officials of parties to the Statute does not totally negate the effect of Article 27, such an interpretation leaves only a very small scope of application for Article 27(2). First of all, it is incorrect to assert that the waiver of international law immunities in Article 27(2) at least allows the Court to investigate and issue arrest warrants in relation to officials of ICC parties in circumstances where it would otherwise have been unable to do so. If Article 98(1) were interpreted as preserving the immunity of officials of ICC parties from arrest by other States, the warrants issued under Article 58 will only be legally effective in relation to the official's own State. Since officials do not possess immunities

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[35] Gaeta, n. 4 supra, 993-4; Broomhall, n. 17 supra, 145; Wirth, n. 27 supra, 452.
[36] Wirth, n. 27 supra, 452.
[37] Art. 98(1).
[38] See n. 28 supra.
[39] See Triffterer., "Article 27", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), p. 513, margin n. 24.

under international law with respect to their own State, the waiver in Article 27(2) of the international law immunities of State parties could not have been for the purpose of allowing the ICC to issue arrest warrants that operates only in relation to the official's State.

Secondly, the argument that Article 27 operates solely in relation to the *ICC* and denies a plea of immunity only when the court has custody of an accused person will in practice mean that that provision applies only to a small number of cases. It is expected that in the vast majority of cases, the Court will obtain custody of accused persons either through the surrender by their own State or by another State. Where an official has been surrendered by his own State, reliance on Article 27 in order to remove immunity is hardly necessary as the surrender itself constitutes a waiver. If Article 98(1) is interpreted as allowing State parties to rely on immunities to prevent the surrender of their officials to the ICC by other States, it would mean that the waiver of immunity contained in Article 27 is effectively applicable only in those minority of cases in which custody is secured through the acts of non-State entities[40] or through voluntary appearance.[41] To confine such an important provision to these very limited and exceptional circumstances would appear to be contrary to the objects and purposes of the Statute.

Therefore, in order to give meaningful effect to Article 27, Article 98(1) must be interpreted as applying only to officials of non-parties. Thus, Article 98(1) does not prevent the Court from requesting the surrender of officials of parties even where those officials would otherwise be protected from national jurisdiction by international law immunities. Correspondingly, parties to the Statute, have an obligation under Part 9 to comply with such requests for arrest and surrender where an official of a State party is sought. Thus, the Rome Statute confers on parties the power (or more accurately *obligation*) to arrest and surrender senior officials, including a serving head of State or a serving head of diplomatic mission, when such persons are wanted for prosecution by the ICC. The conferral of a power to arrest a visiting head of State or a serving ambassador is practically unprecedented (though not unknown)[42] in international relations and may lead to

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[40] It cannot be excluded that private parties, peacekeeping or peace-enforcement forces operating under a mandate from an international organization will be involved in surrendering persons to the ICC. A number of persons were transferred to the ICTY by NATO forces operating in Bosnia and Croatia. In one case there appeared to be collusion between private parties and the NATO force. See Prosecutor v. Nikolic, IT-94-2-AR73, Interlocutory Decision of Appeals Chamber (June 2003). Since peacekeeping or peace enforcement forces are composed of State forces, it is arguable that any limitations that apply to States (eg Art. 98) would also apply to such forces.

[41] Gaeta, n. 4 supra, 994; Triffterer, n. 29 supra.

[42] In 1999, Slobodan Milosevic, the then head of State of the Federal Republic of Yugoslavia was indicted by the ICTY (see n. 10 supra). Although there are doubts as to whether the FRY was a UN member at the time, it has not been disputed that if the FRY was a UN member, the Security Council Resolutions establishing the ICTY imposed an obligation on UN members to arrest Milosevic if he came within their territory. Similarly, in 2003, the Special Court for Sierra Leone indicted the then head of State of Liberia (Charles Taylor) and requested that Ghana arrest

significant tensions and disruptions in international relations if not exercised judiciously. It is unclear whether the drafters of the relevant parts of the Statute intended to confer on States, the power to arrest a serving head of State or ambassador,[43] but, as demonstrated above, this power follows from the text of the Statute as well as from its objects and purpose.

The Position Under Article 98(2)

If Article 98(1) applies only to officials of non-parties, the question arises as to whether the same is true of Article 98(2).[44] Like the first paragraph of Article 98, the second paragraph is designed to avoid a situation in which a State to whom a request for surrender or arrest is directed by the Court is subjected to conflicting obligations. Article 98(2) allows States to honour treaties which prohibit the surrender of persons sent to their territory by other States.[45] In particular, this paragraph allows States to respect those provisions of Status of Forces Agreements which prohibit States on whose territory armed forces of another State are located from arresting troops and related personnel of the sending State.[46] That provision would also cover extradition agreements which provide that a person that has been extradited from one State to another may not be re-extradited to a third State without the consent of the first State.[47]

The question that arises is whether ICC parties may rely on the agreements covered by Article 98(2) in order to prevent the surrender by other States of the personnel of the ICC party to the ICC. This question is of practical importance because a number of ICC parties have concluded agreements with other States in which it is specifically stated that neither party may transfer

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him whilst he was on an official visit to that State. Since the Special Court was established by a treaty to which Liberia is not a party, it is doubtful that it had the power to override the immunity of the Liberian head of State. See n. 12 supra.

[43] Articles 27 and 98 were drafted by different committees, see Triffterer, n. 39 supra. It is not clear whether any thought was given to the consistency of the two provisions with one another or to question whether Art. 98 applied to ICC parties.

[44] N. 18 supra.

[45] For an analysis of Art. 98(2), see Akande, n. 10 supra & Zappalà, "The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements", (2003) 1 *Journal of International Criminal Justice* 114.

[46] See, for eg, the NATO Status of Forces Agreement (SOFA). Some have doubted whether the NATO and similar SOFAs come within the scope of Art. 98(2), see Paust, n. 21 supra, 10; Amnesty International "International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes", AI Index: IOR 40/025/2002, Section III, (hereinafter "Amnesty Int. Memo") [http://web.amnesty.org/web/web.nsf/pages/documents]; Wirth, n. 27 supra, 455. However, it is generally admitted that Art. 98(2) was drafted with the intention of applying to SOFAs. See Prost & Schlunck, "Article 98", p. 1133 margin n. 6, in Triffterer, n. 39 supra. More importantly, Art. VII(3)C & VII(5) of the NATO SOFA would appear to fall within the language of Art. 98(2). See Akande, n. 10 supra.

[47] Eg, Art. 15, European Convention on Extradition, 1957, *E.T.S.* No. 24. See Akande, n. 10 supra ; Wirth, n. 27 supra, 455; Prost & Schlunck, n. 46 supra, p. 1133, margin n. 6.

persons of one party present in the territory of the other to the ICC without the consent of the first party. Most of these agreements have been concluded with and on the initiative of the United States of America. However, it is significant that not only have some ICC parties been willing to conclude these agreements with the US, the provisions of the agreements are reciprocal so that they also benefit persons of the ICC party.[48] In addition, there is at least one such agreement concluded for the benefit of a number of ICC parties with a State other than the US. Under the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Afghanistan agreed not to surrender personnel of ISAF to any international tribunal without the express consent of the ISAF contributing nation.[49] It is significant that at the time the Military Technical Agreement was signed and subsequently, the overwhelming majority ISAF troop contributing States were and have been ICC parties.[50] The only conclusion that can be drawn from these agreements is that at least some of the ICC parties take the view that, contrary to the situation with Article 98(1), ICC parties may rely on agreements covered by Article 98(2). It has even been argued that *only* agreements by ICC parties are protected by that provision.[51] For reasons discussed earlier,[52] the view that agreements for the benefit of non-parties are not covered by Article 98(2) cannot be accepted. The ICC Statute cannot be taken as overriding the rights of non-parties.

There are at least three reasons why it is important that Article 98(2) is construed - like Article 98(1) - as benefiting only non-parties. Firstly, the reasons described above for construing Article

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[48] See the works cited at [redacted] for the argument that these agreements with the US, as currently worded go beyond the scope of Art. 98(2). By the summer of 2003, over 50 States had reportedly concluded such agreements with the US. Almost half of that number are parties to the ICC Statute. For a list and for the text of the agreement, see http://www.iccnow.org/documents/otherissuesimpunityagreem.html. See also Murphy, "Contemporary Practice of the United States", (2003) 97 *AJIL* 201-2.

[49] Section 1(4), Annex A, Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (Jan. 2002): "The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation."

[50] For the composition of ISAF at its inception, see http://www.cdi.org/terrorism/isaf.cfm. For a more recent list, see http://www.isafkabul.org.

[51] See, "Effective Functioning of the International Criminal Court Undermined by Bilateral Agreements as Proposed by the U.S.", Internal Opinion of the EC Commission Legal Service, (2002) 23 *Human Rights Law Journal* 158 (hereafter "EC Commission Opinion"); Human Rights Watch, "United States Efforts to Undermine the International Criminal Court: Impunity Agreements", 4 Sept. 2002, [http://www.iccnow.org/documents/otherissuesimpunityagreem.html].

Those taking this view argue that to interpret Article 98(2) as extending to agreements with non-parties would result in impunity in cases where the non-party decides not to prosecute. It is then argued that such an interpretation must be rejected since one of the purposes of the Statute is the prevention of impunity. According to this view, Article 98(2) is only a "routing device", allowing the ICC party on whose territory a national of another ICC party is found to comply with its treaty obligations to the latter ICC party but leaving the court free to request surrender from the latter State.

98(1) as applying only to non-parties apply also to those agreements covered by Article 98(2)[53] which confer immunity based on official capacity (eg SOFAs).[54] Secondly, there is a significant degree of overlap in the two provisions which suggest that similar interpretations must be given to the two. The overlap arises because treaties conferring State or diplomatic immunities clearly fall within the language of Article 98(2). Whatever the intent of the drafters of the Rome Statute, it cannot be doubted that the Vienna Convention on Diplomatic Relations 1961 and the UN Convention on Special Missions 1969 are "international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court."[55] Thus, if Article 98(2) is not limited to non-parties, the limitation of Article 98(1) to non-parties would easily be avoided by relying on Article 98(2) instead. Thirdly, interpreting Article 98(2) as extending to parties whilst Article 98(1) does not will lead to the absurd result that that troops of parties and extradited persons may not be surrendered to the ICC (as a result of the SOFAs and extradition agreements covered by Article 98(2)) but that a serving Head of State or Foreign Minister or head of diplomatic mission who goes to visit those troops in the same country has no immunity and may be surrendered to the ICC. This would be a very strange conclusion indeed. Thus, an interpretation of Article 98(2) in context, i.e. in the light of interpretation given to 98(1), must lead to the conclusion that only agreements for the benefit of non-parties to the ICC Statute come within the scope of Article 98(1).

Even though agreements requiring the consent of ICC parties for the transfer of their officials to the ICC do not come within the scope of Article 98(2), those agreements may nevertheless be legally effective in preventing such transfers to the Court where the agreement was concluded after the entry into force of the ICC Statute. Since the ICC Statute is an ordinary treaty that has no "constitutional" status, it does not prevail over subsequent treaties. Clearly, the obligation to

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[52] See the first section of Part 3 above. See also Akande, n. 10 supra for further reasons suggesting this argument is unacceptable.

[53] It must be admitted that its more difficult to interpret the wording of Art. 98(2) as applying only to agreements concluded by non-parties. That provision prevents requests for surrender that would "require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required . . ." Firstly, this language does not explicitly exclude agreements concluded by parties. Secondly, whilst obligations under the Statute (such as those in Art. 27) are part of the "obligations under international law" of State parties and can therefore be taken into account under Art. 98(1), it may be argued that Art 98(2) only requires consideration of the obligations under the other international agreement and not the obligations under the Statute. Whilst, as between the same parties, the obligations under the Statute would normally prevail over those in prior agreements (Art. 30(3) VCLT), it might be argued that Art. 98(2) effectively specifies that the Statute is subject to the agreements referred to in that provision. In such circumstances the provision of that other agreement will prevail: Art. 30(2) VCLT.

[54] Whilst extradition agreements within the scope of Art. 98(2) (see n. 47 supra) will not be covered by the waiver in Art. 27, it has been argued that the right of ICC parties, under those extradition treaties, to demand that persons they extradite are not transferred to the Court has been waived by Art. 89 of the ICC Statute. See Wirth, n. 27 supra, 455.

[55] See Akande, n. 10 supra.

confer immunity arising under pre-existing agreements between ICC parties are superseded by the provisions of the ICC Statute.[56] However, the obligations arising under agreements entered into after the ICC Statute, will, *as between the parties to that later agreement*, prevail over the obligations under the ICC Statute.[57] This, of course does not detract from the obligations which those parties continue to have under the ICC Statute to the other ICC parties and to the ICC. Thus, an ICC party that has entered into a relevant subsequent agreement and is requested by the ICC to surrender a person covered by such a subsequent agreement will have inconsistent obligations.[58] If that ICC party chooses to surrender a person covered by such an agreement, it will be in breach of valid treaty obligations and will be legally responsible to the other party for that breach.

The Position of Officials of International Organizations

A further question that may arise in connection with requests by the Court to States for surrender of persons is whether such requests may be issued when the person wanted is an official (or an expert on mission) of an international law organization. Whilst, most international officials possess immunity only in respect of acts done in their official capacity,[59] it is not inconceivable that an official could be accused of committing an international crime in the exercise of his official duties. For example, it might be alleged that such a crime was committed during the planning or implementation of peacekeeping or other military operation conducted or authorised by the international organization.[60] Furthermore, the most senior officials of international organizations, like the UN Secretary General and Assistant Secretaries General possess immunity which is analogous to that of a diplomat in that there is general immunity from the jurisdiction of States whilst they are in office.[61] Therefore, they may not be arrested in relation to any acts whether committed before or during office. Likewise, under the UN Immunities Convention, experts on mission are immune from arrest or detention.[62] Therefore, there are cases in which

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[56] Art. 30(3) VCLT.
[57] Art. 30(3) VCLT.
[58] Where the agreement is between an ICC party and a non party, the only relevant obligation for the non-party is its obligation not to surrender the person of the ICC party to the non-party. See Art. 30(4)(b) VCLT.
[59] See, eg, Art. V, Section 18(a), Convention on the Privileges and Immunities of the United Nations 1946 (hereinafter "UN Immunities Convention"). Whilst there are a range of treaties dealing with the immunities of international organizations, the provisions in those treaties dealing with immunity from arrest and criminal process tend to be uniform.
[60] See Schermers & Blokkers, *International Institutional Law*, p. 358, §534 (1999, 3rd rev. ed.); Szasz & Ingadottir, "The UN and the ICC: The Immunity of the UN and its Officials", (2001) 14 *Leiden J.I.L.* 867, 880.
[61] See, eg, Art. V, Section 19, UN Immunities Convention. Since many heads of international organizations have previously been senior State officials or government members, it is not inconceivable that they may be accused of having committed or been involved in the commission of an international crime. In fact, it has been alleged that a former Austrian UN Secretary General - Kurt Waldheim – was involved in the commission of war crimes during World War II.
[62] See, eg, Art. VI, Section 22(a), UN Immunities Convention .

States are bound to refrain from arresting and surrendering officials or experts of international organizations, even if those persons are accused of having committed international crimes.

Whether or not the Court may require the arrest and surrender of an official or expert of an international organization in circumstances where that person is immune from arrest in the host State is not addressed in Article 98. The text of that provision is limited to "immunities of a person or property of a third *State*"[63] and "international agreements pursuant to which the consent of a sending *State* is required to surrender a person of that *State* to the Court"[64] and makes no mention of immunities accruing to international organization. Whilst the declaration in Article 27(1) that the Statute applies equally irrespective of official capacity may be taken as including officials of international organizations,[65] such a declaration cannot bind the organization as a non-party to the Rome Statute and may not be regarded as a waiver of the immunity of the official.[66] The position remains the same even if all members of the organization are parties to the ICC Statute. This is because the organization is a separate legal person and the immunity of its officials and experts are rights belonging to the organization and not to the member States.[67] Only the international organization can waive the immunities of its officials and experts[68] and nothing in the Statute can be regarded as having this effect.

In conclusion, whilst Article 98 does not preclude the ICC from requesting the surrender of those officials and experts of international organizations who ordinarily possess immunity, an ICC party that is party to a treaty conferring such immunity would be acting in violation of that treaty if it arrests and surrenders the official or expert. In order to prevent the possibility of inconsistent obligations arising, it will be prudent for the ICC not to request the surrender of officials or experts of international organizations until the organization has waived the immunity of that person.[69] In the case of officials of the United Nations, the UN has undertaken in Article 19 of its Relationship Agreement with the ICC to waive any immunities that may otherwise apply

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[63] Art. 98(1).

[64] Art. 98(2). This provision is probably wide enough to cover treaty provisions conferring immunity on the representatives of States to international organizations since it is the member State and not the organization that is usually empowered to waive the immunity. See, eg, Art. IV, Section 14, UN Immunities Convention.

[65] See Triffterer, n 39 supra, 509.

[66] Szasz & Ingadottir, n 60 above, 881-2.

[67] This follows from the principle that an official or expert of an international organization is entitled to immunity even from the jurisdiction of his own State. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports* 1999, 62, 84, para. 46; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports* 1989, 177, 196-6, paras 51-52. See also Amerasinghe, *Principles of the Institutional Law of International Organizations*, 370 (1996).

[68] See, eg, Art. V, Section 20 & Art. VI, Section 23, UN Immunities Convention.

[69] Under Art. 87(6) ICC Statute, the Court is empowered to request cooperation and assistance from international organizations.

where such persons are wanted for prosecution by the Court.[70] It is important to point out that this provision does not in itself constitute a waiver of immunity but rather an undertaking to waive the immunity. Therefore, if an actual case were to arise, there would still need to be a further act of waiver by the UN Secretary General.

Who decides whether a person is entitled to immunity in another State so as to preclude a request for surrender by the ICC?

A final question that must be addressed in the application of Article 98 is that of who decides whether a person sought by the ICC is entitled to State or diplomatic immunity or is covered by an agreement precluding surrender. Is that decision to be made by the ICC or by the State on whose territory the person is? Furthermore, if the decision is to be made by the ICC by what procedure is the decision to be made and is the decision binding on a State to whom a request for surrender is directed?

Since Article 98 states "the Court shall not proceed with a request for surrender . . ." if the conditions stipulated therein are met, the Court must first of all make a decision as to whether those conditions apply. This is confirmed by Rule 195 of the ICC's Rules of Procedure and Evidence (RPE) which provides that a requested State that is of the view that a request for surrender raises a problem in respect of article 98 "shall provide any information relevant to assist the Court in application of article 98." In addition, "[a]ny concerned third State or sending State may provide additional information to assist the Court."[71] Unfortunately, neither the Statute nor the RPE stipulate the procedure by which the Court is to make a decision in respect of Article 98. However, on a matter of such importance it can only be assumed that a State concerned is entitled to a decision of the Pre-Trial chamber even though this issue is not specifically included in the list of functions of the Pre-Trial Chamber contained in Article 57 of the Statute. Arguably, Rule 195 of the RPE grants procedural rights to a concerned third State or sending State in any hearings before the Pre-Trial Chamber.

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[70] "If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities."

[71] Rule 195, ICC Rules of Procedure and Evidence.

Despite the fact that the Court, must in the first place, make a decision under Article 98, there remains the issue whether that decision is binding on the requested State. Once a request for surrender is made, Article 89of the Statute imposes an obligation on parties to comply with such a request. However, since a request governed by Article 98 deals with a situation in which an ICC party's obligations to non-parties are concerned, leaving the final decision to the ICC is very far reaching.[72] This is because any errors by the ICC would make the ICC party concerned legally responsible to the non-party. It may even be argued that Art. 59(2)(c) of the Statute, which provides that a person arrested at the request of the Court shall be brought before the competent judicial authorities of the custodial State for the purpose, *inter alia*, of determining that his rights have been respected, allows those judicial authorities to make a decision on immunity.

Unfortunately, an examination of those national statutes which deal with the issue of immunity of foreign officials when a request for arrest has been made by the ICC, reveals that States have taken differing views on the question of which body is entitled to decide the issue. Both the Canadian Crimes Against Humanity and War Crimes Act 2000[73] and the New Zealand International Crimes and International Criminal Court Act 2000[74] leave the final decision on immunity to the ICC. Under the Australian International Criminal Court Act 2002, the final decision is left to the Australian Attorney General, whose decision on the question is binding on the Australian courts.[75] Similarly, under the United Kingdom International Criminal Court Act 2001, the Secretary of State may certify with conclusive effect whether or not a State is or is not a party to the Statute and whether a non-party has waived its immunity.[76] More importantly, the Secretary of State may also direct, after consultation with the ICC and the state concerned, that proceedings in the UK which would ordinarily be barred by State or diplomatic immunities shall not be taken.[77] Thus, a decision by the executive that immunities are available would appear to bind the UKs court. However, in the case of an official or diplomat of a non-party and on which the executive takes no view or takes the view that international immunities are not available, the ordinary rules apply and the UK courts will be able to decide for themselves whether arrest or surrender would be inconsistent with any immunity attaching to that person.

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[72] Broomhall, n.17 supra, 145; Wirth, n.27 supra 458 argue that the final decision should be left to the ICC.
[73] S. 48, amending S. 6 of the Extradition Act 1999. See also S. 70 of the Crimes Against Humanity and War Crimes Act, amending S. 16 of the State Immunity Act 1991.
[74] See S. 31. Under Sections 66 & 120, the New Zealand executive may request the ICC to make a final determination on whether or not Article 98 applies to a request for surrender. However, if the ICC advises that it intends to proceed with the request, the New Zealand authorities must comply.
[75] S. 12.
[76] S. 23(3).

4. The Application of State and Diplomatic Immunities to National Proceedings Concerning International Crimes

The main issue that arises in connection with the application of Art. 98(1) is the determination of the circumstances in which a request for surrender of a person would require the requested State "to act inconsistently with obligations under international law with respect to the State or diplomatic immunity of a person" of another State. It is commonly accepted that State officials are immune in certain circumstances from the jurisdiction of foreign States.[78] Whilst some officials enjoy a broad immunity because of their status or office (immunity *ratione personae*), others are immune only in relation to acts performed in their official capacity (immunity *ratione materiae*). However questions remain as to whether these immunities are applicable in cases in which an official or diplomat is accused of committing a crime under international law. To the extent that there is no immunity in relation to acts amounting to international crimes, there would be no bar to ICC parties arresting officials or diplomats of a non-party and surrendering them to the ICC for trial.

Immunity Ratione Personae *(Immunity Attaching to an Office or Status)*

The first type of immunity applicable to State officials are those immunities which attach to a particular office and which are possessed only as long as the official is in office ("personal immunity" or "immunity *ratione personae*"). These immunities are limited to a small group of senior State officials, especially the head of State, head of government and the foreign minister.[79] They also apply to diplomats and other officials on special mission in foreign States.[80] As the International Court of Justice has recently pointed out, this type of immunity is practically absolute in criminal cases in that it applies not only in relation to official acts of this limited group of senior officials but also in relation to private acts.[81] Furthermore, the immunity applies whether or not the act in question was done at a time when the official was in office or before

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[77] S. 23(4).

[78] See generally, Whomersley, "Some Reflections on the Immunity of Individuals for Official Acts", (1992) 42 *ICLQ* 848; Tomonori, "The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct", (2001) 29 *Denver J. Int. L. & Pol.* 261; Fox, n. 6 supra, 352-360 & Chapter 10; Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", (1994-III) 247 *RdC* 13; Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organizations", in Evans (ed.), *International Law* 387 (2003).

[79] See Watts, n. 78 supra.

[80] Art. 29 & 31, Vienna Convention on Diplomatic Relations (VCDR) 1961; Arts 21, 39 & 31 UN Convention on Special Missions 1969.

[81] *Arrest Warrant case*, n. 3 supra, para. 54; Fox, n. 6 supra, 441. See also the treaty provisions cited in n. 77 supra.

entry to office.[82] Consequently, the issuance and circulation of an arrest warrant, not to speak of the actual arrest and prosecution of these senior officials would constitute a violation of international law.[83] However, immunity *ratione personae* exists only for as long as the person is in office.

The persons on whom immunity *ratione personae* are conferred are those specifically charged with the conduct of international relations and the breadth of those immunities is usually justified on the ground that it would be too great an interference with States and the conduct of international relations for these senior officials to be subject to the criminal jurisdiction of foreign States whilst they are in office.[84] For these reasons, the International Court of Justice has held that immunity *ratione personae* of a serving Foreign Minister from criminal process subsists even when it is alleged that he has committed an international crime and applies even when the Foreign Minister is abroad on a private visit.[85] The Court stated that:

> "It has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[86]

This principle, which must be taken as applying to all State officials and diplomats possessing immunity *ratione personae*,[87] has been applied in recent years by several higher national courts.[88] Judicial opinion and state practice[89] on this point is unanimous and no case can be found in

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[82] *Arrest Warrant case*, n. 9 supra, paras. 54-55.

[83] *Arrest Warrant case*, n. 9 supra, paras. 55, 70-71.

[84] *Arrest Warrant case*, n. 9 supra, para. 53; also Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, *ibid.*, para. 75: ". . . immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system." See also Fox, n. 6 supra, 427.

[85] *Arrest Warrant case*, n. 9 supra, para. 55. Prior to this judgment, it had been doubted whether Foreign Ministers possessed the same immunity as Heads of State. In particular, it had been argued that international law did not confer immunity on Foreign Ministers whilst abroad on a private visit. See Watts, n. 78 supra, 102-109. In support of this view is the fact that there is little practice, if any, suggesting that States consider the position of Foreign Ministers to be the same as that of Heads of States and governments.

[86] *Ibid.*, para. 58.

[87] See generally, Cassese, n. 15 supra, 271-273; Gaeta, n. 4 supra, 983-989; Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*", (2001) 2 *EJIL* 595; Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government", (2002) 51 *ICLQ* 119.

[88] See the *Ghaddafi* case, Arrêt no. 1414, 125 *ILR* (France: Cour de Cassation, 2001); *Castro* case (Spain: Audiencia Nacional, 1999), cited by Cassese, n. 15 supra, p. 272, n. 20; *Re Sharon & Yaron*, (Belgium: Cour de Cassation, 2003); See *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet* (No.3), [1999] 2 All ER 97, 126-7, 149, 179, 189 (England: House of Lords, per Lords Goff, Hope, Millett & Phillips).

[89] In Aug. 2003, Saied Baghban, an Iranian diplomat accused of having been involved in a bombing of a Jewish centre in Argentina was briefly detained in Belgium but then released on grounds of diplomatic immunity, see *The Times* (London), 28 Aug. 2003, p. 17. Similarly, despite accusations that the Israeli Ambassador to Denmark was

which it has been held that a State official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign State when it is alleged that he or she has committed an international crime. It therefore follows, that under Article 98, the ICC may not request that States arrest and surrender those senior State officials of non-parties possessing immunity *ratione personae.*

Whilst it is clear that this type of immunity applies to heads of States, heads of governments, foreign ministers,[90] and diplomats[91] questions remain about whether it applies to other senior government members. In the *Arrest Warrant case*, the ICJ suggested that immunity *ratione personae* applies to the Foreign Minister because he or she is responsible for the international relations of the State and "in the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise."[92] However, to base this type of immunity solely on the fact that the official concerned is charged with international functions would considerably extend the range of officials entitled to it. The current state of international affairs requires a very wide range of officials (senior and junior) to travel in the exercise of their functions. It has never been recognized that the mere fact that an official acts in the exercise of international relations suffices of itself to confer immunity *ratione personae.* Nevertheless, it may well be that the person of officials abroad on a special mission on behalf of their State, is inviolable with the result that they may not be arrested or detained.[93]

Immunity Ratione Materiae *(Immunity Attaching to Official Acts)*

Even those State officials that are not entitled to immunity *ratione personae* are immune from the jurisdiction of other States in relation to acts performed in their official capacity ("functional immunity" or "immunity *ratione materiae*").[94] Since this type of immunity attaches to the official act, it may be relied on not only when an official is in office but also when he or she is out of office.[95] It may also be relied on by persons or bodies that are not State officials

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complicit in torture whilst he was head of the Israeli Intelligence Service – Shin Bet, Denmark has maintained that he is entitled to diplomatic immunity from Danish criminal jurisdiction. See *The Guardian*, 16 Aug. 2001.

[90] *Arrest Warrant case*, n. 2 supra, para. 51-53 & Watts, n. 78 supra.

[91] Art. 29 & 31VCDR.

[92] *Arrest Warrant case*, n. 2 supra, para. 53.

[93] See Arts 29 & 31 UN Convention on Special Missions 1969. Whether these provisions represent customary international law has been doubted, see *USA v. Sissoko* 121 ILR 599 (USA: SD Fla., 1997); Wickremasinge, n. 78 supra, 402.

[94] For relevant cases from different jurisdiction, see Tomonori, n. 78 supra, 269-273. For a consideration of US and UK law on the matter, see Whomersley, n. 78 supra & Fox, n. 6 supra, 352-360.

[95] Wickremasinghe, n. 78 supra, 403. See also Art. 39(2) VCDR in relation to former diplomats and Art. 43(1) of the Vienna Convention on Consular Relations 1963 in relation to consular officials. Some have doubted whether the immunity *ratione materiae* applicable to former diplomats is of the same nature as the general immunity applicable to

or entities but that acted on behalf of the State.[96] Although the application of immunity *ratione materiae* to State officials has been rather more common in civil cases,[97] the reasons for which the immunity is conferred apply *a fortiori* in criminal cases and the assertion of such immunity in criminal cases is not unknown.[98] The conferral of immunity *ratione materiae* serves two purposes. Firstly, this type of immunity constitutes a substantive defence in that it indicates that the individual official is not to be held responsible for acts which are in effect those of the State.[99] Secondly, the immunity of the official is a procedural or jurisdictional bar in that it prevents the circumvention of the immunity of the State through action taken against those who act on behalf of the State.[100] Thus cases involving foreign officials are regarded as cases in which the State is being indirectly impleaded and the immunity of the foreign official prevents the courts from exercising control over the acts of the foreign State.

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other official acts of other State officials. For example, Dinstein, "Diplomatic Immunity from Jurisdiction *Ratione Materiae*", (1966) 15 *ICLQ* 76, 86-89, argues that diplomatic immunity *ratione materiae* is broader than that accorded to other State officials. Tomonori, n. 78 supra, 281, questions whether other State officials possess immunity *ratione materiae* in criminal proceedings and in relation to *ultra vires* acts.

[96] See Van Panhuys, "In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities", (1964) 13 *ICLQ* 1193, 1201. See also *Twycross v. Dreyfus*, (1877) 5 Ch.D 605 (England: Court of Appeal); *Kuwait Airways Corp. v. Iraq Airways Co*, 1995) 3 All ER 694 (England: House of Lords); *Walker v. Bank of New York*, (1994) 16 O.R. 3d 504 (Canada: Ontario Court of Appeal)& S. 14(2) UK State Immunity Act 1978.

[97] For the suggestion that the paucity of domestic criminal cases recognising the immunity *ratione materiae* of State makes it difficult to prove that this type of immunity applies in criminal proceedings, see Tomonori, n. 78 supra, 262.

[98] The most well known case in which this type of immunity was asserted in respect of criminal proceedings is *Macleod's case* (on which see Jennings, "The *Caroline* and *McLeod* Cases", (1938) 32 AJIL 92). Whilst, both the British and US governments accepted that there was immunity under international law from both civil and criminal processes, Macleod was actually subject to trial owing to the inability of the US federal govt to interfere with the prosecution. However, in the *Rainbow Warriori case*, 74 ILR 241, the French govt's assertion that military officers should not be tried in New Zealand once France had accepted international responsibility, was rejected by New Zealand. See also the few cases cited by Tomonori, n. 78 supra, 262.

[99] See Cassese n. 15 supra, 266; Fox, n. 6 supra, 510-513. In *Attorney General of Israel v. Eichmann*, 36 ILR 5, 308-309, (1962), the Israeli Supreme Court stated that: "The theory of 'Act of State' means that the act performed by a person as an organ of the State – whether he was Head of the State or a responsible official acting on the Government's order – must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefore, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty." However, the Court was not prepared to accept that this theory applied in all cases. In *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecume*) IT-95-14-AR108, 110 ILR 607, 707, para. 38, the Appeals Chamber of the ICTY stated that: "[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since." See also the correspondence in the *MacLeod case* n. 98 supra.

[100] In *Zoernsch v. Waldock* (1964) 1 WLR 675, 692 (England: Court of Appeal), Diplock LJ stated that:: "A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be "en poste" at the date of his suit." For similar statements, see, *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (US: 9th Cir, 1990) & *Propend Finance Pty Ltd v. Sing* 111 ILR 611, 669 (England, Court of Appeal, 1997).

International Immunities in Respect of Violations of Jus Cogens?

At this stage, it is useful to address the argument that States and their officials can never be immune from the jurisdiction of other States in respect of international crimes because these crimes, for the most part, constitute violations of norms of *jus cogens*. It has been argued that there are two reasons why there cannot be immunity in cases involving violations of *jus cogens* norms. Firstly, it is argued that State immunity only applies in respect of sovereign acts and that international crimes, particularly those contrary to norms of jus cogens may never be regarded as sovereign acts.[101] In relation to immunity of officials, the related, but different, argument has been made that whilst officials possess immunity *ratione materiae* in respect of official acts, the commission of international crimes may never be regarded as an official act.[102] Secondly, it has been argued that since norms of *jus cogens* supersede all other norms, they must prevail over the rules of international law providing immunity.[103]

Whilst these arguments have proved attractive to some national and international judges,[104] they have not been generally accepted by the national[105] and international tribunals that have

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[101] See Bianchi, "Immunity Versus Human Rights: The *Pinochet* Case", (1999) 10 *EJIL* 237, 265: "human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values." See also Belsky, Merva & Roht-Arriaza, "Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law", (1989) 77 *Cal. L. Rev.* 365, 394; Bianchi, "Denying State Immunity to Violators of Human Rights", (1994) 46 *Austrian J. Publ. Intl. Law*, 195, 205, 217; Reimann, "A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v. Federal Republic of Germany*", (1995) 16 *Mich. J.I.L.* 403, 421-3; Orekhelashvili, "State Immunity and International Public Order", (2002) 43 *GYIL* 227, 237.

[102] It was for this reason that some judges in the *Pinochet* case held that a former head of State is not immune in respect of torture committed whilst in office. See *Pinochet* (No.3), n.98 supra, 113, 166 (England: House of Lords, per Lords Browne Wilkinson, Hutton); R. *v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet* (No.1), [1998] 4 All ER 897, 939-40, 945-6 (England: House of Lords, per Lords Nicholls & Steyn). It is amazing these judges could have reached this conclusion in respect of torture, which under Art. 1 of the 1984 Torture Convention is limited to acts "of a public official or other person acting in *an official capacity*." Emphasis added. See also the *Bouterse* case, para. 4.2 (Netherlands: Gerechtshof Amsterdam, 2000), http://www.icj.org/objectives/decision.htm ; Separate opinion of Judges Higgins, Kooijmans & Buergenthal, *Arrest Warrant* case, n.4 supra, para. 85. For US civil cases taking the same view, see O'Keefe, "Civil Actions in US Courts in Respect of Human Rights Abuses Committed Abroad; Would the World's Oppressors be Wise to Stay at Home?", (1997) 9 *African J. Int. L.* 15, 38-9.

[103] See Bianchi, "Immunity Versus Human Rights: The *Pinochet* Case", (1999) 10 *EJIL* 237, 265: "As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities." See also Reimann, n.101 supra, 421-3; Byers, "Comment on *Al-Adsani v. Kuwait*", (1996) 67 *BYIL* 539-40; Orakhelashvili, "State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights", (2002) 15 *Leiden J.I.L.* 703, 712-3; Orakhelashvili, "International Decisions: *Arrest Warrant Case*", (2002) 96 *AJIL* 677; Orakhelashvili, n.101 supra, 255 *et seq.*

[104] See *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000 (Greece: Supreme Court, 2000) commented on in Voumas, "*Prefecture of Voiotia v. Federal Republic Of Germany*: Sovereign Immunity and the Exception for *Jus Cogens* Violations", (2002) 21 NYU Sch. J. Int. & Comp. L. 629 7 Gavouneli & Banterkas, (2001) 95 *AJIL* 198. See also *Pinochet* (No. 3), n.98 supra, 113, 146-7, 179 (per Lords Browne Wilkinson, Hope & Millett); Dissenting Opinions of Judges Al-Khasawneh & Van den Wyngaert, in *Arrest Warrant Case*, n.4 supra, paras. 7 & 28 respectively; Dissenting Opinion of Judges Rozakis & Caflisch joined by Wildhaber, Costa, Cabral Baarreto & Vajic, Dissenting Opinion of Judge Ferrari Bravo, Diseenting Opinion of Judge Loucaides *Al-Adsani v. United Kingdom*, 123

considered the issue.[106] Neither of the arguments given in support of the view that there cannot be immunity in cases concerning violations of *jus cogens* norms are persuasive. The argument that acts which amount to international crimes cannot be regarded as sovereign acts ultimately rests on the proposition that the gross illegality of the acts means that international law cannot regard them as acts which are open to States to perform. However, there are a number of problems with this argument.

Firstly, at the stage of proceedings at which immunity is raised it will not yet have been established that the State has acted illegally. Indeed, it may turn out the allegations made against the State or official turn out to be unfounded. It would therefore be wrong to assert that the State, by acting in a grossly illegal manner has deprived itself of the rights that it would otherwise be entitled to in international law and has implicitly waived its immunity.[107] This assertion would be especially problematic in criminal cases, where there is a presumption of innocence.

Secondly, whether or not an act is *jure imperii* or sovereign for the purposes of State immunity does not depend on the international legality or otherwise of the conduct but on whether the act in question is intrinsically governmental. This in turn depends on an analysis of the nature of the act as well as the context in which it occurred.[108] International crimes committed by States usually occur in the context of uses of armed force or in the exercise of police power and these are acts

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ILR 24, 49 & 52 (European Court of Human Rights, Nov. 2001); Dissenting Opinion of Judge Wald, *Prinz v. Federal Republic of Germany*, 103 ILR 594, 612-621 (USA: DC Cir. 1992).

[105] See *Al-Adsani v. Kuwait* 107 ILR 536 (CA) (England: Court of Appeal); *Prinz v. Federal Republic of Germany*, 103 ILR 594 (USA: DC Cir. 1992); *Smith v. Libya*, (1997) 36 I.L.M. 100 (USA: 2d Cir. 1996); *Persinger v. Islamic Republic of Iran*, 90 ILR 486 (USA: D.C. Cir, 1992); *Sampson v. Federal Republic of Germany*, 975 F.Supp 1108 (USA: N.D. Ill. 1997); *Bouzari v. Iran* (Canada: Ontario Superior Court, 2002). *Prefecture of Voiotia v. Federal Republic of Germany*, n. 104 supra, was reversed by the Greek Special Supreme Court (September, 2002), see Voumas, n. 104 supra, 648-9. See also the *Distomo Massacre Case*, BGH- 1112R 245/98 (Germany: Supreme Court, June 2003).

[106] See the *Arrest Warrant* case, n. supra, para. 58 and *Al-Adsani v. United Kingdom*, n. 104 supra, para. 61.

[107] For the implied waiver argument, see Belsky, Merva & Roht-Arriaza, n. 101 supra.

[108] See Lord Wilberforce, in *I Congresso del Partido* (1981) 2 All ER 1064, 1074 (England: House of Lords): " . . . in considering, under the restrictive theory, whether State immunity should be granted or not, the court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the State has chosen to engage or whether the relevant activity should be considered as having been done outside the area and within the sphere of governmental or sovereign activity." See also *Holland v. Lampen Wolfe* [2000] 3 All ER 833 (England: House of Lords), where Lord Hope stated that: ". . . it is the nature of the act that determines whether it is to be characterised as *iure imperii* or *iure gestionis*. The process of characterisation requires that the act must be considered in its context. In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a U.S. base overseas. The maintenance of the base itself was plainly a sovereign activity." For similar statements, see also *United States v. The Public Service Alliance of Canada* (1993) 32 ILM 1 (Canada: Supreme Court); *Litterell v. USA (No. 2)* 100 ILR 438 (England: Court of Appeal, 1995); *Egypt v. Gamal-Eldin* [1996] 2 All ER 237 (England).

which are as intrinsically governmental as any other.[109] State immunity is not designed to shield States from the consequences of their illegal conduct though it cannot be denied that it can have this effect. The plea of State immunity does not mean that a State is not responsible in international law[110] and it has never been the case that immunity is only available for those acts that are internationally lawful.[111] On the contrary, the very purpose of the rule according immunity is to prevent national courts from determining the legality or otherwise of certain acts of foreign States. Thus, it would be illogical if application of that rule depended on a prior determination that conduct was illegal or grossly illegal. To say that an act is sovereign is not to say that it is an act permitted by international law or within a sphere of permitted acts. In fact, one consequence of the restrictive immunity theory is that it is precisely in those circumstances where international law has something to say about the acts of States, i.e. governmental or public acts, that national courts are precluded from acting.[112]

For much the same reasons, whether or not acts of State officials are regarded as official acts does not depend on the legality, in international or domestic law, of those acts. Whether or not the acts of individuals are to be deemed official depends, instead on the purposes for which the acts were done and the means through which the official carried them out.[113] If they were done for reasons of the State as opposed to those of the individual and were carried out using the state apparatus, i.e under colour of law, those acts should be regarded as official acts. Acts which constitute international crimes are usually carried out by people invested with State authority and often for State purposes as opposed to being carried out for private purposes. Thus, "[t]o deny

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[109] In *Saudi Arabia v. Nelson*, 100 ILR 544, 553 the US Supreme Court stated that: "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." See also *Claim against the Empire of Iran* 45 ILR 57 at 81 (West Germany: Federal Constitutional Court, 1963): "In this generally recognisable field of sovereign activity are included transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority, and the administration of justice." See further, *Propend Finance Pty. Ltd and others v. Sing*, n. 100 supra; *Argentine Republic v. Amerada Hess*, 488 US 428, 436; (US: Supreme Court); *Paprocki v. German State*, 104 ILR 684 (England: High Court).

[110] "The immunity, where it exists, is *from the local jurisdiction* and not from *legal* (or State) *responsibility* on the international plane. The issue is, in part at least, a question of the appropriate forum." (Emphasis in original). Brownlie, "Preliminary Report on the Contemporary Problems Concerning the Jurisdictional Immunity of States", *Annuaire de L'Institut de Droit international*, Vol. 62-I, 13, at 18 (1987). See also Fox, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", in Evans (ed.) *International Law* 357, 363 (2003).

[111] See generally, Fox, n. 6 supra, chapter 13.

[112] Art. 2(3)(a) & (b), Resolution of the Institut de Droit International on "Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement" (1991), indicates that the fact that a particular case involves the adjudication of the validity or legality of the acts of the defendant State in terms of international law itself indicates the incompetence of the forum court in the matter. See *Annuaire de L'institut de Droit international*, 64-II, 393-4 (1992).

[113] See Watts, n. 8 supra, 56-7; Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case", (2002) 13 *EJIL* 877, 891.

the official character of such offences is to fly in the face of reality."[114] Such acts are characterised as acts of the State for the purpose of imposing State responsibility[115] and it would be artificial to apply a different test in the context of individual responsibility.

Thirdly, the argument that acts amounting to violations of *jus cogens* norms are not sovereign and therefore non-immune is irrelevant in that category of cases where the immunity of the official is not based on the nature of the act at issue but on the status of the individual concerned.[116]

The argument that immunity may not be successfully pleaded in proceedings relating to international crimes because of the superior position of *jus cogens* norms in the hierarchy of international law norms is similarly unpersuasive. Firstly, it should be noted that although it has been stated that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*,"[117] it is by no means established that all rules prohibiting international crimes are prohibitions that rise to the level of *jus cogens*. Whilst the prohibitions of aggression,[118] genocide[119] and torture[120] would seem to clearly fall into that category, it is doubtful that other rules of international humanitarian law are norms of *jus cogens*. Doubts as to whether many rules of international humanitarian law rise to the level of *jus cogens* can be seen in the debate about belligerent reprisals. To the extent that violations of some rules of humanitarian law can be legally justified as belligerent reprisals,[121] it is impossible to assert that those rules are *jus cogens* norms.[122]

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[114] Barker, "The Future of Former Head of State Immunity After *Ex Parte Pinochet*", (1999) 48 *ICLQ* 937, 943. See also, Denza, "*Ex Parte Pinochet*: Lacuna or Leap", (1999) 48 *ICLQ* 949, 952.

[115] See Arts. 4 & 7 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

[116] See the section on immunity *ratione personae* above

[117] *Prosecutor v. Kupreškić et al*, IT-95-16, (ICTY: Trial Chamber, 2000), para. 520. For similar assertions see, Cassese, *International Law*, 141(2001). In the *Nuclear Weapons Advisory Opinion (Request by General Assembly)*, *ICJ Reports* 1996, 226, the ICJ was evasive on this point. One the one hand, it stated (at para. 79) that "a great many rules of humanitarian law" were "fundamental rules" which "constitute intransgressible principles of international customary law." However, the Court stated later in the same opinion (para. 83) that whilst it had been argued that the rules and principles of humanitarian law were part of *jus cogens*, there was "no need for the Court to pronounce on this matter."

[118] See *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports* 1986, 14, at para. 190.

[119] See Judge ad hoc Elihu Lauterpacht, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Further Request for Provisional Measures, *ICJ Reports*, 1993, 325, 440.

[120] See *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 121 ILR 213, 260 (ICTY: Trial Chamber, 1998), para. 153; *Al-Adsani v. United Kingdom* n. 104 *supra*, paras. 60-61.

[121] Belligerent reprisals are defined as "coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to the a conflict in order to stop the adversary from violating international law." See Oeter, "Methods and Means of Combat", in Fleck (ed.), *The Handbook of International Humanitarian Law in Armed Conflicts*, 204 (1995). See generally, Kalshoven, *Belligerent Reprisals* (1971).

[122] Under Art 53 of the VCLT, a peremptory norm of international law or *jus cogens* is "a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted."

Despite the considerable extension of the prohibition of belligerent reprisals in the First Additional Protocol to the Geneva Conventions,[123] the prohibitions contained in that instrument cannot be regarded as representing customary international law[124] – let alone *jus cogens* - given the opposition of countries such as the US, UK and France to those provisions.[125]

Secondly, it is difficult to see how the rules concerning State and diplomatic immunity - which are procedural rules relating to the exercise of jurisdiction by national courts - come into conflict with norms of *jus cogens*.[126] Those immunities do not in themselves mean that a person or the State is not legally responsible for the violation alleged[127] but simply have the effect of preventing adjudication of such violations in the domestic courts of other States. For the granting of immunity to come into conflict with those *jus cogens* rules prohibiting certain international crimes, it would have to be argued that (i) there is an *obligation* on third States (i.e. States other than that responsible for the violation) to prosecute the crime in their domestic courts (or in civil cases to provide a civil remedy) and (ii) that this obligation is a rule of *jus cogens*. Each step of this argument is tenuous and fraught with much difficulty. Undoubtedly, there are some rules that impose obligations on third States to prosecute *some* international crimes, for example those rules concerning grave breaches of the Geneva Conventions[128] and torture.[129] However, in other cases of war crimes or crimes against humanity there is no recognised *obligation* on third States to institute criminal prosecutions,[130] even if there may be a *right* to do so.[131] Likewise, there is no

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[123] See Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions 1949", (1988) 37 *ICLQ* 818; Greenwood, "The Twilight of the Law of Belligerent Reprisals", (1989) 20 *NYIL* 35; Kalshoven, "Belligerent Reprisals Revisited", (1990) 21 *NYIL* 43.

[124] For the view that Art. 51(6) of Additional Protocol I to the Geneva Conventions, which prohibits reprisals against civilians, constitutes a rule of customary international law, see *Prosecutor v. Kupreškić*, n. 117 supra, paras. 521-36.

[125] See Greenwood, n. 123 supra, 63-4; Kalshoven, n. 123 supra, 53; Oeter, n. 121 supra, 206-7. See also *Prosecutor v. Kupreškić*, n. 117 supra, 532-3.

[126] See Fox, n. 6 supra, 525 : "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite." Likewise, Voyiakis, "Access to Court v State Immunity", (2003) 52 *ICLQ* 297, 321: " . . . it is not all clear how the prohibition of torture and the law of State immunity could collide in the first place. To risk some triviality, the prohibition of torture seems mainly about prohibiting the practice of torture, whereas the rules of State immunity are mainly about the exercise of jurisdiction over foreign States."

[127] See n. 110 supra.

[128] Art. 49, First Geneva Convention 1949; Art. 50, Second Geneva Convention 1949; Art. 129, Third Geneva Convention 1949; Art. 146, Fourth Geneva Convention, 1949; Art. 85(1) First Additional Protocol of the 1949 Geneva Conventions, 1977.

[129] Art. 7, Torture Convention 1984.

[130] See Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?", (1996) 31 *Texas Int. L. J.* 1; Broomhall, n. 47 supra, 111-2; Meron, "International Criminilazation of Internal Atrocities", in Meron, *War Crimes Law Comes of Age* 229, 249-6 (1998).

[131] In *Prosecutor v. Furundžija*, Judgment, n. 120 supra, para. 156, the ICTY held that "At the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is *entitled to* investigate, prosecute and punish or

obligation on third States to provide a civil remedy.[132] Furthermore, even in the minority of cases where there is an *obligation* to prosecute, it has not generally been suggested that that obligation is a *jus cogens* obligation. The *jus cogens* obligation is the rule *prohibiting* the act and not the rule requiring prosecution by third States.[133] It is the State that has committed the act that is in violation of a norm of *jus cogens* and not the State that has failed to prosecute or provide a civil remedy. To summarise, a failure by a third State to prosecute those accused of committing an international crime (because of a granting of immunity) is in many cases not a breach of any international obligation. Furthermore, even where there is an obligation on third States to prosecute, that obligation does not rise to the level of *jus cogens*.

Thirdly, the argument that there is no immunity in cases alleging violations of *jus cogens* norms has been implicitly and explicitly rejected by two international tribunals. In the *Arrest Warrant case*, the ICJ held that the immunities *ratione personae* of senior state officials such as the head of State, head of government and foreign minister continue to apply even when they are alleged to have committed acts constituting international crimes.[134] Unless it is asserted that the rule granting immunity *ratione personae* is itself a rule of *jus cogens*,[135] the ICJ's decision is an implicit rejection of the argument under consideration. Furthermore, the European Court of Human Rights (ECHR) has explicitly held that the fact that there is a violation of a *jus cogens* norm does not of itself supercede the rules of State immunity. In *Al-Adsani v. United Kingdom*, ECHR held that the granting of State immunity to a case involving an allegation of torture by a foreign State was consistent with international law and therefore not a denial of the right of access to a court.

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extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad." Emphasis added. See also *Pinochet* (No. 3), n. 88 supra, 109 (per Lord Browne-Wilkinson), 177 (per Lord Millett).

[132] Fox, n. 6 supra, 525. See also *Bouzari v. Iran* , paras. 43-56 (Canada: Ontario Superior Court, 2002) holding that Art. 14(1) of the Torture Convention which provides that States parties "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation", does not impose an obligation on parties to provide a civil remedy in respect of torture committed by another State.
Indeed it would be strange if the violation of a *jus cogens* norm automatically conferred jurisdiction on foreign national courts in civil cases when such violations do not automatically confer jurisdiction on international courts. See *East Timor Case* (Portugal v. Australia), *ICJ Reports* 1995, p. 90; *Armed Activities on the Territory of the Congo*, (Congo v. Rwanda), Provisional Measures, 2002. For the argument that State immunity is based on the consent rule applicable to international tribunals, see Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", (1983) 54 *BYIL* 75, 79-85.

[133] If the obligation to prosecute were a *jus cogens* obligation, it would prevail over other norms of international law. There would therefore be an obligation to prosecute even if such a prosecution would violate the rights of the individual concerned or that of other States.

[134] *Arrest Warrant case*, n. 5 supra, para. 58. See discussion below.

[135] Whilst some support this view [see, Black-Branch, "Sovereign Immunity Under International Law: The Case of Pinochet", in Woodhouse (ed.), *The Pinochet Case: A Legal and Constitutional Analysis* 93,101 (2000); *Pinochet* (No. 3), n. 88 supra, 149 (per Lord Hope)], it is untenable since immunity *ratione personae* can always be waived or set aside by treaty. Indeed, it is argued above, the Art. 27 ICC Statute constitutes a treaty waiver of immunity *ratione personae*.

Whilst the ECHR acknowledged that the prohibition of torture was a peremptory norm of international law, it held (by 9 votes to 8) that:

> "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[136]

Although, this case dealt only with immunity of the State from civil suits, if the Court had found that the *jus cogens* prohibition prevailed over that immunity, it is difficult to see how that prohibition would not have overridden immunity in criminal cases against all officials, including senior officials.

Immunity Ratione Materiae *and International Crimes*

In the *Arrest Warrant* case, the ICJ appeared to suggest that immunity *ratione materiae* would bar the prosecution of officials or former officials for international crimes committed whilst in office. This suggestion arises *implicitly* from (i) the inclusion by the Court of a statement that a former Foreign Minister will not be immune in respect of acts committed in a private capacity whilst in office,[137] and (ii) the failure to specify that immunity in respect of official acts does not extend to acts which amount to international crimes. Unless, the ICJ took the view that international crimes are to regarded as private acts, the *obiter dictum* of the Court is to be regretted.

Despite the fact that international crimes will usually constitute official acts for the purposes of immunity *ratione materiae*, there are nevertheless good reasons for arguing that international law is now at a stage where this type of immunity does not apply in relation to such crimes.[138] There have been a significant number of national prosecutions of foreign State officials for international crimes and these decisions proceed, either implicitly or explicitly, on the basis of a lack of immunity *ratione materiae* in respect of such crimes.[139] The best explanation for the absence of immunity *ratione materiae* in cases concerning international crimes is that in such cases, the principle is necessarily in conflict with more recent rules of international law and it is immunity that must yield. In addition, developments in international law now mean that the reasons for which immunity *ratione materiae* are conferred simply do not apply to prosecutions for international crimes. As set out above, the first reason for this type of immunity is that acts done

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[136] *Al-Adsani v. United Kingdom*, n. 104 supra para. 61.
[137] *Arrest Warrant* case, n. 3 supra, para. 61.
[138] See Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", (2002) 13 *EJIL* 853, 870 *et seq*; Cassese, n. 35 supra, 267 *et seq.*; Gaeta, n. 4 supra, 981-3; Zappalà, n. 87 supra, 601-605, Wirth, n. 113 supra.
[139] See the various cases cited by Cassese, n. 138 supra, 870-1.

by officials are deemed to be acts of State for which it is the State and not the individual responsible.[140] However, this general principle does not apply to international crimes as it has been superseded by the principle that the official position of an individual does not exempt them from individual responsibility for international crimes.[141] As the Nuremberg Tribunal stated:

> "[t]he principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."[142]

Similarly, the development of the principle of universal jurisdiction in relation to prosecution of international crimes means that international law now contemplates that foreign national courts are competent to exercise jurisdiction in relation to these types of acts and removes the second reason for immunity *ratione materiae*.[143] Although, it is generally true that "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: [and that] jurisdiction does not imply absence of immunity . . .",[144] there are circumstances in which a jurisdictional rule may override any immunities that would otherwise be available. This will occur in circumstances in which there is a necessary conflict between a subsequent jurisdictional rule and a prior rule according immunity such that application of the immunity would deprive the jurisdictional rule of practically all meaning. In such circumstances, the only logical conclusion must be that a jurisdictional rule that is practically co-extensive with the circumstances in which immunity is available displaces the rule according immunity. This is the best explanation for the decision in the *Pinochet* case. As was stated by some of the judges in that case, to have accorded immunity *ratione materiae* would have necessarily been inconsistent with those provisions of the Torture Convention according universal jurisdiction for torture.[145] Since the Convention limited the offence of torture to acts committed in the exercise of official capacity, application of immunity *ratione materiae* would have deprived the universal jurisdiction provisions of that Convention of practically all meaning. Because this is an absurd result which

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[140] See the text at n. 99 supra.

[141] See Art. 7, London Agreement for the Nuremberg Tribunal (1945); Art. 6, Charter of the Tokyo Tribunal (1946); Art. 7(2), Statute of the ICTY; Art. 6(2), Statute of the ICTR; Art. 27(1) ICC Statute; and Art. 6(2), Statute of the Special Court for Sierra Leone (2002). Whilst these treaty texts apply to the respective tribunals, there is no doubt that this lack of a substantive defence is now a principle of international law applicable even with respect to domestic prosecutions. See discussion at n. 14 supra & authors cited at n. 108 supra.

[142] *In re Goering and others*, 13 ILR 203, 221 (1946).

[143] See n. 100 supra.

[144] *Arrest Warrant* case, n. 3 supra, para. 59; also *ibid.*, Separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 4.

[145] See *Pinochet* (No. 3), n. 88 supra, 114, 169-70, 178-9, 190 (per Lords Browne-Wilkinson, Saville, Millett, Phillips).

would be contrary to the objects and purpose of the treaty, it was held that immunity *ratione materiae* must be regarded as having been displaced.

To the extent that universal jurisdiction exists in respect of the international crimes within the ICC Statute, immunity *ratione materiae* cannot logically co-exist with such a grant of jurisdiction. Whilst, the crimes covered by the Statute, are not (as is the case with torture) limited to official acts, it is necessarily the case that most of these crimes will be committed by those acting in the exercise of official capacity.[146] As a matter of fact, practically all of the crimes in the ICC Statute were originally intended to cover State action and it is only more recently, that private non-State action has been brought within the umbrella of these international crimes. In the case of war crimes committed in the context of an international armed conflict (i.e, an armed conflict between States), the acts will almost by definition be committed by soldiers in a State army or other officials exercising State authority. Therefore, when, the Geneva Conventions conferred universal jurisdiction in respect of those crimes,[147] it cannot be supposed that immunity *ratione materiae* was left intact as that would have rendered the conferral of universal jurisdiction meaningless. Similarly, although the more modern definition of crimes against humanity, does not require State action, the definition that was used at Nuremberg effectively required that those crimes to be linked to an international armed conflict and thus implicitly to State action.[148] Therefore, when international law began to confer universal jurisdiction in relation to this crime, any conferral of immunity *ratione materiae* would also have necessarily been displaced.

The position was well summarised by Lord Phillips in the *Pinochet* case when he stated that:

> "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 extra-territorial 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. . . . Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity."[149]

The challenge is therefore one of ascertaining the circumstances in which universal or at least extra-territorial jurisdiction is permitted under international law in relation to national

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[146] See Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State", in Cassese, Gaeta & Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 1085 (Vol. II, 2002); Commentary of the International Law Commission to Art. 5 of the Draft Code of Crimes (1996), *Report of the International Law Commission on the work of its 48th Session*, UN Doc A/51/10, p. 31.

[147] See n.126 supra.

[148] Schabas, n.27 supra, 34-5.

prosecutions for international crimes. This task is complicated by two opposite trends which are concurrently taking place in the international community. On the one hand, the principle of universal jurisdiction is being increasingly asserted in national legislation (much of it prompted by the ICC Statute)[150] and judicial decisions.[151] On the other hand, the principle has been challenged in no less than three recent cases before the ICJ and by other States.[152] Despite the apparent contradictions in State practice, the more dominant trend is the assertion of universal jurisdiction. The challenges to the exercise of universal jurisdiction have not related to cases in which the alleged offender is ordinarily present in the territory of the forum but has been directed at those cases in which States seek to exercise universal jurisdiction *in abstentia*.[153] It may therefore be tentatively asserted that international law permits the exercise of universal jurisdiction with respect to the crimes defined by the Statute of the ICC at least in cases in which the alleged offender is present on the territory of the State seeking to exercise jurisdiction.[154] It therefore follows that immunity *ratione materiae* does not exist in relation to those crimes and that serving State officials not entitled to immunity *ratione personae* and former State officials who are present on the territory of the forum may be arrested and prosecuted for such crimes. In addition such persons, whether they are connected to ICC parties or non parties, may be arrested and surrendered to the ICC, since there are no international obligations precluding such surrender.

A final point that needs to be considered in relation to immunity *ratione materiae* is whether the position of the former diplomat is the same as that of other State officials. The position of the former diplomat deserves separate consideration because unlike the case with other State

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[149] *Pinochet* (No. 3), [redacted], 190.

[150] See for eg, Art. 7 Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999 (as amended in 2003); S. 8(b), Canadian Crimes Against Humanity and War Crimes Act 2000; S. 8(1)(c) New Zealand International Crimes and International Criminal Court Act 2000; S. 268.117 Australian Criminal Code Act 1985 (together with S. 15(4)); Art. 1, German Code of Crimes Against International Law 2002; S. 4(3)(c), South African Implementation of the Rome Statute of the international Criminal Court Act 2002. See further, the national surveys in Reydams, [redacted] & *ILA Report on Universal Jurisdiction*, [redacted].

[151] See Reydams, [redacted].

[152] See *Arrest Warrant of 11 April 2000* Case (Democratic Republic of the Congo v. Belgium), 2002; *Certain Criminal Proceedings in France* (Congo v. France), (Provisional Measures Request), 2003; and Liberia's application instituting proceedings against Sierra Leone in respect of the indictment by the Special Court for Sierra Leone of the Liberian Head of State. See ICJ Press Release 2003/26 (5 Aug. 2003). In addition, the United States has challenged the exercise of universal jurisdiction over its officials by Belgian courts. This challenge has led to the amendment of the Belgian universal jurisdiction legislation ([redacted]). See "Belgium Gives in to US on War Crimes Law", *The Guardian*, June 24 2003.

[153] See, Reydams, [redacted], 223-226. In the *Arrest Warrant* case, [redacted], whilst 3 judges [President Guillaume, Judges Rezek (paras. 9-10) & Judge Ranjeva (paras. 8-12)] were of the view that international law does not permit the exercise of universal jurisdiction *in abstentia*., another 3 judges took the opposite view (see the Joint separate opinion of Judges Higgins, Kooijmans & Buergenthal, paras. 53-59).

[154] See the authors and cases cited at [redacted]. See also, Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", (2001) 42 *Va. J.I.L.* 81; Randall, "Universal Jurisdiction Under International Law", (1988) 66 *Texas L. Rev.* 785; *ILA Report on Universal Jurisdiction*, [redacted]; *Restatement (Third) of the Foreign Relations Law of the United States*, §404 (1986).

officials, the immunity *ratione materiae* is provided in a treaty.[155] Whilst some have argued that the immunity *ratione materiae* of the diplomat is simply a reflection of the general immunity *ratione materiae* available to other State officials,[156] this view has been rejected by other authors[157] and by the German Constitutional Court.[158] This question is important for at least two reasons. First of all, the questions arises as to whether any exceptions to immunity *ratione materiae* for State officials also applies to former diplomats. Secondly, the question arises as to whether the immunity *ratione materiae* of former diplomats applies *erga omnes*, i.e in relation to States other the State to which the diplomat was accredited.

It has been argued that acts which amount to international crimes cannot amount to acts performed in the exercise of diplomatic functions because the definition of diplomatic functions in Article 3 of the VCDR limits them to acts within the limits of international law.[159] However, the international law limitation to diplomatic functions appears in only one of the five functions listed in Article 3, which itself is not a comprehensive list of such functions. More importantly, the reasons for rejecting the argument that acts contrary to international law are not official acts of other State officials apply with equal force to diplomats. The German Constitutional Court confirmed in the *Former Syrian Ambassador case* that "diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law."[160]

Because the immunity *ratione materiae* of former diplomats is treaty based, it is difficult to argue that this immunity is superseded by the emerging customary international law rule according universal jurisdiction. It would therefore appear that *the State to which a former diplomat was accredited* is bound to respect his or her immunity *ratione materiae* even if the diplomat is charged with having committed an international crime. However, the treaty rule according diplomatic immunity *ratione materiae* does not apply with respect to third States.[161] With respect to those States the position of the former diplomat is the same as that of other officials and he or she is entitled to the general immunity *ratione materiae* of State officials which derives from State

[155] Art. 39(2) VCDR.
[156] See eg, van Panhuys, n 96 supra, 1206.
[157] See Dinstein, n 95 supra, 86-89.
[158] *Former Syrian Ambassador to the German Democratic Republic case*, Case No. 2 BvR 1516/96, 115 ILR 595, 609-10, 613-4.
[159] Wirth, n 27 supra, 449.
[160] N 158 supra, 607.
[161] *Ibid.*, 610-3.

immunity.[162] Therefore, *when in a third State*, a former diplomat is not entitled to immunity *ratione materiae* with respect to prosecutions for international crimes.

5. Conclusion

The goal of those States that drafted the ICC Statute "that the most serious crimes of concern to the international community as a whole must not go unpunished" and their determination "to put an end to impunity for the perpetrators of these crimes,"[163] can only be realised to the extent that there is an attempt to bring to justice those who initiate and plan these crimes as opposed to those who merely carry them out. Since history suggests that most international crimes are carried out by State agents, a strategy of prosecuting right to the top of the planning chain will entail attempts to prosecute senior State officials. Because the ICC will in all probability have to rely on cooperation from States in order to secure the custody of persons wanted for trial, it is likely that the question of the immunity of State officials from arrest and surrender will prove to be important to the work of the Court.

When applied to criminal cases alleging the commission of international crimes, the rules of international law concerning immunity strike a fair balance between the need to ensure that there is no undue interference with the functioning of foreign States and the need to ensure that those who perpetrate international crimes are punished. Thus, very senior State officials as well as serving diplomats and officials abroad on special mission are entitled to immunity and may not be arrested or subject to prosecution whilst in office or working as part of the mission. However, the position is different for other State officials as well as former officials (irrespective of the rank they held). The development of the rule of universal jurisdiction means that all States are entitled to prosecute those persons on their territory who are accused of committing certain international crimes irrespective of the nationality of the perpetrator or the place where the crime was committed. Since this rule contemplates prosecutions of State officials, those officials that are not entitled to immunity as result of their current status (immunity *ratione personae*) are not entitled to rely on immunity in cases in which universal jurisdiction is exercised. There is therefore no immunity attaching to those acts which constitute the international crimes that are subject to universal jurisdiction.

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[162] The part of the *Former Syrian Ambassador Case*, *ibid.*, 613-4 holding that former diplomats do not possess even the immunity accorded to other former State officials is unconvincing. It is difficult to see why the immunity of the State *ratione materiae* will not apply where the official acting on behalf of the State was a former diplomat. See Fassbender, Case Comment, (1998) 92 *AJIL* 74.

[163] Preamble, ICC Statute.

The parties to the ICC Statute have gone beyond the developments in customary international law. In subjecting all State officials to possible prosecution by the ICC and explicitly waiving the international law immunities which senior officials, including heads of States, possess (Article 27), the ICC parties have agreed not only to prosecution by the ICC but also to the possibility that these senior officials may be arrested and surrendered to the ICC by other States. This conclusion has been reached despite of Article 98 of the Statute. Although, it is not easy to dismiss the argument that Article 98 preserves the international law immunities of officials of ICC parties when they are in a third State, such an interpretation must ultimately be rejected because it would render certain parts of Article 27 ineffective. Whilst the conferral of a power on States to arrest a visiting serving head of State or a serving ambassador is very far reaching, this is probably the only way in which such persons will in practice be subject to the jurisdiction of the ICC. Since the ICC Statute expresses the determination of the parties to ensure that all perpetrators of international crimes are brought to justice, the Statute must be construed in a way that permits this possibility.

Since State immunity is derived from the independence and sovereign equality of States,[164] it is appropriate that this principle is set aside where a State is acting in support of an international tribunal. In such a case, the maxim *par in parem non habet imperium* is hardly applicable since it is the ICC and not the arresting State that is ultimately seeking to exercise authority. However, it is important to emphasise that this waiver of immunity *vis-à-vis* other States only applies when there is a request for arrest and surrender by the ICC and not in relation to domestic prosecutions by other States.

It is equally important to emphasise that it is only parties to the ICC Statute that have waived the international law immunities (*ratione personae*) of their senior officials. Although, the ICC may exercise jurisdiction over nationals and officials of non-parties, nothing in the Statute can affect the immunities which the officials of non-parties would otherwise possess. Accordingly, Article 98 of the Statute represents an instruction to the Court and to ICC parties not to interfere with those officials of non-parties who ordinarily possess immunity in international law.

[164] Fox, n 6 *supra*, 30.

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REVUE BELGE DE DROIT INTERNATIONAL
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LIBRES PROPOS SUR L'ARRÊT DE LA C.I.J. DU 14 FÉVRIER 2002 DANS L'AFFAIRE RELATIVE AU *MANDAT D'ARRÊT DU 11 AVRIL 2000* (*R.D.C. C. BELGIQUE*)

PAR

Jean SALMON

PROFESSEUR ÉMÉRITE
À L'UNIVERSITÉ LIBRE DE BRUXELLES

Cet arrêt peut inciter à de nombreuses réflexions y compris sur des questions qu'il n'a pas voulu aborder, telle la compétence universelle telle qu'elle est conçue par la législation pénale belge. Nous ne traiterons cependant pas de cette question nous bornant à quelques considérations sur ce que la Cour a décidé à propos de l'immunité de juridiction pénale des ministres des affaires étrangères.

1. — La Cour tranche l'affaire en droit coutumier

Il est tout s'abord remarquable que la Cour examine la question et tranche au regard du droit international coutumier. Pour déterminer l'étendue des immunités du ministre des affaires étrangères, elle examine la nature des fonctions qu'ils exercent et elle les énumère (1). Elle souligne, à cet égard, ce qui suit :

> « La Cour fait en outre observer qu'un ministre des affaires étrangères est responsable de la conduite des relations de son État avec tous les autres États et occupe une position qui fait qu'à l'instar du chef de l'État et du chef du gouvernement, il se voit reconnaître par le droit international la qualité pour représenter son État du seul fait de l'exercice de sa fonction » (2).

La Cour confirme ainsi le rôle, à côté de l'exercice des fonctions, du concept de représentation comme fondement du principe de l'immunité de certains hauts personnages de l'État (chef de l'État, premier ministre, ministre des affaires étrangères). La Cour en conclut que

> « les fonctions d'un ministre des affaires étrangères sont telles que, pendant la durée de sa charge, il bénéficie d'une immunité de juridiction [...] d'une inviolabilité totales à l'étranger. Cette immunité et cette inviolabilité protègent l'intéressé contre tout acte d'autorité de la part d'un autre État qui ferait obstacle à l'exercice de ses fonctions » (3).

(1) Par. 53 de l'arrêt.
(2) *Ibid.*

À ce stade, il convient de mettre en lumière le rôle joué par la Cour lorsqu'il s'agit de déclarer quel est le contenu de la coutume de droit international. Il faut bien dire que tant la pratique que la doctrine sont particulièrement lacunaires sur le statut du ministre des Affaires étrangères. La Cour n'a pas pris beaucoup de peine, c'est le moins que l'on puisse dire, pour justifier le statut qu'elle décrit comme étant de droit. Pas le moindre exemple de pratique étatique ou jurisprudentielle. Ceci confirme — si besoin était — le rôle créateur de la Cour dès qu'elle s'instaure en porte-voix du droit coutumier et, par la même occasion, la protection très limitée que représente pour les tiers l'article 59 de son statut concernant l'effet relatif de la chose jugée (qui se limite d'ailleurs, en bonne doctrine, au dispositif).

Au demeurant, cette prise de position de la Cour est tout à fait en phase avec la résolution que l'Institut de droit international a adoptée à Vancouver en août 2001 sur « Les immunités de juridiction et d'exécution du chef d'État et de gouvernement en droit international ». L'article 2 de cette résolution prévoit, en effet ce qui suit :

> « En matière pénale, le chef d'État bénéficie de l'immunité de juridiction devant le tribunal d'un État étranger pour toute infraction qu'il aurait pu commettre, quelle qu'en soit la gravité ».

2. — Extension de l'immunité pénale

On notera en passant, que la Cour ne se prononce pas sur l'immunité *civile* des ministres des Affaires étrangères. Elle ne tranche que la question de l'inviolabilité et de l'immunité pénale. Mais, pour cette dernière, on peut dire qu'elle verrouille complètement la protection offerte par l'immunité.

L'immunité pénale va jouer *ratione temporis* pendant toute la durée des fonctions de manière absolue, couvrant les actes accomplis aussi bien avant l'entrée en fonctions que ceux accomplis pendant l'exercice des fonctions, que le ministre soit présent sur le territoire à titre privé ou officiel, qu'il s'agisse d'actes de nature privée ou d'actes officiels (4).

3. — Crimes de guerre ou crimes contre l'humanité

En dépit des éléments de pratique allégués par la Belgique, la Cour a estimé ne pas pouvoir déduire de « cette pratique des États l'existence en droit international coutumier, d'une exception quelconque à la règle consa-

(3) Par. 54 de l'arrêt.
(4) Par. 55 de l'arrêt.

crant l'immunité de juridiction pénale et l'inviolabilité des ministres des Affaires étrangères en exercice, lorsqu'ils sont soupçonnés d'avoir commis des crimes de guerre ou des crimes contre l'humanité » (5). Ceci ne manquera pas inaperçu et en peinera plus d'un. Mais, encore une fois, c'est la solution que celle retenue par l'Institut pour les chefs d'État et les chefs de gouvernement en exercice. L'extension de la protection aux ministres des Affaires étrangères est justifiée par ce qui a été dit plus haut de leur caractère représentatif et de la nature de leurs fonctions.

4. — *Jus cogens*

Pour ceux qui estimaient que la répression de crimes de cette nature serait considérée comme relevant du droit impératif (*jus cogens*), ce ne peut être que la désillusion. Un tel caractère n'est pas reconnu par la Cour à la répression de crimes graves contre le droit humanitaire. En effet, l'existence de cette dernière n'est pas de nature à prévaloir sur un régime d'immunité qui, pour être de droit coutumier international, n'a, de manière notoire, pas de caractère impératif puisque l'État peut toujours y renoncer. La Cour confirme, une fois de plus, que la Cour n'est pas encline à jouer le rôle de la Pythie — c'est le moins que l'on puisse dire — lorsqu'il s'agit de révéler le *jus cogens*.

Il en résulte une affirmation forte de l'immunité pénale absolue, pendant l'exercice de leurs fonctions, des hauts fonctionnaires de l'État, car ce qui vaut pour les ministres des Affaires étrangères vaut *a fortiori* pour les premiers ministres et les chefs d'État en exercice. Placée devant un choix entre deux valeurs : un souci de répression des crimes les plus graves et le maintien harmonieux des relations internationales routinières, la Cour choisit la seconde au nom du droit coutumier international dont elle est le porte-parole.

5. — Absence d'impact en droit interne des exceptions prévues pour les juridictions internationales

La Cour laisse aux États le soin de prévoir autre chose par le biais du droit conventionnel notamment lorsque sont créées des juridictions internationales. Mais il n'y a pas, en droit international coutumier, d'extension aux juridictions nationales de la règle prévue pour les juridictions internationales (6). Les règles relatives aux immunités adoptées pour les tribunaux

(5) Par. 58 de l'arrêt.
(6) Par. 58 de l'arrêt.

internationaux ne concernent pas les juridictions nationales. On notera en passant que cette position de la Cour signifie implicitement, contrairement à ce qui est parfois soutenu en doctrine, que l'immunité de juridiction n'est pas seulement affaire de juridictions nationales, mais est aussi invocable devant une juridiction internationale, quitte à ne pas être retenue devant celles-ci du fait de dispositions conventionnelles.

6. — Distinction entre compétence et immunités

D'importance aussi la distinction très nette que la Cour établit entre compétence des tribunaux et immunités :

> « la compétence n'implique pas l'absence d'immunité et l'absence d'immunité n'implique pas la compétence ». Les obligations souscrites conventionnellement par les États d'assurer la compétence de leurs juridictions aux fins de répression de divers crimes graves, ne signifie pas la disparition de l'immunité devant ces mêmes tribunaux » (7).

La Cour a estimé qu'elle n'avait plus à se prononcer sur la validité en droit international ou sur l'opposabilité à la République démocratique du Congo du principe de la compétence universelle invoqué par la Belgique, puisqu'aucune des deux parties ne lui demandaient, dans leurs dernières conclusions, de se prononcer sur ce point. Néanmoins plusieurs juges ont fait valoir, dans leurs opinions individuelles, que la Cour aurait dû se prononcer sur la compétence des tribunaux nationaux, car l'immunité n'a de sens que devant un tribunal compétent.

7. — Cas où l'immunité ne joue pas

Après avoir rappelé que l'immunité d'un individu ne l'exonère pas de sa responsabilité pénale (8), la Cour mentionne une liste des situations où l'immunité ne joue pas ou plus. Les bénéficiaires ne jouissent d'aucune immunité devant les tribunaux de leur propre pays. Ils ne bénéficient pas non plus de l'immunité devant certaines juridictions pénales internationales. Ils ne peuvent plus invoquer leur immunité lorsqu'elle est levée.

Enfin, dernière hypothèse, la situation qui se présente à l'expiration des fonctions.

(7) Par. 59 de l'arrêt.
(8) Par. 60 de l'arrêt.

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8. — L'immunité à l'expiration des fonctions

La Cour s'est exprimée comme suit :

« À condition d'être compétent selon le droit international, un tribu[nal] État peut juger un ancien ministre des affaires étrangères d'un aut[re] titre d'actes accomplis avant ou après la période pendant laquelle il [a] ses fonctions, comme au titre d'actes qui, bien qu'accomplis du[rant] période, l'ont été à titre privé » (9).

Il n'y aurait rien à redire à cette formulation si les trois derni[ères] n'avaient pas un sens très ambigu.

Ici encore, il s'agit de droit commun des immunités. On peut [se] l'article 39 § 2 de la convention de Vienne sur les relations diploma[tiques] 18 avril 1961 qui a souvent été adopté comme modèle en la mati[ère] :

« Lorsque les fonctions d'une personne bénéficiant des privilèges [et] nités prennent fin, ces privilèges et immunités cessent normal[ement] moment où cette personne quitte le pays, ou à l'expiration d'un dé[lai] nable qui lui aura été accordé à cette fin, mais ils subsistent [jusqu'au] moment, même en cas de conflit armé. Toutefois, l'immunité subsist[e] concerne les actes accomplis par cette personne dans l'exercice de ses [fonctions] comme membre de la mission ».

La formule utilisée habituellement c'est que les immunités s[ubsistent] après l'expiration des fonctions *pour les actes accomplis par cette [personne] dans l'exercice de ses fonctions*. La *ratio legis* de cette règle est sim[ple] : agent de l'État ne doit pas être poursuivi pour des actes qui engag[ent] lorsqu'ils ont été accomplis, non sa personne mais celle de l'État [pour] lequel il agissait. Cette formulation classique est, elle-même, suscep[tible] diverses interprétations. Nous en avons rendu compte dans un [article] l'*Annuaire français de droit international* en 1992. Une question [délicate] que suscite cette expression est de savoir si un acte illicite (du point [de vue] international) peut être un acte accompli dans l'exercice de la fonction [officielle]. cas particulier, la question est d'importance s'agissant de crimes de [droit] et contre l'humanité dont il peut être soutenu qu'ils ont été accomplis [non] fins de politique étatique et donc dans l'exercice de la fonction.

Quoiqu'il en soit, ce n'est pas la formulation classique que la [Cour] employée mais une formulation inverse : il n'y a pas d'immunité pour [les] actes accomplis durant la période pendant laquelle l'agent a exercé ses [fonc]tions s'il a agi « *à titre privé* » (*in a private capacity* dans le texte anglais).

Cette formulation est pire que la précédente si l'on veut exclure de l'[im]munité les crimes de guerre et contre l'humanité; car s'il est encore possible de soutenir qu'une politique de génocide, de disparition forcée ou de net[toy]age ethnique n'est pas un acte (sous-entendu normal) de la fonction étatique, il ne pourra certainement pas être soutenu qu'il s'agit d'un acte

(9) Par. 61 de l'arrêt.

accompli à titre privé, sauf à prouver que l'on se trouve devant un dangereux psychopathe, un pervers, qui a agi dans le dos des autorités de son pays!. La formulation adoptée par la Cour — dont il faut espérer qu'elle fut le fruit d'une inadvertance — est donc particulièrement regrettable. C'est l'éléphant dans le magasin de porcelaine. Il est certain, en tout état de cause, qu'elle ne représente en rien le droit coutumier international. Si elle estimait que des crimes de guerre et contre l'humanité devaient être considérés comme des actes privés, elle se devait de le dire. En s'abstenant, elle prolonge et envenime la controverse.

La formulation retenue par la Cour est d'autant plus malencontreuse que de nombreux membres de cette haute juridiction entretiennent avec l'Institut de droit international une manière d'union personnelle et que, de ce fait, ils auraient pu se souvenir que l'Institut avait *mis* au point une formule pour éviter ce problème dans sa résolution précitée de Vancouver.

Il y est dit ce qui suit à l'article 13 concernant l'ancien chef d'État :

« 1. Le chef d'État qui n'est plus en fonction ne bénéficie d'aucune inviolabilité sur le territoire d'un État étranger.

2. Il n'y bénéficie d'aucune immunité de juridiction tant en matière pénale qu'en matière civile ou administrative, sauf lorsqu'il y est assigné ou poursuivi en raison d'actes qu'il a accomplis durant ses fonctions et qui participaient de leur exercice. Il peut toutefois y être poursuivi et jugé lorsque les actes qui lui sont personnellement reprochés sont constitutifs d'un crime de droit international, lorsqu'ils ont été accomplis principalement pour satisfaire un intérêt personnel ou lorsqu'ils sont constitutifs de l'appropriation frauduleuse des avoirs ou des ressources de l'État ».

Par cette formulation, l'Institut a voulu soustraire, de manière explicite, de l'immunité du bénéficiaire, lorsqu'il n'est plus en fonction, certains actes illicites (« crimes de droit international et actes constitutifs de l'appropriation frauduleuse des avoirs ou des ressources de l'État ») et éviter ainsi les pièges de la controverse sur le point de savoir si de tels actes peuvent être considérés comme participant de l'exercice des fonctions.

À partir du moment où, la Cour, par un *obiter dictum*, entendait exposer le statut de l'immunité à l'expiration des fonctions — ce qui n'était pas directement en cause dans l'affaire dont elle était saisie — il est vraiment déplorable qu'elle ne se soit pas inspirée de la solution de l'Institut.

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session de Vancouver - 2001

Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international

(Treizième Commission, Rapporteur : M. Joe Verhoeven)

(Le texte français fait foi. Le texte anglais est une traduction.)

L'Institut de Droit international,

Rappelant le projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains et chefs d'Etats étrangers, qu'il a adopté lors de sa 11ème Session (Hambourg, 1891), ainsi que les Résolutions sur "L'immunité de juridiction et d'exécution forcée des Etats étrangers" et sur "Les aspects récents de l'immunité de juridiction et d'exécution des Etats" qu'il a adoptées respectivement lors de ses 46ème (Aix-en-Provence, 1954) et 65ème (Bâle, 1991) Sessions ;

Désireux de dissiper les incertitudes qui entourent, dans la pratique contemporaine, l'inviolabilité et l'immunité de juridiction ou d'exécution dont le chef d'Etat ou de gouvernement est en droit de se prévaloir devant les autorités d'un autre Etat ;

Affirmant qu'un traitement particulier doit être accordé au chef d'Etat ou de gouvernement, en tant que représentant de cet Etat, non pas dans son intérêt personnel, mais parce qu'il lui est nécessaire pour exercer ses fonctions et assumer ses responsabilités de manière indépendante et efficace, dans l'intérêt bien compris tant de l'Etat concerné que de la communauté internationale dans son ensemble ;

Rappelant que les immunités reconnues à un chef d'Etat ou de gouvernement n'impliquent aucunement qu'il soit en droit de ne pas respecter les règles en vigueur sur le territoire du for ;

Soulignant que ces immunités ne devraient pas lui permettre de s'approprier frauduleusement des avoirs de l'Etat qu'il représente et que tous les Etats doivent se prêter mutuellement assistance en vue de la restitution de ces avoirs à l'Etat auquel ils appartiennent, conformément aux principes rappelés par l'Institut dans la Résolution qu'il a adoptée, lors de sa Session d'Oslo (1977), sur "Les demandes fondées par une autorité étrangère ou par un organisme public étranger sur les dispositions de son droit public" ;

Adopte la Résolution suivante :

1ère partie : Le chef d'Etat en exercice

Article 1

La personne du chef d'Etat est inviolable sur le territoire d'un Etat étranger. Elle ne peut y être soumise à aucune forme d'arrestation ou de détention. Les autorités de celui-ci traitent ce chef d'Etat avec le respect qui lui est dû et prennent toutes mesures raisonnables pour empêcher qu'il soit porté atteinte à sa personne, à sa liberté ou à sa dignité.

Article 2

En matière pénale, le chef d'Etat bénéficie de l'immunité de juridiction devant le tribunal d'un Etat étranger pour toute infraction qu'il aurait pu commettre, quelle qu'en soit la gravité.

Article 3

En matière civile ou administrative, le chef d'Etat ne jouit d'aucune immunité de juridiction devant le tribunal d'un Etat étranger, sauf lorsqu'il est assigné en raison d'actes qu'il a accomplis dans l'exercice de ses fonctions officielles ; dans ce dernier cas, il ne jouit pas de l'immunité si la demande est reconventionnelle. Toutefois, aucun acte lié à l'exercice de la fonction juridictionnelle ne peut être accompli à son endroit lorsqu'il se trouve sur le territoire de cet Etat dans l'exercice de ses fonctions officielles.

Article 4

1. Les avoirs personnels du chef d'Etat qui sont localisés dans le territoire d'un autre Etat ne peuvent y être saisis ni y faire l'objet d'une quelconque mesure d'exécution forcée, sauf pour donner effet à un jugement prononcé contre lui et passé en force de chose jugée. Toutefois, ces avoirs ne peuvent faire l'objet d'aucune saisie ou mesure d'exécution lorsque ce chef d'Etat se trouve sur le territoire du for dans l'exercice de ses fonctions officielles.

2. Lorsque la légalité de l'appropriation d'un bien ou de tout autre avoir détenu par ou pour le compte d'un chef d'Etat prête sérieusement à doutes, les dispositions qui précèdent n'empêchent pas les autorités de l'Etat dans le territoire duquel ces biens ou avoirs sont localisés de prendre à leur égard les mesures provisoires jugées indispensables pour en conserver le contrôle tant que la légalité de leur appropriation n'est pas établie à suffisance de droit.

3. Conformément à leur devoir de coopération, les Etats devraient prendre toute mesure utile pour lutter contre les pratiques illicites, notamment en identifiant l'origine des dépôts et des mouvements de fonds et en fournissant toute information à leur propos.

Article 5

Les membres de la famille ou de la suite d'un chef d'Etat ne bénéficient, sauf à titre de courtoisie, d'aucune immunité devant les autorités d'un autre Etat, ce qui ne préjuge pas des immunités qui peuvent leur être reconnues à un autre titre, notamment celui de membre d'une mission spéciale, lorsqu'ils accompagnent ce chef d'Etat dans un déplacement à l'étranger.

Article 6

Les autorités de l'Etat doivent accorder au chef d'Etat étranger, dès l'instant où sa qualité leur est connue, l'inviolabilité, l'immunité de juridiction et l'immunité d'exécution auxquelles il a droit.

Article 7

1. Le chef d'Etat ne jouit plus de l'inviolabilité, de l'immunité de juridiction ou de l'immunité d'exécution qui lui sont accordées en vertu du droit international lorsque son Etat y a renoncé. Cette renonciation peut être explicite ou implicite, pourvu qu'elle soit certaine.

Il appartient au droit national de l'Etat intéressé de déterminer l'organe compétent pour décider de cette renonciation.

2. La renonciation devrait être décidée lorsque le chef d'Etat est suspecté d'avoir commis des infractions particulièrement graves ou lorsque l'exercice de ses fonctions ne paraît pas compromis par les décisions que les autorités du for seraient appelées à prendre.

Article 8

1. Les Etats peuvent par accord apporter à l'inviolabilité, à l'immunité de juridiction et à l'immunité d'exécution de leurs chefs d'Etat les dérogations qu'ils jugent opportunes.

2. Si la dérogation n'est pas explicite, il convient de présumer qu'il n'est pas dérogé à l'inviolabilité et aux immunités visées au paragraphe précédent ; l'existence et l'étendue de cette dérogation doivent être établies sans ambiguïté par toutes voies de droit.

Article 9

Rien dans la présente Résolution n'interdit à un Etat d'accorder unilatéralement, dans le respect du droit international, des immunités plus étendues au chef d'Etat étranger.

Article 10

Rien dans la présente Résolution ne préjuge du droit ou de l'obligation d'un Etat d'accorder ou de refuser l'accès ou le séjour sur son territoire à un chef d'Etat étranger.

Article 11

1. Les dispositions de la présente Résolution ne font pas obstacle :

a. aux obligations qui découlent de la Charte des Nations Unies ;

b. à celles qui résultent des statuts des tribunaux pénaux internationaux ainsi que de celui, pour les Etats qui y sont parties, de la Cour pénale internationale.

2. Les dispositions de la présente Résolution ne préjugent pas :

a. des règles déterminant la compétence du tribunal devant lequel l'immunité est soulevée ;

b. des règles relatives à la détermination des crimes de droit international ;

c. des obligations de coopération qui pèsent en ces matières sur les Etats.

3. Rien dans la présente Résolution n'implique ni ne laisse entendre qu'un chef d'Etat jouisse d'une immunité devant un tribunal international à compétence universelle ou régionale.

Article 12

La présente Résolution ne préjuge pas de l'effet de la reconnaissance ou de la non-reconnaissance d'un Etat ou d'un gouvernement étranger sur l'application de ses dispositions.

2ème Partie : L'ancien chef d'Etat

Article 13

1. Le chef d'Etat qui n'est plus en fonction ne bénéficie d'aucune inviolabilité sur le territoire d'un Etat étranger.

2. Il n'y bénéficie d'aucune immunité de juridiction tant en matière pénale qu'en matière civile ou administrative, sauf lorsqu'il y est assigné ou poursuivi en raison d'actes qu'il a accomplis durant ses fonctions et qui participaient de leur exercice. Il peut toutefois y être poursuivi et jugé lorsque les actes qui lui sont personnellement reprochés sont constitutifs d'un crime de droit international, lorsqu'ils ont été accomplis principalement pour satisfaire un intérêt personnel ou lorsqu'ils sont constitutifs de l'appropriation frauduleuse des avoirs ou des ressources de l'Etat.

3. Il n'y bénéficie d'aucune immunité d'exécution.

Article 14

L'article 4, paragraphes 2 et 3, et les articles 5 à 12 de la présente Résolution s'appliquent, *mutatis mutandis,* aux anciens chefs d'Etat dans la mesure ou ceux-ci bénéficient de l'immunité d'après l'article 13.

3ème Partie : Le chef de gouvernement

Article 15

1. Le chef de gouvernement d'un Etat étranger bénéficie de l'inviolabilité et de l'immunité de juridiction qui sont reconnues, dans la présente Résolution, au chef d'Etat. Cette disposition ne préjuge pas de l'immunité d'exécution qui pourrait lui être reconnue.

2. Le paragraphe premier ne préjuge pas des immunités qui peuvent être reconnues aux autres membres du gouvernement en raison de leurs fonctions officielles.

Article 16

Les dispositions des articles 13 et 14 sont applicables à l'ancien chef de gouvernement.

*

(26 août 2001)



LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRACTIC KAMPUCHEA.

CHAPTER I

GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, thatwere committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II

COMPETENCE

Article 2

Extraordinary Chambers shall be established in the existing court structure, namely the trial court, the appeals court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes,

international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code of Cambodia, and which were committed during the period from 17 April 1975 to 6 January 1979:

-- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
-- Torture (Article 500)
-- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 20 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

-- killing members of the group;
-- causing serious bodily or mental harm to members of the group;
-- deliberately inflicting on the group conditions of life calculated to bring
about its physical destruction in whole or in part;
-- imposing measures intended to prevent births within the group;
-- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

-- attempts to commit acts of genocide;
-- conspiracy to commit acts of genocide;
-- participation in acts of acts of genocide.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

-- murder;
-- extermination;
-- enslavement;
-- deportation;
-- imprisonment;
-- torture;
-- rape;
-- persecutions on political, racial, and religious grounds;
-- other inhuman acts.

Article 6

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Convention of 12 August 1949, such as the following acts against persons or property protected under provisions of this Convention, and which were committed during the period 17 April 1975 to 6 January 1979:

-- willful killing;
-- torture or inhumane treatment;
-- willfully causing great suffering or serious injury to body or health;
-- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
-- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
-- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
-- unlawful deportation or transfer or unlawful confinement of a civilian;
-- taking civilians as hostages.

Article7

The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8

The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979. .

CHAPTER III
COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9

The trial court shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges, with one as president, and two are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The appeals court shall be an Extraordinary Chamber shall be composed of seven judges, of whom four are Cambodian judges, with one as president, and three are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The supreme court shall be an Extraordinary Chamber composed of nine judges, of whom five are Cambodian judges, with one as president, and four are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

CHAPTER IV
APPOINTMENT OF JUDGES

Article 10

The judges of the Extraordinary Chambers shall be appointed from among the existing judges or from judges who are additionally appointed, in accordance with the existing procedures for appointment of judges, who have high moral character, a spirit of impartiality and integrity, and who are experienced, particularly in criminal law or international law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11

The Supreme Council of the Magistracy shall appoint at least twelve Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the regularly appointed Cambodian judges in case of their absence or withdrawal. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least nine individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than twelve candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint nine sitting judges and three reserve

judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of the Chamber may, on a case-by-case basis, designate , one or more reserve judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12

All judges under this law shall enjoy equal status and rank according to each level of the Extraordinary Chambers .

Each judge under this law shall be appointed for the period of these proceedings.

Article 13

Judges shall be assisted by Cambodian and international staff as needed.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary, and with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia . The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS

Article 14

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a) a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges.

b) a decision by the Extraordinary Chamber of the appeals court shall require the affirmative vote of at least five judges.

c) a decision by the Extraordinary Chamber of the supreme court shall require the affirmative vote of at least six judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the views of the majority and the minority.

Article 15

The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

CHAPTER VI
CO-PROSECUTORS

Article 16

All indictments in the Extraordinary Chambers shall be made by two prosecutors, one Cambodian and another foreign, who shall work together as Co-Prosecutors to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17

The Co-Prosecutors in the trial court shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

The Co-Prosecutors in the appeals court shall have the right to appeal the decision of the Extraordinary Chamber of the appeals court.

Article 18

The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the regularly appointed prosecutors in case of their absence or withdrawal. These reserve prosecutors may continue to perform their regular duties in their respective courts. One foreign prosecutor with the competence to appear in all three Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19

The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral

character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20

The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If necessary, and if there are lacunae in these existing procedures, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. Article 10 shall apply to the judges.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately

convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21

The Co-Prosecutors under this law shall enjoy equal status and rank according to each level of the Extraordinary Chambers .

Each Co-Prosecutor shall be appointed for the period of these proceedings.

In the event of the absence or withdrawal of the foreign Co-Prosecutor, he or she shall be replaced by the reserve Prosecutor.

Article 22

Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the Supreme Council of the Magistracy from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia . The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants and other qualified nationals of Cambodia, if necessary .

CHAPTER VII
INVESTIGATIONS

Article 23

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges in accordance with existing procedures in force. If necessary, and if there are lacunae in these existing procedures, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any source, including the Government, United Nations organs, or non-governmental organisations.

The Co-Investigating Judges shall have the power to question suspects, victims and witnesses, and to collect evidence in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel free of charge if they cannot afford it , including the right to interpretation of the proceedings into and from a language they speak and understand.

Article 25

The Co-Investigating Judges shall be appointed from among the existing judges or from judges who are additionally appointed in accordance with the existing procedures for appointment of judges, who have high moral character, a spirit of impartiality and integrity, and who are experienced in criminal investigations. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26

The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the regularly appointed Investigating Judges in case of their absence or withdrawal. The reserve Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of investigations, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one sitting Investigating Judge and one reserve Investigating Judge.

Article 27

All Investigating Judges under this law shall enjoy equal status and rank and the same terms and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence or withdrawal of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve Investigating Judge.

Article 28

The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed.

In choosing staff to serve as assistants, the Director of the Office of Administration shall comply with the provisions set forth in Article 13 of this law.

CHAPTER VIII
INDIVIDUAL RESPONSIBILITY

Article 29

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX
OFFICE OF ADMINISTRATION

Article 30

The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

The Office of Administration shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31

The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration.

The Director of the Office of Administration shall be appointed from those with significant experience in court administration, be fluent in one of the foreign languages used in the Extraordinary Chambers, and be a person of high moral character and integrity. The foreign Deputy Director shall be nominated by the Secretary-General of the United Nations and appointed by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all foreign staff, as required by the international components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources allotted against the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and foreign staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from the Cambodian civil service system and, if necessary, other qualified nationals of Cambodia.

Article 32

All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same

working conditions according to each level of the Extraordinary Chambers.

CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS

Article 33

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Suspects who have been indicted and arrested shall be brought to the trial court according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear voluntarily before the court and is responsible in taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including its armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall be not limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 34

Trials shall be public unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force.

Article 35

The accused shall be presumed innocent until proven guilty.

In determining charges against the accused, the accused shall be entitled to the following minimum guarantees, in equal fashion:

a) To be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;

b) To have adequate time to be prepared and contact their counsel;

c) To be tried without delay;

d) To defend themselves or with the assistance of their counsel;

e) To examine evidence against them and obtain the attendance and examination of evidence on their behalf under the same conditions as evidence against them;

f) To have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;

g) Not to be compelled to testify against themselves or to confess guilt.

Article 36

The Extraordinary Chamber of the appeals court shall decide the appeals from the accused persons, the victims, or by the Co-Prosecutors on the following grounds:

-- an error of fact
-- an error of law

The Extraordinary Chamber of the appeals court shall review the decision of the Extraordinary Chamber of the trial court and may affirm, reverse or modify the decision. In this case, the Extraordinary Chamber of the appeals court may apply existing procedures in force. If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Article 37

The Extraordinary Chamber of the supreme court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the appeals court. In this case, the supreme court shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the appeals court.

CHAPTER XI
PENALTIES

Article 38

All penalties shall be limited to imprisonment.

Article 39

Those who have committed crimes as provided in Articles 3, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

CHAPTER XII
AMNESTY AND PARDONS

Article 40

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law.

CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES

Article 41

The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42

1. Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

2. Foreign personnel shall be accorded, in addition:
a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.
b. immunity from taxation on salaries, allowances and emoluments paid to them by contributing States of the United Nations Trust Fund;
c. immunity from immigration restriction;
d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:
a. immunity from personal arrest or detention and from seizure of personal baggage while fulfilling his or her functions in the proceedings;
b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
c. immunity from criminal or civil jurisdiction in in respect of words spoken or written and acts performed by them in their official capacity.

4. The archives of the court, and in general all documents and materials made available, belonging to, or used by it, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV
LOCATION OF THE Extraordinary Chambers

Article 43

The Extraordinary Chambers established in the trial court, the appeals court and the supreme court shall be located in Phnom Penh.

CHAPTER XV
EXPENSES AND SALARIES

Article 44
The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, the Cambodian investigating judges and reserve investigating judges, and the Cambodian prosecutors and reserve prosecutors shall be borne by the Cambodian national budget.

2. The expenses of the foreign administrative officials and staff, the foreign judges, the foreign Co-investigating judge and the foreign Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations Trust Fund.

3. The salaries of the foreign administrative officials and staff, the foreign judges, the foreign Co-Investigating Judge and the foreign Co-Prosecutor shall be borne by the countries that contribute them at the request of the Secretary-General of the United Nations.

4. The defence counsel may receive fees for mounting the defence;

5. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by

foreign governments, international institutions, non-governmental organisations, and other persons wishing to assist the proceedings.

CHAPTER XVI
WORKING LANGUAGE

Article 45

The official working language of the Extraordinary Chambers shall be Khmer, with translations into English, French and Russian.

CHAPTER XVII
ABSENCE OF FOREIGN JUDGES OR CO-PROSECUTORS

Article 46

In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose

replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII
EXISTENCE OF THE COURT

Article 47

The Extraordinary Chambers in the courts of Cambodia shall be dissolved following the conclusion of these proceedings.

FINAL PROVISION

Article 48

This law shall be proclaimed as urgent.

This law was adopted by the National Assembly of the Kingdom of Cambodia on the _____th day of _____ in the year _____ in the _____th Session of the Second Legislature.

Phnom Penh Municipality, _____th day of _____ in the year ____.

President of the National Assembly
Norodom Ranariddh

HJ 5-Jan-:1

Authority of the Transitional Administration in East Timor (hereinafter: UNTAET Regulation No. 1999/1),

Taking into account UNTAET Regulation No. 2000/11 of 6 March 2000 on the Organisation of Courts in East Timor (hereinafter: UNTAET Regulation No. 2000/11) as amended by UNTAET Regulation No. 2000/14 of 10 May 2000 (hereinafter: UNTAET Regulation No. 2000/14),

Recalling the recommendations of the International Commission of Inquiry of East Timor in their report to the Secretary-General of January 2000,

After consultation in the National Consultative Council,

For the purpose of establishing panels with exclusive jurisdiction over serious criminal offences as referred to under Section 10.1 of UNTAET Regulation No. 2000/11,

Promulgates the following:

I. General

Section 1
Panels with Jurisdiction over Serious Criminal Offences

1.1 Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.

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1.2 Pursuant to Section 15.5 of UNTAET Regulation No. 2000/11 there shall be established panels within the Court of Appeal in Dili to hear and decide an appeal on a matter under Section 10 of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation.

1.3 The panels established pursuant to Sections 10.3 and 15.5 of UNTAET Regulation No. 2000/11 and as specified under Section 1 of the present regulation, shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

(a) Genocide;
(b) War Crimes;
(c) Crimes against Humanity;
(d) Murder;
(e) Sexual Offences; and
(f) Torture.

1.4 At any stage of the proceedings, in relation to cases of serious criminal offences listed under Section 10 (a) to (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation, a panel may have deferred to itself a case which is pending before another panel or court in East Timor.

Section 2
Jurisdiction

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

(a) the serious criminal offence at issue was committed within the territory of East Timor;
(b) the serious criminal offence was committed by an East Timorese citizen; or
(c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have

exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (ratione loci) throughout the entire territory of East Timor.

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Section 3
Applicable Law

3.1 In exercising their jurisdiction, the panels shall apply:

(a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and

(b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

3.2 In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

II. Serious Criminal Offences

Section 4
Genocide

For the purposes of the present regulation, "genocide" means any of the following acts

committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Section 5
Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as

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impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;
(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purposes of Section 5.1 of the present regulation:

(a) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(b) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(f) "Persecution" means the intentional and severe deprivation of fundamental

rights contrary to international law by reason of the identity of the group or collectivity;

(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in Section 5.1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(h) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

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5.3 For the purpose of the present regulation, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Section 6
War crimes

6.1 For the purposes of the present regulation, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will

cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural

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environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of

any kind which are
neither justified by the medical, dental or hospital treatment of the
person concerned nor carried out in his or her interest, and which cause
death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile
nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or
seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the
rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the
operations of war directed against their own country, even if they were
in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous
liquids, materials or devices;

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(xix) Employing bullets which expand or flatten easily in the human body,
such as bullets with a hard envelope which does not entirely cover the
core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare
which are of a nature to cause superfluous injury

or unnecessary
suffering or which are inherently indiscriminate in violation of the
international law of armed conflict;

(xxi) Committing outrages upon personal dignity, in particular humiliating
and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced
pregnancy, as defined in Section 5.2 (e) of the present regulation,
enforced sterilization, or any other form of sexual violence also
constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render
certain points, areas or military forces immune from military
operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units
and transport, and personnel using the distinctive emblems of the
Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by
depriving them of objects indispensable to their survival, including
wilfully impeding relief supplies as provided for under the Geneva
Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the
national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious
violations of Article 3 common to the four Geneva Conventions of 12 August 1949,
namely, any of the following acts committed against persons taking no active part in

the hostilities, including members of armed forces who have laid down their arms and
those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds,
mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating
and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without
previous judgement pronounced by a regularly constituted court,
affording all judicial guarantees which are generally recognized as
indispensable.

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(d) Section 6.1 (c) of the present regulation applies to armed conflicts not of an
international character and thus does not apply to situations of internal disturbances
and tensions, such as riots, isolated and sporadic acts of violence or other acts of a
similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts
not of an international character, within the established framework of international
law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or
against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units
and transport, and personnel using the distinctive emblems of the
Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest,

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and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Section 6.1 (e) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

6.2 Nothing in Section 6.1 (c) and (e) of the present regulation shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Section 7
Torture

7.1 For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has

committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

7.2 This Section is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

7.3 No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Section 8
Murder

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 9
Sexual Offences

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 10
Penalties

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10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals;

for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

III. General Principles of Criminal Law

Section 11
Ne bis in idem

11.1 No person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel.

11.2 No person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation for which that person has already been convicted or acquitted by a panel.

11.3 No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

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Section 12
Nullum crimen sine lege

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

Section 13
Nulla poena sine lege

A person convicted by a panel may be punished only in accordance with the present regulation.

Section 14
Individual criminal responsibility

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

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(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Section 15
Irrelevance of official capacity

15.1 The present regulation 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 the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.

15.2 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 panels from exercising its jurisdiction over such a person.

Section 16
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to

punish the perpetrators thereof.

Section 17
Statute of limitations

17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.

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Section 18
Mental element

18.1 A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

18.2 For the purposes of the present Section, a person has "intent" where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

18.3 For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Section 19
Grounds for excluding criminal responsibility

19.1 A person shall not be criminally responsible if, at the

time of that person's conduct:

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels;

(c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

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19.2 The panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it.

19.3 At trial, the panel may consider a ground for excluding criminal responsibility other than those referred to in Section 19.1 of the present regulation where such a ground is derived from applicable law. The procedures relating to the consideration of such a ground shall be provided for in an UNTAET directive.

Section 20
Mistake of fact or mistake of law

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

Section 21
Superior orders and prescription of law

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

IV. Composition of the Panels and Procedure

Section 22
Composition of the Panels

22.1 In accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

Section 23
Qualifications of Judges

23.1 The judges of the panels established within the District Court in Dili and the Court of Appeal in Dili shall be selected and appointed in accordance with UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.

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23.2 The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

V. Other Matters

Section 24
Witness Protection

24.1 The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age,

gender, health and the nature of
the crime, in particular, but not limited to, where the crime involves sexual or gender violence
or violence against children.

24.2 Procedures regarding the protection of witnesses shall be elaborated in an UNTAET
directive.

Section 25
Trust Fund

25.1 A Trust Fund may be established by decision of the Transitional Administrator in
consultation with the National Consultative Council for the benefit of victims of crimes
within the jurisdiction of the panels, and of the families of such victims.

25.2 The panels may order money and other property collected through fines, forfeiture,
foreign donors or other means to be transferred to the Trust Fund.

25.3 The Trust Fund shall be managed according to criteria to be determined by an
UNTAET directive.

Section 26
Entry into force

The present regulation shall enter into force on 6 June 2000.

Sergio Vieira de Mello

Transitional Administrator

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International Court of Justice

Press Release 2003/26

5 August 2003

Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President

THE HAGUE, 5 August 2003. By an Application filed on 4 August 2003, the Republic of Liberia seeks to bring proceedings before the International Court of Justice (ICJ) against Sierra Leone in respect of a dispute concerning the indictment and international arrest warrant of 7 March 2003, issued against Charles Ghankay Taylor, President of the Republic of Liberia, by a decision of the Special Court for Sierra Leone at Freetown.

In its Application, Liberia alleges that "[T]he international arrest warrant . . . against President Charles Ghankay Taylor, violates a fundamental principle of international law providing for immunity from criminal proceedings [in] foreign criminal jurisdictions of an incumbent Head of State as recognized by the jurisprudence of the International Court of Justice." It further maintains that "[a]n arrest warrant of a Head of State issued by a foreign jurisdiction is also inconsistent with the internationally recognised principle that foreign judicial powers or authority may not be exercised on the territory of another State." Liberia contends "that the arrest warrant of Charles Ghankay Taylor violates customary international law and impugns the honour and reputation of the Presidency and its sovereignty". It further alleges that "The Special Court cannot impose legal obligations on States that are not a party to the Agreement between Sierra Leone and the United Nations of 16 January 2002. The Special Court for Sierra Leone is not an organ of the United Nations and is not established as an international criminal court."

Liberia accordingly asks the Court:
"(a) to declare that the issue of the indictment and the arrest warrant of 7 March 2003 and its international circulation, failed to respect the immunity from a criminal jurisdiction and the inviolability of a Head of State which an incumbent President of the Republic of Liberia enjoys under international law;
(b) to order the immediate cancellation and/or withdrawal of the indictment and the arrest warrant; and the communication thereof to all authorities to whom the indictment and the warrant was circulated."

In the Application, Liberia also requests the Court to indicate provisional measures.

With regard to the Court's jurisdiction, Liberia refers to its own declaration of 1952 accepting the Court's jurisdiction as compulsory, and "[w]ith a view to Article 38 (5) of the Rules of the Court, [it] expects the Republic of Sierra Leone to accede for the purpose of this Application to the jurisdiction of the Court pursuant to Article 36 (2) of the Statute of the Court . . .".

Article 38, paragraph 5, of the Rules of Court reads as follows:
"[W]hen the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

In accordance with that Article, a copy of the Application has been transmitted to the Government of Sierra Leone. However, no action will be taken in the proceedings (in particular on the request for provisional measures) unless and until Sierra Leone consents to the Court's jurisdiction in the case.

Website of the Court: www.icj-cij.org
Information Department:
Mr. Arthur Witteveen, First Secretary of the Court (tel: + 31 70 302 23 36)
Mrs. Laurence Blairon and Mr. Boris Heim, Information Officers (tel: + 31 70 302 23 37)
E-mail address: information@icj-cij.org

2412

24 October 2003

Fact sheets

Interpol's International Notices System

- What is an International Notice?
- For what purposes are Notices used?
- Since when has Interpol been producing International Notices?
- Are Notices simply 'wanted' or 'missing person' posters?
- Do red notices have a legal status?
- Can Interpol refuse to issue a Red Notice?
- How many notices does Interpol produce in a year?
- What's the notice production process?
- How to contact the Interpol General Secretariat

What is an International Notice?

One of Interpol's most important functions is to help member countries' police communicate critical crime-related information to one another using Interpol's system of international notices. Thus, an Interpol international notice is a document used to help the world's law enforcement community exchange information about missing persons, unidentified bodies, persons who are wanted for committing serious crimes, and criminal modus operandi. In addition, notices are used by the International Tribunals for the Former Yugoslavia and Rwanda to seek persons wanted for serious violations of international human rights law.

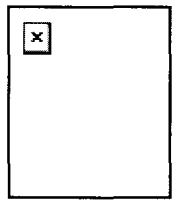
Each notice gives full details of the individual concerned and in the case of red notices, the relevant national arrest warrant or court order and specifically requests that the fugitive be traced and arrested or detained with a view to extradition.

Based on requests made by the National Central Bureaus, the General Secretariat produces notices in all four of the Organisation's official languages (English, French, Spanish and Arabic). However the General Secretariat can issue green notices on its own initiative.

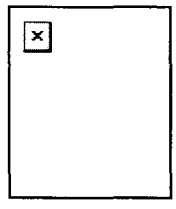
For what purposes are Notices used?

Interpol issues five types of notices:

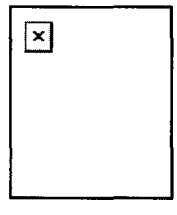
Red Notice	Yellow Notice



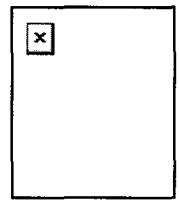
Used to seek the arrest with a view to extradition of subjects wanted and based upon an arrest warrant.



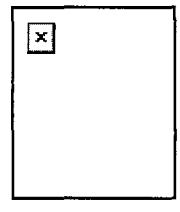
Blue Notice
Used to collect additionnal information about person identity or illegal activities related to a criminal matter. This notice is primarily used for tracing and locating offenders when the decision to extradite has not yet been made, and for locating witnesses to crimes.



Green Notice
Used to provide warnings and criminal intelligence about persons who have committed criminal offences,



Used to help locate missing persons, especially minors, or to help identify persons who are not able to identify themselves; for example, a person suffering from amnesia.



Black Notice
Used to seek the true identity of unidentified bodies.

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and are likely to repeat these crimes in other countries.

Since when has Interpol been producing International Notices?

Shortly after its inception, in 1923, Interpol began posting wanted notices in its journal, International Public Safety, and subsequently the International Criminal Police Review. In time, however, this method proved to be ineffective, and in 1946, Interpol initiated its present system. The first red notice was produced in 1946, and the first notice for a missing child was produced in 1949.

Are Notices simply 'wanted' or 'missing person'posters?

No, the printed notices form part of a vast number of investigative resources used by Interpol to assist the international law enforcement community in police matters.

It contains:

- *information on identification* (comprehensive identity particulars, physical description, photograph and fingerprints if available, any other relevant information such as occupation, languages spoken, identity document numbers, etc.)
- *judicial information* (offense with which the person is charged, references to the relevant laws under which the charge is made or conviction was obtained, the maximum penalty that has been or can be imposed, the references of the arrest or of the sentence imposed by a court, and details of the countries from which the requesting country will seek the fugitive's extradition).

Behind the notices system is a network of Interpol components working together to help the Organisation's member countries track down fugitives, find missing persons and provide alerts involving criminal activity.

Do red notices have a legal status?

The legal basis for a red notice is the arrest warrant or court order issued by the judicial authorities in the country

concerned and therefore serves the purposes of both police and judicial officials.

Many of the Organisation's member countries consider a red notice a valid request for provisional arrest, especially when the requested country is linked to the requesting country via a bilateral extradition treaty or an extradition convention. This is particularly true when the legal instruments on extradition (national law, treaty or convention) allow for the use of Interpol channels to forward such requests.

Furthermore, Interpol is recognized as an official channel for transmitting requests for provisional arrest in a number of bilateral and multilateral extradition treaties, such as the European Convention on Extradition, the Economic Community of West African States (ECOWAS) Convention on Extradition, and the United Nations Model Treaty on Extradition.

If a red notice is considered to be a valid request for provisional arrest, the appropriate judicial authority in a country receiving the notice can decide, on the basis of the information contained in the notice, that the wanted person should be provisionally arrested. In that case, the requesting country will be informed that the wanted person has been provisionally arrested and that the extradition process can be launched. It will also have an assurance that the person concerned will be detained for an adequate length of time.

If, on the other hand, a fugitive is traced in a country where a red notice is not considered to be a valid request for provisional arrest, the requesting country will have to issue a request for provisional arrest after it has been informed that the wanted person has been located. There is then an obvious risk that the individual will have time to escape to another country or that he will have to be released before extradition proceedings can be initiated. Consequently, the recognition of a red notice as a valid request for provisional arrest both simplifies and speeds up the extradition process.

Can Interpol refuse to issue a Red Notice?

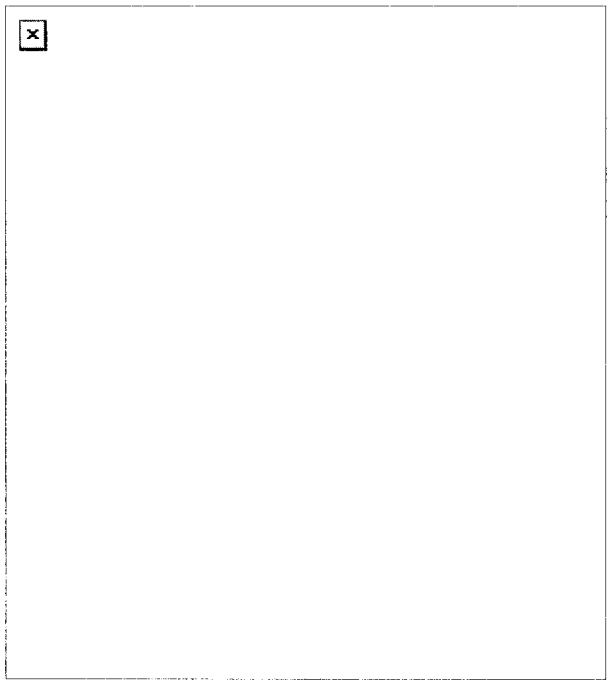
Yes, Interpol's General Secretariat has been empowered by the Organisation's General Assembly to refuse to issue a red notice when it is not satisfied that the notice contains all the information needed to formulate a valid request for provisional arrest.

The information supplied is also checked to ensure that requests for notices do not infringe upon Article 3 of Interpol's Constitution, which prevents the Organisation from undertaking any activity of a political, military, religious or racial character. This Article applies directly to,

and is one of the chief concerns, of the notices system.

How many notices does Interpol produce in a year?

As the following chart shows, the number of notices produces each year has nearly doubled in the last six years.



What's the notice production process?

Notices often concern fugitives, terrorists and violent criminals posing imminent danger to citizens throughout the world and perpetrators of other forms of serious crime of an international dimension. Therefore, notices demand an urgent response by the General Secretariat and the National Central Bureaus.

In order to minimize delays in exchanging notices information, make it less labor-intensive and generally improve efficiency, Interpol's General Secretariat introduced a reformed process for requesting and issuing notices which is more rapid and cost-efficient.

The previous paper-based system was converted into an electronic system for member countries with the necessary technical equipment. This new system allows secure, speedy and efficient means to request and receive notices in an electronic format. The faster circulation of notices from and to the National Central Bureaus coincided with the introduction at the General Secretariat of a 72-hour production deadline for high priority notices, such as notices for terrorists. This service is available on the

restricted web site and also via the new I-24/7 communication system.

All new notices are now published on Interpol's restricted-access website, this permits all member countries with electronic capability to access them directly, and to print copies they would need. In addition, it is Interpol's aim to publish all red, yellow and black notices also on Interpol's public website unless there is an expressed objection by a member country directly concerned.
Public knowledge of an arrest warrant is often of great value to law enforcement agencies in their efforts to locate important police information.

How to contact the Interpol General Secretariat

cp@interpol.int

For matters relating to specific crime cases, please contact your local police or national Interpol office.

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RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

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2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,[1] which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. *Approves* the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

3. *Recommends* that all efforts be made so that the Declaration becomes generally known.

1883rd plenary meeting,
24 October 1970.

[1] *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018).

ANNEX

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfilment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(*a*) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(*b*) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(*c*) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(*d*) The duty of States to co-operate with one another in accordance with the Charter,

(*e*) The principle of equal rights and self-determination of peoples,

(*f*) The principle of sovereign equality of States,

(*g*) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter,

so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. *Solemnly proclaims* the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(*a*) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(*b*) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(*a*) States shall co-operate with other States in the maintenance of international peace and security;

(*b*) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(*c*) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(*d*) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights

and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(*a*) To promote friendly relations and co-operation among States; and

(*b*) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(*a*) States are juridically equal;

(*b*) Each State enjoys the rights inherent in full sovereignty;

(*c*) Each State has the duty to respect the personality of other States;

(*d*) The territorial integrity and political independence of the State are inviolable;

(*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. *Declares* that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. *Declares further* that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

2634 (XXV). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-second session,[2]

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

Noting with satisfaction that at its twenty-second session the International Law Commission completed its provisional draft articles on relations between States and international organizations, continued the consideration of matters concerning the codification and progressive development of the international law relating to succession of States in respect of treaties and State responsibility and included in its programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, as recommended by the General Assembly in resolution 2501 (XXIV) of 12 November 1969,

Noting further that the International Law Commission has proposed to hold a fourteen-week session in 1971 in order to enable it to complete the second reading of the draft articles on relations between States

[2] *Ibid., Supplement No. 10* (A/8010/Rev.1).

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12

National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice

ANDREW CLAPHAM*

The International Court of Justice has jurisdiction over inter-state disputes where the states concerned consent to the Court's jurisdiction.[1] The Court can also consider requests for advisory opinions, when the request comes from an authorised UN organ or specialised agency.[2] At first sight this seems an unlikely forum for a discussion of the international law concerning individual criminal accountability and justice for crimes against humanity. But the application brought by the Democratic Republic of Congo (DRC) against Belgium on 17 Oct 2000 has prompted the Court to consider the limits of state action with regard to prosecutions in national courts for international crimes committed by foreign officials.[3]

The press release of the Court of 8 December 2000 neatly summarised the facts:

> The merits of the dispute concern an international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against Mr Yerodia Abdoulaye Ndombasi—Minister for Foreign Affairs of the DRC at the time, now Minister of Education—seeking his provisional detention pending a request for extradition to Belgium for 'serious violations of international humanitarian law'. In its request for the indication of provisional measures, the DRC had *inter alia* asked the Court to make an order for the immediate discharge of the disputed arrest warrant.[4]

* I am grateful to Théo Boutruche, graduate student at the Graduate Institute of International Studies (GIIS), Geneva, for his excellent research assistance for this chapter.

[1] Art 36 of the Statute of the International Court of Justice (1945).

[2] Art 96 of the UN Charter (1945), Arts 65 to 68 of the Statute of the International Court of Justice (1945).

[3] Application instituting proceedings available on the website of the ICJ http://www.icj-cij.org/icjwww/idocket. The Provisional Measures order of 8 Dec 2000 and the final judgment of 14 Feb 2002 are also posted at this site.

[4] Release 2000/40 of 8 Dec 2000.

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The Court declined to indicate provisional measures.[5] The Court focused on the fact that Mr Yerodia Ndombasi (Yerodia) was no longer Minister for Foreign Affairs after the first day of oral pleadings and had been given the post of Minister of Education. The Court stated that this involved less foreign travel and 'it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need be protected by the indication of provisional measures'.[6] However the Order of the Court stated that it was 'desirable that the issues before the Court should be determined as soon as possible' and that 'it is therefore appropriate to ensure that a decision on the Congo's application be reached with all expedition'.[7]

The eventual final judgment on the merits held that Belgium had violated the rights of the DRC under international law. The Court held that a foreign minister enjoys inviolability of the person and complete immunity from prosecution by the authorities of any other state. Belgium was required by the ICJ to cancel the arrest warrant 'by means of its own choosing' and 'so inform the authorities to whom that warrant was circulated'.[8]

What I propose to do in this short contribution is to use the litigation as a springboard to examine three issues of international law which arise in this context. First, is there a violation of the sovereignty of a state such as the DRC as a result of the issue of an international arrest warrant for international crimes against a foreign minister? Secondly, does international law demand immunity from criminal jurisdiction for an acting foreign minister accused of international crimes? Thirdly, what is the legitimate scope of the principle of universal jurisdiction?

The purpose of this chapter is first, to shed some light on the principles of international law involved, and, second, to suggest ways of resolving some of the apparent contradictions. International law is more than a language used by states to make their claims and counter-claims. It comprises principles and rules which permit and prohibit certain forms of action. The international legal order, if it is to command respect and co-operation, must reflect a serious attempt to combine these rules into a system which works in the common interest. One way to ensure its credibility in this context is to suggest a framework which is not only principled but coherent.

[5] On 8 Dec 2000 the Court unanimously rejected the request of Belgium that the case be removed from the Court's List, and found by 15 votes to two that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power to indicate provisional measures, as the DRC had wished. Considerations of space preclude an examination of the questions relating to the preliminary measures requested or the complex questions of the ICJs jurisdiction related to this application. The reader is referred to the oral pleadings of 20–32 Nov 2000 and the order of the Court of 8 Dec 2000 available on the Court's website http://www.icj-cij.org/icjwww/idocket

[6] Order of the Court, 8 Dec 2000, para 72.

[7] Order of the Court, 8 Dec 2000, para 76.

[8] Judgment, 14 Feb 2002, para 78 (3) by 10 votes to six.

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SOVEREIGNTY

The DRC claimed that the arrest warrant issued by the Belgian judge, Judge Vandermeersch, with regard to Mr Yerodia, for grave breaches of international humanitarian law and crimes against humanity, violated the principle that no state can exercise its power on the territory of another state. They also claimed that the arrest warrant violated the principle of the sovereign equality of states.

The claim of a violation of sovereignty suggested that the issuance of an arrest warrant infringed on the sovereignty of all states, and in particular the DRC. It somehow suggested that the request created an obligation on those states which receive the request to apply the law of the issuing state in contravention of their own law and applicable international law.

First, let us look at the effect of the warrant on the sovereignty of DRC. Sovereignty is often seen as an overarching notion from which a number of international law rules flow.[9] Sovereignty as such is a changing notion which adjusts to the developing nature of international law. The specific rule of public international law which guarantees the *sovereign equality* of states is not usually considered a *jus cogens* norm,[10] and it too adapts to the evolution of international law. [11]

[9] A Cassese, *International Law in a Divided World* (Oxford University Press, Oxford, 1986), 129.

[10] *Ibid*, 131. See also A Bleckmann, 'Article 2 (1) of the UN Charter', in B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford/New York, 1995), 89. Interestingly the International Tribunal for the former Yugoslavia has commented that the fact that a crime such as torture has achieved the status of a *jus cogens* norm means that not only are states entitled to prosecute individuals for this crime without the need to show a link to the state in question, but also that no rule of international law could undermine the rights of states to prosecute this crime. '153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.... [footnote omitted] The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.... 156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. ... 157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.' Judgment 10 Dec 1998, IT9517, *Furundžija*. This issue was not addressed on appeal, see Appeal Judgment 21 July 2000, IT-95-17/1-A.

[11] See O Schachter, 'Sovereignty – Then and Now', in R St. John MacDonald, *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993), 671–88 at 679:

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According to Antonio Cassese sovereignty grants each state a set of powers relating to its jurisdiction (we might call this the internal dimension).[12] Sovereignty also protects states from inadmissible intervention by other states in their internal affairs, it gives rise to the rule that individuals representing the state in their official capacity create obligations for the state and are not usually held individually accountable (the exception being where international crimes are at issue), and, lastly, sovereignty suggests that one state can not judge another state for acts performed in their 'sovereign capacity'. Cassese is then careful to state that there is an exception to this rule with regard to 'international crimes'.[13]

Sovereignty and Non-Intervention

With regard to the first issue of intervention, the parameters of what is considered legal action and illegal intervention, are changing. The UN General Assembly's Declaration on Friendly Relations (1970) states in two key paragraphs:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.[14]

'Like other abstract concepts of law and politics, it [sovereignty] cannot be reasonably applied without considering competing principles and the particular contextual circumstances.'

[12] Cassese, *International Law in a Divided World*, 130.

[13] *Ibid*: 'individuals can not be brought to trial and punished by foreign States for any such official act if the latter proves contrary to international law (the exceptions being international crimes)'. For the crimes to be included under international crimes in this context, see A Cassese, *International Law* (Oxford University Press, Oxford, 2001), 246. See also A Cassese and A Clapham, 'International Law', in J Krieger (ed), *The Oxford Companion to Politics of the World* 2nd edn, (Oxford University Press, Oxford, 2001), 408–11 at 409: 'at least with respect to some of those values (torture, the prohibition of crimes against humanity, in particular genocide), international rules now provide for the personal criminal responsibility of the state officials who engage in such prohibited acts, in addition of course, to the traditional state responsibility which will be triggered where the acts of the individual can be attributed to the state'. The articles on State Responsibility adopted by the International Law Commission in 2001, and annexed to General Assembly Resolution, A/Res/56/83, adopted 12 Dec 2001, specifically provide for the possibility of the same act giving rise to both individual and state responsibility under international law. See Art 58: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.'

[14] Declaration of Principles of International Law concerning Friendly Relations and

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It remains clear under public international law today that 'compulsion (force arrest, seizure, search and other coercive measures within the territory of another state) is illicit, unless expressly legitimated under international law'.[15] In the present context the non-intervention principle is usually considered to cover 'intervention by physical means, in particular the use of force, which leads to concrete violations of the territorial integrity of other states'.[16] This rule would of course forbid sending law enforcement officials to another state to exercise executive jurisdiction over an individual and execute an arrest in that other state.[17] Such action is not permitted under international law, unless the state where the arrest was taking place consented to such an exercise of executive jurisdiction.[18]

But we cannot deduce from this prohibition on extraterritorial *executive* jurisdiction (jurisdiction to enforce) an absolute prohibition on extraterritorial *legislative* jurisdiction (jurisdiction to prescribe).[19] The two issues are not the same and any prohibition on legislating against extraterritorial crimes will have to come from general international law and be coherent with other obligations under international law. This distinction between legislative jurisdiction and executive jurisdiction was approved by the Select Committee of Experts on

Co-operation between States adopted by consensus on 24 Oct 1970, Resolution 2625 (XXV). See also the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA Resolution of 9 Dec 1981 (which did not enjoy the same degree of consensus).

[15] Extraterritorial criminal jurisdiction European Committee on Crime Problems, Council of Europe, Strasbourg 1989, ch III 'The Relationship between public international law and the law of criminal jurisdiction' at 18 in the French text version 'Competence extraterritoriale en matière pénale'.

[16] *Ibid* at 22 of the French version.

[17] 'The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter. Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.' I Brownlie, *Principles of Public International Law,* 5th edn (Oxford University Press, Oxford, 1998), 310.

[18] See above n 16 at 18 of the French version: 'On peut, dès le départ, faire l'observation suivante: le droit international interdit l'exercice de la compétence exécutive sur le territoire d'un autre Etat, si ce n'est avec le consentement de l'Etat concerné.'

[19] See G Abi-Saab, *Cours Général de Droit International Public*, vol 207 *RCADI* (Nijhoff, The Hague, 1996), 73–74: 'A cet égard on peut distinguer, avec les auteurs anglais, entre deux types de pouvoirs juridques, le pouvoir d'édicter ou de prescrire (par une législation ou par une décision spécifique) (*jurisdiction to prescribe*) et le pouvoir d'exécuter (*jurisdiction to enforce*). Le souverain territorial peut évidemment exercer les deux types de pouvoirs. Mais alors que l'exercice du pouvoir d'exécuter est strictement limité à l'assise territoriale de l'Etat, qui ne peut par conséquence souffrir aucun exercice de pouvoir par un autre Etat, l'exercice du pouvoir d'édicter peut déployer ses effets au-delà de l'assise territoriale de l'Etat, et par conséquent sur le territoire d'un autre Etat. La raison en est que l'exercice du pouvoir d'exécuter comporte la possibilité du recours à la force légale, à l'exécution forcée, qui est la forme ultime de l'exercice de la puissance publique.... En revanche, les effets de l'exercice du pouvoir d'édicter ne sont pas en eux-mêmes exécutoires, de sorte que quand ils touchents des personnes, des biens ou des relations juridiques localisées sur le territoire d'un autre Etat, leur aboutissement passe nécessairement par la reconnaissance de ces effets et ou par l'exercice par l'Etat territorial de son pouvoir d'exécuter; ce que cet Etat choisira de faire en cas d'accord, parce que le droit international général lui en impose l'obligation, ou par simple courtoisie (*comitas gentium*).' (footnote omitted)

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Extraterritorial Jurisdiction set up by the Council of Europe's European Committee on Crime Problems in 1984:

> Legislative jurisdiction seldom performs its function in isolation. Usually jurisdiction claimed by the legislature has to be implemented through the exercise of judicial and executive jurisdiction. This is not to say that the scope of established legislative jurisdiction may not be broader than the scope of executive jurisdiction. It is perfectly possible to conceive of the enforcement of legislative jurisdiction either through the exercise of executive jurisdiction by another state, or with respect to persons who have come or been brought within the reach of a state's executive jurisdiction. This should not, however, be interpreted as meaning that the scope of legislative jurisdiction is in principle without territorial limits.[20]

What these limits are remains controversial. Let us examine in more detail the contours of legislative jurisdiction under international law. What seems required by the international legal order is that where international law has created an individual crime it makes no sense to say that states can not legislate against that crime even when it is committed abroad. Where a state has legislated to ensure that it has jurisdiction to prosecute and punish at home international crimes committed abroad this can not, as such, be considered a violation of the non-intervention principle. Where the crimes at issue are international crimes such as those contained in the Geneva Conventions of 1949 these crimes are crimes under customary international law and would be international crimes wheresoever committed. If there are limits to the legislative jurisdiction of states to enact criminal legislation for acts committed abroad they would not relate to international crimes under general international law.[21] They could only relate to crimes which international law had not specified as giving rise to individual criminal liability under international law.

Issues of non-retroactivity and unpredictability would be involved here and the individual would have the right not to be tried for an 'offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed'.[22] But where general international law has prohibited certain conduct and made this a crime for which individuals are accountable under international law there would seem to be no international law prohibition on legislative jurisdiction over such extraterritorial international crimes.[23]

[20] See above n 16 at 19 of the French version.

[21] For Georges and Rosemary Abi-Saab, both grave breaches and war crimes (which have been criminalised under international law) give rise to universal jurisdiction. The difference being for them that the grave breaches regime is more stringent in that it demands that states extradite or prosecute, whilst international war crimes merely give rise to a permissive jurisdiction. They suggest that a minority opinion amongst writers would extend the obligation to extradite or punish to include war crimes. G Abi-Saab and R Abi-Saab 'Les crimes de guerre', in H Ascensio, E Decaux and A Pellet (eds), *Droit international pénal* (Pedone, Paris, 2000), ch 21, paras 54–5.

[22] Universal Declaration of Human Rights 1948, Art 11(2).

[23] The *Lotus* case, Judgment No 9, PCIJ [1927] is usually cited in this context as the Permanent Court of International Justice seems to have gone out of its way to stress that rather than extraterri-

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As already stated, the strict rule of non-intervention through *executive* jurisdiction abroad is violated for example by sending officers to physically arrest someone outside the territory. But we are suggesting here that there is no rule of public international law which prevents a state from exercising its sovereignty by *legislating* for jurisdiction over international crimes committed abroad. The issue would be more complicated if a state sought to legislate for crimes committed abroad by foreigners which were not considered international crimes under general international law.[24] For present purposes we might confine our discussion to international crimes at the heart of the allegations in the *DRC v Belgium* case: grave breaches of the 1949 Geneva Conventions, war crimes under international law, and crimes against humanity.[25] For such international crimes it must be understood that all states enjoy the right to legislate against them.

We should now examine whether the actual *issuance of a warrant for arrest* might constitute an interference in the internal affairs of another state. We saw above that the essence of the non-interference rule is that it prohibits the coercion of one state by another state. Of course this could in some circumstance occur without the physical invasion of one state by officers from another.

torial jurisdiction being a violation of sovereignty it was in fact a legitimate privilege of sovereignty unless one could point to an international rule which prohibited such an exercise of criminal jurisdiction. It is worth citing the relevant paragraphs in full: 'Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention' (at p. 18). Here the Court is talking about what we have described above as 'executive competence'. One cannot deduce from this that a state has no power to legislate for criminal acts committed abroad by non-nationals and with no link to the territory. This becomes clear as the judgment continues: 'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside the territory, and if, as an exception to the general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases every State remains free to adopt the principles which it regards as best and most suitable.... In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty' (pp 18–19). So in fact the assertions of legislative jurisdiction/competence are an expression of sovereignty rather than an infringement of it. The Court summarises its approach later on: 'The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty' (p 20).

[24] For a discussion of the legality of prosecutions against nationals from non-parties to international criminal law treaties see MP Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position', vol 64 (2001), 1 *Law and Contemporary Problems*, 98–103, and MP Scharf, 'Applicability of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', vol 35 (2001), 2 *New England Law Review* 363–82.

[25] Genocide was not an issue in this particular case. In other cases the question of a waiver of immunity through ratification of the Genocide Convention could arise.

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Georges Abi-Saab suggests that an act could violate the principle of non-interference in two different categories of cases.[26] First, if 'it carries or constitutes in itself a negation of the sovereignty of the other State'. This would be so for example 'where a State exercises acts of public authority or enforcement such as the arrest of certain persons on the territory of another State without its consent, as if the latter did not exist as a sovereign State'.[27] Secondly, he suggests that it would be illegal for a state to act in a situation where that act has the effect of 'bending the will of the other State in order to force it to act in a certain manner against its will'.

It is not obvious that issuing a warrant of arrest falls within these categories. Such a warrant is in effect a request for other states to co-operate and to act according to their own national law. There is no order, no obligation, and no imposition of one national legal system on another state. Even if the crime for which the warrant had been issued could not be punished under the law of the requested state then the warrant *on its own* could not be described as amounting to an act which has the effect of *bending the will* of a state and *coercing* it to act. To constitute an unlawful interference the concern would have to be coupled with some sort of sanctions capable of forcing a state to abandon its political, economic or cultural elements.[28] It is not even the use of sanctions, such as the termination of assistance or a trade embargo, which would be itself an illegal interference, but rather their effect in extreme circumstances.[29]

[26] 'Some Thoughts on the Principle of Non-Intervention', in K Wellens (ed) *International Law: Theory and Practice* (1998), 228.

[27] *Ibid*. The other example he gives in this context may be 'the "premature recognition" of a secessionist State, which by definition, signifies the negation of the sovereignty of the State on that part of the territory that attempts to secede'. This is a reference to the recognition by the United States of the Panamanian secession from Colombia in 1903. See G Abi-Saab 'Cours Général de Droit International Public', *Recueil des cours*, 207 (1996), 382.

[28] See General Assembly Resolutions A/RES/2131 (XX) and A/RES/36/103. However these resolutions are seen as enjoying less authority than the comprehensive Friendly Relations Declaration, A/RES/2625 (XXV) of 24 Oct 1970 which details the legal principles involved. This Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations explains the non-intervention principle in the following way: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.... Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.' In the context of the 'principle of the sovereign equality of States' the Declaration specifies that sovereign equality included the following elements: '(a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right to freely choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.'

[29] In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Rep (1986) at 14, the International Court of Justice considered the cessation of economic aid in

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Philippe Cahier draws a distinction in this context between the non-renewal of a trade agreement and the asphyxiation of a state.[30] As long as alternatives exist for the state only the latter extreme result is an illegal intervention.

The legal effects of such a request for arrest are exemplified in the European Convention on Extradition of 1957 which is of interest in the current context as it is in effect for Belgium since November 1997 with respect to the other contracting parties. Article 16(1) reads: 'In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested party shall decide the matter in accordance with its law.' The Explanatory Memorandum on this paragraph reads: 'Paragraph 1 permits the requesting Party to request provisional arrest and it is for the requested Party alone to decide on this request'.

With regard to international arrest warrants, it is considered that any extra-territorial effects deriving from their execution is due not to any mandatory character of the warrant, but to the existence of a new source of obligation either under the municipal law of the responding state or under international law.[31] Whether or not the crime is one of universal jurisdiction is not relevant in this regard. It is also understood, that the requesting Party is the sole judge of the 'urgency' justifying the request for provisional arrest. It seems clear that a request for provisional arrest leaves the requested state to apply its own law, use its own forces for the execution of the warrant, and can in no way be seen as a form of exercise of jurisdiction to enforce by the requesting state. Nor is it a form of interference against the personality of the state or a threat to the development of a state's political, economic and cultural systems.[32]

To the extent that this issue has been addressed in the doctrine the answer seems clear. According to Rafaëlle Maison even where the suspect is not on the territory of the state concerned, judges may often have to start to look for a suspect abroad and such action could not be prohibited by a rule of international law. Most of the time it will be carried out in the context of international

April 1981 to Nicaragua from the United States, the 90% reduction in the sugar quota for United States imports from Nicaragua in 1981, and the trade embargo adopted on May 1985. The Court rejected the argument that cumulatively these actions resulted in a systematic violation of the principle of non-intervention (at paras 244 and 245). Of course the Court was not concerned with whether any of these actions might have violated treaty obligations under economic instruments. The focus was on the question of intervention and the facts of the case: 'At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention' (para 245).

[30] P Cahier, *Changements et Continuité du Droit International*, vol 195 *RCADI* (Nijhoff, Dordrecht, 1992), 41.

[31] Under the heading 'Mandat d'arrêt dit international', Huet quotes from a French decision '"si donc un mandat d'arrêt est mis à exécution hors des frontières, ce ne peut être en vertu de sa propre force exécutoire, mais d'une autre force qui procède d'une véritable novation, et qui n'entraîne pas mis en application, dès ce moment, des dispositions du Code de procédure pénale"; cette solution découle de Crim., 29 juin 1967, JCP, 1967, II, 1532'. A Huet, *Droit pénal international* (PUF, Paris, 1994), 405.

[32] See Friendly Relations Declaration, cited above.

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judicial co-operation treaties. Such action does not in any way imply a violation of the sovereignty of the state where the suspect is found. [33]

The judgement of the Court seems to interpret sovereignty as, not only encompassing the rights and duties of states under international law, but also assuming that one of the duties international law places on states is a duty to respect the dignity of other states. The judgement seems to respond to the plaintiff state's complaint that there had been an attack on the dignity of the state[34] ('a serious insult to the honour of the Democratic Republic of Congo'[35]). The judgement assumes that there is another duty on states not to hinder the ability of other states to carry out activity in the field of international relations. Claims that there were competing values to be taken into consideration, such as the struggle to prevent and punish attacks on individual human dignity, were not given any priority or recognition by the Court.

In the end the debate turns on what one chooses to understand by the term sovereignty and who should be protected. New understandings of sovereignty are emerging which may in the end reverse the priority currently accorded to the rights of the state to respect over the claims of human beings to their rights to be treated with dignity. The recent report of the International Commission on Intervention and State Sovereignty has discerned shifting meanings in this context. They propose that sovereignty be considered as responsibility:

> Thinking of sovereignty as responsibility, in a way that is being increasingly recognised in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and

[33] 'En ce qui concerne l'instruction, le juge peut affirmer sa compétence pour mener des enquêtes en l'absence de l'arrestation du suspect, en l'absence même d'indices de sa présence sur le territoire national. Les "recherches" à l'étranger ne sont pas non plus exclues dans la mesure où elles sont le plus souvent effectuées dans le cadre d'une coopération répressive dont les moyens sont définis par des Conventions internationales: *elles n'impliquent en aucune manière la violation de la souveraineté de l'Etat sur le territoire duquel se trouve le suspect.* Toutefois, si on l'admet la valeur normative supérieure de certains obligations posées par le droit international humanitaire, il serait possible de déroger aux normes de coopération classiques.' R Maison, 'Les premiers cas d'application des dispositions pénales des conventions de Genève par les juridictions internes', (1995), vol 6 *European Journal of International Law*, 260–73 at 271–2.

[34] See the separate opinion of Judge Bula-Bula, the ad hoc judge appointed by DRC at paras 24, 25 and 85 where he refers to 'La dignité du peuple congolais'. Compare the approach of Judge Van den Wyngaert, ad hoc judge appointed by Belgium at p. 19 of her dissenting opinion: 'In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment, para 42) was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it".' [Footnote 88 in original reads: 'H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", *BYBIL*, 1951, 232.']

[35] Oral pleadings, Prof. Rigaux, CR 2001/6, 16 Oct 2001, at 19.

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> omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security. (ICISS 2001, p 12)

UN Secretary-General Kofi Annan has presented the issue more prescriptively: 'National sovereignty offers vital protection to small and weak States, but it should not be a shield for crimes against humanity.'[36]

By way of interim conclusion, the rule that there should be no interference in state sovereignty simply begs the question: what are the rights and duties associated with sovereignty? The majority of the judges in the *DRC v Belgium* case have assumed that the international rules which have protected the dignity of states have not been supplanted by international developments designed to protect the dignity and worth of the human person.

Turning to the second element of sovereignty mentioned above, that related to the sovereign state immunity of states for official acts committed by individuals, we can first of all distinguish this rule of functional immunity, or immunity *ratione materiae*, from personal immunity or immunity *ratione personae*. Functional immunity stems from the sovereignty principle outlined above.

Functional Immunity of State Officials

States enjoy sovereign state immunity before the courts of other states for official acts committed by individuals. This is a principle which stems from the concept of sovereignty. According to Antonio Cassese, sovereignty grants each state a set of powers relating to its jurisdiction; sovereignty also protects states from inadmissible intervention by other states in their internal affairs, and it gives rise to the rule that individuals representing the state in their official capacity create obligations for the state and are not usually held individually accountable (an assumed exception being where international crimes are at issue).[37] Sovereignty suggests that one state cannot judge another state for acts performed in its 'sovereign capacity'. As already stated, Cassese has been careful to state that there is an exception to this rule with regard to 'international crimes'. He has stated clearly that there is no immunity for state officials from the civil or criminal jurisdiction of foreign states for international crimes (including crimes against humanity and war crimes).[38] For many lawyers such

[36] Secretary-General Statement to the General Assembly on the presentation of the Millennium Report, New York, 3 Apr 2000, SG/SM/7343, GA/9705. See also Kofi Annan, 'Two concepts of sovereignty', *Economist*, 18 Sept 1999, and 'The legitimacy to intervene: International action to uphold human rights requires a new understanding of state and individual sovereignty', *Financial Times*, 10 Jan 2000. The SG is addressing the issue of 'intervention to protect civilians from wholesale slaughter' and is aware that he is suggesting a paradigm shift in thinking about sovereignty: 'Any such evolution in our understanding of state sovereignty and individual sovereignty will, in some quarters, be met with distrust, scepticism, even hostility. But it is an evolution we should welcome.' *Financial Times ibid.*

[37] Cassese, *International Law in a Divided World*, 130.

[38] Cassese, *International Law*, 90, 246.

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crimes can hardly be 'official' acts under international law. The relevant working group of the International Law Commission put the point as follows:

> Although the judgement of the House of Lords in that case [Pinochet] only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.[39]

After a careful review of provisions in recent instruments for the prosecution of international crimes, Zappalà concludes that these provisions 'are generally considered to have confirmed the existence, under customary international law, of an exception to functional immunity for those state officials who may be responsible for international crimes'.[40] The evidence which points to such a conclusion is recalled in the *DRC v Belgium* case in the separate opinion of Judges Higgins, Kooijmans and Buergenthal (at para 82). The joint separate opinion refers to the arguments developed by Bianchi that legal interpretation demands that we aim to achieve the values the legal system is supposed to be protecting.[41] There is no particular reason to suppose that the Court has refined or altered this understanding of the functional immunity rule. The actual judgment of the Court is confined to the absolute immunity of only one type of official: foreign ministers in office. The judgment does however allude to an exception to this immunity rule simply stating that a *former* foreign minister may be tried in the courts of another state for 'acts committed during that period of office in a private capacity' (at para 61). There is no explanation as to what sort of crimes are committed in a 'private capacity' but it seems unlikely that the Court wants to protect those accused of the most serious crimes under international law. It would be odd if a former minister could be tried for something clearly private, such as shop-lifting during an official visit, but not tried for war crimes involving grave breaches of the Geneva Conventions. It is worth recalling a statement of the ILC from 1996:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes committed covered by the Code [of Crimes against the Peace

[39] Report of the work of the ILC, UN Doc A./54/10, 1999, report of the Working Group on Jurisdictional Immunities of States and their Property, appendix to the Report of the Working Group, at para 12. 'The Working Group was composed as follows: Mr G Hafner (Chairman), Mr C Yamada (Rapporteur), Mr H Al-Baharna, Mr I Brownlie, Mr E Candioti, Mr J Crawford, Mr C Dugard, Mr N Elaraby, Mr G Gaja, Mr Q He, Mr M Kamto, Mr I Lukashuk, Mr T Melescanu, Mr P Rao, Mr B Sepúlveda, Mr P Tomka and Mr R Rosenstock (ex officio)'.

[40] A Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French *Cour de Cassation*', (2001), 12 *European Journal of International Law*, 595–612 at 604.

[41] A Bianchi, 'Denying State Immunity to Violators of Human Rights', (1994), 46 *Austrian Journal of Public International Law* 195–229.

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> and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[42]

Furthermore, the sovereign state immunity rule has been said to apply when proceedings before a court have been instituted 'against one of the representatives of that State in respect of an act performed in his capacity as a representative'.[43] This is quite restrictive as the individual must have been acting as a representative.[44] No similar provision appears in the European Convention on State Immunity, and the final report of the International Law Association on state immunity is clear that the proposed draft Convention:

> is not intended to cover individuals, because the reasons underlying the concept of state immunity do not apply. Court action against an individual (who would then be liable with his personal estate only) does not implicate sovereignty or sovereign equality. The formal approach as applied in the distinction between diplomatic and consular immunity and state immunity is to be applied generally, ie the problem of state immunity arises only if a state is named as a party to a suit. (ILA 1994: p 466).

IMMUNITY

Sovereignty was at the heart of the arguments before the Court. But the judgment focuses in on the derivative concept of personal immunity of foreign ministers. In

[42] ILC Commentary to the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the ILC in 1996, A/48/10, commentary to Art 7 at para (1).

[43] Draft Art 7(3) in the International Law Commission's draft articles on jurisdictional immunities of States and their property, text adopted by the Commission on first reading, *Yearbook of the ILC* (1986), Volume II Part Two: 'In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.' (at 9). See also the European Convention on State Immunity, Art 27: '1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions. 2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority *(acta jure imperii)*. 3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.' The implication in the Convention is that individual immunity should be dealt with through the law of diplomatic immunity see Art 32. In the ILC commentary to draft Art 7(3), immunity *ratione personae* is discussed with regard to personal sovereigns, ambassadors and diplomatic agents (at 105).

[44] In the ILC Commentary to draft Art 3 in addition to head of state the commentary mentions: heads of government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, acting in their official capacities. *Ibid* at 14.

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the actual judgment of 14 February 2002 the Court held, by 13 votes to three, that issuing the arrest warrant, and its international circulation, constituted violations of a legal obligation by Belgium in that these acts failed to respect the immunity and inviolability of the incumbent Minister of Foreign Affairs.

Foreign Ministerial Immunity

The Court's judgment does not focus on the general rules on functional immunity derived from state sovereignty, discussed above, but rather on what could be termed: an almost absolute personal immunity from the actions of foreign states for foreign ministers during their period in office. The Court stressed that the immunities accorded to foreign ministers were for the effective performance of their functions. It recalled the powers of a foreign minister under the law of treaties, and it stressed the fact that such a minister is recognised in customary international law as the representative of the state without the need for any recognition by other states through letters of credence. From this the Court deduces an absolute immunity for foreign ministers in office, although the judgment fails to offer any obvious evidence of the familiar requirements of state practice or *opinio juris* to confirm the existence of such a rule in contemporary international law. Three aspects of the various arguments put before the Court deserve a brief mention here.

Personal Immunity in the Face of Accusations of International Crimes

First, the judgment did not accept the argument that this presumption of immunity had to give way where the foreign minister is accused of international crimes. The Court held there was absolute immunity before foreign courts while the minister held office. The Court stated that it had:

> carefully examined State practice including national legislation and those few decisions of national Higher Courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. (para 58)

The decisions which the Court alluded to were not concerned with incumbent Ministers of Foreign Affairs. In one sense then it is not surprising that they did not therefore supply the evidence for the customary rule. Nevertheless, the reasoning in those decisions can in fact be read as suggesting that the national judges in these cases did indeed think there was a rule of customary international law that would oblige them to ignore a claim of ministerial personal immunity when faced with a case concerning international crimes, such as torture, war crimes or crimes against humanity.

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In the *Pinochet* case the national legislation covered sovereign or other heads of state as well as former heads of state by analogy with former ambassadors. The issue of foreign ministers was not addressed. On the other hand, considerable attention was paid to the internationalization of the crime of torture and crimes against humanity in order to determine that: certain international crimes could not be considered part of the functions of a head of state for the purposes of functional immunity of former heads of state.[45] To the extent that an incumbent head of state was considered to enjoy immunity this was primarily due to judicial recognition of the existence of clear national legislation in this regard rather than any detailed examination of the customary international law on this point.[46]

In the *Qaddafi* case, had absolute immunity been perceived to attach to a head of state, the Cour de Cassation would presumably have been free to simply dismiss the case on those grounds. However the reasoning was otherwise. The Cour de Cassation dismissed the case on the grounds that the crime of terrorism was not yet part of the customary international law exceptions to immunity ('alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercise'[47]). The implication is that were Colonel Qaddafi to have been charged with a customary international law crime, then the claimed immunity may have been inapplicable, as, according to that Court, there are exceptions to the immunity of incumbent heads of state.

The Court dismisses these two cases as providing no evidence for the purposes of customary international law; but the Court itself provides us with no evidence of the customary international law rule of absolute immunity for foreign ministers. Given that both the cases referred to leave open the question whether any such rule of immunity may give way in the face of allegations of international crimes it would have been more satisfactory if the Court offered some alternative decisions which clearly recognised the absolute nature of this personal immunity rule as divined by the Court.

[45] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (hereinafter *Pinochet No 3*).

[46] In the present context it is worth quoting part of a speech by Professor Christopher Greenwood, instructed by the Crown Prosecution Service for the Commissioner of Police and the government of Spain, in the *Pinochet No 3* hearing in the House of Lords: 'If I can distinguish between two different points there, at the previous hearings we accepted that under the State Immunity Act, as a matter of United Kingdom law a serving head of state would be able to invoke immunity, but as a matter of international law our submission has always been that there is no immunity in respect of torture and other crimes against humanity. That is why I took your Lordships yesterday to the various passages in Sir Arthur Watts' lectures in which he is referring to the lack of immunity as a serving head of state. He is talking about the position in international law.' R Brody and M Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International, The Hague, 2000), 226. See also N Rodley, 'Introduction—the Beginning of the End of Immunity and Impunity of Officials Responsible for Torture' in Brody and Ratner, *The Pinochet Papers*, 3–6, where a distinction is suggested between a head of state who 'represents the dignity and authority of the state' and head of government immunity 'which probably falls under the general theory applicable to all public officials'.

[47] Arrêt, 21 Mar 2001, Cour de Cassation, Chambre Criminelle, on file with the author.

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No Distinction Between Official Visits and Private Visits

Secondly, Belgium had sought to draw a distinction between official visits and private visits by a foreign minister.[48] This was a concession to the importance of ministerial effectiveness, and the arrest warrant had in fact been drafted so as to preclude arrest during an official visit to Belgium. This distinction between private and official visits was rejected by the Court.[49] The Court was primarily concerned that arrest on a criminal charge would prevent a minister from exercising the functions of that office (para 55). The Court therefore considered that the mere issuance of the arrest warrant, 'intended to enable the arrest' (para 70), breached the inviolability of the person of the foreign minister under international law. We should recall that this ruling was addressed to the particular case of a foreign minister in office. There is no reason to believe that a lower level official would enjoy such a personal immunity. Such an official would be covered by a functional immunity but the scope of this immunity will be limited to representational acts of the state.[50]

Violation of Ministerial Inviolability even in the Absence of an Arrest

Thirdly, according to the judgment, this rule protects the Minister even in the absence of any harassment, request for extradition, actual arrest or judicial proceedings. Belgium had argued that the warrant represented a request to other states and could not be considered coercive with regards to the DRC or violative of the person of the foreign minister. But the Court considered: 'even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions' (para 55). The judgment states the circulation of the warrant violated the obligations owed to

[48] Professor Cahier had suggested a functional immunity with regard to missions abroad in the context of discussions, negotiations, and international meetings, but no such immunity for trips for pleasure: P Cahier, *Le droit diplomatique contemporain* (Publications de l'IUHEI—n° 40, Geneva/Paris, 1962) at 359–60. 'Il semble donc que, lorsqu'il se rend à l'étranger pour accomplir une mission, ce qui exclut tout traitement privilégié lorsqu'il s'y rend en voyage d'agrément, le ministre doit jouir en tout premier lieu de l'inviolabilité, ce qui le met à l'abri de toute mesure de contrainte de la part des autorités locales.' See also J Salmon, *Manuel de droit diplomatique* (Bruylant, Brussels, 1994), 539–41.

[49] The joint separate opinion by Higgins, Kooijmans and Buergenthal seems to suggest that immunities on a private visit are limited to immunity from arrest (warrant) and detention (at para 84). This would allow for a civil suit or seizure of assets but again applying the broad brush approach of the Court such action could also be interpreted as an impediment to official functions.

[50] The Draft Articles on Jurisdictional Immunities of States and their Property, as annexed to the report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property on 13 Feb 2002, UN Doc A/57/22, includes within the definition of state 'representatives of the State acting in that capacity' (Art 2(1)(b)(iv)). Note the articles are stated to be without prejudice to the immunities enjoyed by a state under international law in relation to the exercise of the functions of 'Its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences ... and persons connected with them' (Art 3 (1)).

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the Congo concerning the immunity and inviolability of their foreign minister (paras 70–1). The judgment noted that the Minister had had to change travel plans for fear of possible arrest. This finding with regard to the circulation of the warrant is consistent with the Court's insistence on protecting the overall goal of foreign ministerial effectiveness by concentrating on a chilling effect which generated a legal effect. Judge Oda's dissent saw the legal effect of the warrant quite differently:

> It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is *not* the issuance or international circulation of an arrest warrant but the response of the State receiving it. (para 13)

Once the Court had decided that international law protects an incumbent foreign minister from any threat of arrest, because such a rule is essential for international relations, there was no room for argument either about exceptions to this rule or the legal status of the warrant. The Court in the end found, by 13 votes to three, that the issue of the

> arrest warrant and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of Congo, that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law.[51]

Nevertheless, in an echo of the arguments put by the Congo, the Court stressed that it was drawing a distinction between immunity and impunity (para 60). It offered four instances where the immunity it insisted on would not be a bar to criminal prosecutions:

> First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

[51] At para 78(2) of the Judgment.

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> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.... (para 60)

The third of these examples raises a number of questions, to which we now turn.

The Immunity of Former Ambassadors and Former Foreign Ministers

The Vienna Convention on Diplomatic Relations (1961) states in its Article 31(1) that: 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.' This can be considered a rule of customary international law. This immunity continues only until the person leaves the country, unless the complaint relates to 'acts performed by such a person in the exercise of his functions as a member of the mission', in which case immunity continues to exist under the Convention (Article 39(2)). Until the Court's judgment assimilated foreign ministers to heads of state there was little suggestion in this treaty that foreign ministers enjoyed absolute personal immunity akin to that of diplomatic agents under the Convention, who are defined as follows: 'head of the mission or a member of the diplomatic staff of the mission'.

The Question of Immunity in Other Relevant Treaties

Following the completion of this Convention, the International Law Commission started work on a Convention on Special Missions to complement the Convention on Diplomatic Relations. There was a realisation that ad hoc special diplomatic missions fell outside the scope of the Diplomatic Relations Convention and a new Convention was eventually adopted in 1969 to ensure the proper functioning of such missions. The preamble is telling: '*Realizing* that the purpose of privileges and immunities relating to special missions is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing the State.' During such a special mission the members 'benefit from the ordinary principles based upon sovereign immunity'.[52]

Although neither Belgium nor the Democratic Republic of Congo are parties to the Convention on Special Missions (1969) it is worth mentioning a few of the Articles as they illustrate the extent of diplomatic immunity in this special context. The Convention draws a distinction between heads of the sending state and other participants in the special mission. The head of state is to enjoy in the receiving state or a third state all the facilities, privileges and immunities accorded by international law to heads of state on an official visit. Similarly:

> The Head of Government, the Minister of Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present

[52] I Brownlie, *Principles of Public International Law*, 5th edn (Oxford University Press, Oxford, 1998), 367.

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> Convention, the facilities, privileges and immunities accorded by international law. (Article 21(2))

The suggestion is that international law grants immunities to foreign ministers, but a well known manual on diplomatic law in its commentary on this Article simply states:

> However, it cannot be regarded as at all certain what, if any, additional privileges and immunities are required by international law to be given to visiting heads of government or ministers. Some states may equate a head of government with a head of state, *but ministers have never been regarded under customary law as entitled to any sovereign immunities*.[53] [emphasis added]

Turning to the exact immunities contained in the Convention, the immunity from arrest and criminal jurisdiction is clear:

> The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity. (Article 29)

With regard to immunity from criminal jurisdiction the rule is just as unambiguous: 'The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State' (Article 31(1)). The Article which covers former members of the mission is instructive as it is clear that the only immunity which remains is for: 'acts performed by such a member in the exercise of his functions'.[54]

The Court chose not to discuss the implications of this inapplicable Convention and dealt with the issue as they felt it was determined under customary international law.

It is interesting at this point to consider a number of texts concerning one of the latest human rights violations to be criminalised at the international level. In the draft International Convention on the Protection of All Persons from Forced Disappearance, submitted to the UN Human Rights Commission by the Sub-Commission on the Promotion and Protection of Human Rights, Article 10(2) states that 'No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations.'[55] This draft Convention does not presently grant any immunity for

[53] Lord Gore-Booth (ed), *Satow's Guide to Diplomatic Practice*, 5th edn, (Longman, London, 1979) at 159.

[54] 'When the functions of a member of the special mission have come to an end, his privileges and immunities shall normally cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, in respect of acts performed by such a member in the exercise of his functions, immunity shall continue to exist.' Art 43(3).

[55] UN Doc E/CN.4/Sub.2/1998/19, 19 Aug 1998, Annex.

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foreign ministers or heads of government. The text is modelled on the UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992 and the Inter-American Convention on Forced Disappearance of Persons (1994), which has been in force since 1996.[56] It would seem that, on an ordinary reading of a text such as the Inter-American Convention, at least the states parties to this treaty have contracted out of any foreign ministerial immunity that might have existed between the relevant states. It can also be argued that, taken together with the UN General Assembly Resolution the texts suggest that, in the context of an international crime such as forced disappearance, states do not consider there is a customary international law obligation to grant immunity to officials other than those protected by the Vienna Convention on Diplomatic Relations.

In the pleadings before the ICJ the Congo argued that states could contract out of their duties to grant immunities to officials such as foreign ministers. They put the point clearly:

> It is quite obvious that there is no violation of immunity from suit when the State represented agrees to waive immunity. Immunity may be waived on the occasion of a specific criminal prosecution. It may also be excluded in advance, under the express terms of a treaty.[57]

The Issue of Jus Cogens

The admission by the Congo that states can contract out of any customary international law on ministerial immunity suggests a brief consideration of the relevance of *jus cogens*. The definition of a peremptory (*jus cogens*) norm is that 'it is recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[58] It follows that if the rule on immunities can be derogated from it is not a *jus cogens* norm.[59] No immunities are mentioned as examples of *jus cogens* norms

[56] OAS Treaty, A 60, entered into force 28 Mar 1996. Art IX of the Inter-American Convention reads: 'Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.' Art 16 (3) of the UN Declaration reads: 'No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.'

[57] Mr D'Argent, CR 2001/5, 15 Oct 2001, at 22–23, uncorrected verbatim record.

[58] Art 53, Vienna Convention on the Law of Treaties (1969).

[59] The dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in the European Court of Human Rights in the *Al-Adsani v United Kingdom* judgment (21 Nov 2001) is unambiguous on the understanding that state immunity is not a *jus cogens* norm: 'The Court's majority do not seem, on the other hand, to deny that the rules on State immunity, customary or conventional, do not belong to the category of *jus cogens*; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status. It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted

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by the International Law Commission in their recent commentary to their articles on state responsibility. In fact the reference in the draft articles to the injunction that counter-measures must respect the inviolability of diplomatic agents was moved out of the paragraph dealing with various *jus cogens* obligations (Article 50(1)) and distanced from them in a second paragraph. It was considered 'awkward to include in the list of prohibited countermeasures some obligations which were and others which were clearly not peremptory in character. Among the latter was (c) [now 50(2)(b)], since rules of diplomatic and consular inviolability can be set aside entirely in the relations between a sending and receiving State by consent.'[60]

The same articles include an article entitled 'compliance with peremptory norms'. In this context the ILC has sought to explain the consequences of pitting a peremptory norm against a non-peremptory norm. The Commentary states:

> Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.[61]

In its commentary on the same article the ILC states: 'Those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression,

out of them, or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the "*ordre public*", ie the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.' (at para 2).

[60] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002), 50. The UKs International Criminal Court Act 2001 provides in s 23(1) 'Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this part in relation to that person.' The logic would seem to be that states have waived all immunities regarding arrest and delivery of persons to the ICC on becoming a party to the ICC Statute. State or diplomatic immunity includes inter alia 'any rule of law derived from customary international law', s 23(6)(c). The Explanatory Notes to the Act deal with Arts 27 and 98(1) of the ICC Statute: 'These Articles mean that a State party to the ICC Statute, in accepting Article 27, has already agreed that the immunity of its representatives, officials or agents, including its Head of State, will not prevent the trial of such persons before the ICC, nor their arrest and surrender to the ICC. But non-States Parties have not accepted this provision and so the immunity of their representatives would remain intact unless an express waiver were given by the non-State Party concerned to the ICC.' (para 46). Note that the Secretary of State may after consultation with the ICC and the state concerned direct that proceedings for arrest or delivery not be taken (s 23(4)).

[61] Commentary to Art 26 at para 3 (footnote omitted). Report of the ILC, GAOR, Supp. No 10 (A/56/10) at. 207.

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genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.'[62] This authoritative statement that the prohibition on crimes against humanity is a peremptory norm, and the positioning of the inviolability of diplomatic agents outside the context of peremptory norms,[63] suggests we are in the presence of a hierarchy of norms and that the resolution of any competing obligations should take into consideration such a hierarchy.[64]

The Immunities of Former Foreign Ministers

The issue which has to be addressed now is what the Court meant when it said a former foreign minister would not enjoy immunity in a foreign court (with jurisdiction) for acts committed during the period in office in their 'private capacity' (at para 60, quoted above). This type of immunity was addressed at length in the *Pinochet* litigation and speeches in the final House of Lords judgment turn on findings that, if international law has criminalised behaviour it is unlikely, to say the least, that international law meant to protect that same behaviour through an immunity describing such behaviour as an official act. The fact that in that case the crimes (torture) were described as *jus cogens* crimes was clearly influential. Some passages bear reproduction here as they reveal the influence of international legal logic.

In introducing the judgment of the House of Lords, Lord Browne-Wilkenson said:

> Although the reasoning varies in detail, the basic proposition common to all, save Lord Goff of Chively, is that torture is an international crime over which international law and the parties to the Torture Convention have given universal jurisdiction to all courts wherever the torture occurs. A former head of state cannot show that to commit an international crime is to perform a function which international law protects by giving immunity.[65]

Lord Hope discussed the point in some detail:

> The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two

[62] *Ibid* at para 5, at. 208.

[63] See Crawford, above n 60, at 50).

[64] The dissenting opinion of Judge Rozakis *et al* in *Al-Adsani v United Kingdom* explains the effect of a *jus cogens* norm: 'For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.' (para 1).

[65] House of Lords, 24 Mar 1999, reproduced in Brody and Ratner, *The Pinochet Papers*, 253–4. The introductory speech is not reproduced in the *Pinochet No 3* law report.

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> exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The examples which Lord Steyn gave [1998] 3 WLR 1456, 1506B-C of the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of jus cogens. This compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct.[66]

This passage is amongst the most well known concerning the judicial appreciation of the limits of immunity for those who enjoy immunity in office but only enjoy limited immunity when they leave office for acts committed in office.[67] The *Pinochet* judgment makes it clear that where there is a treaty between the forum state and the state which is claiming immunity, and that treaty foresees criminal proceedings against foreign officials, national courts will not necessarily feel obliged to grant such immunity. The inquiry becomes more difficult when we are in the presence of crimes, such as crimes against humanity, which are not covered in a treaty between the parties. Much will be written about what the ICJ could have meant by acts committed 'in a private capacity'. Because this issue was not part of the dispute it makes little legal sense to second guess here what the Court means.[68] More important is the increasing power of the argument that, if immunity is not a *jus cogens* norm, and the prohibition on committing crimes against humanity is such a *jus cogens* norm, then the presumption must be that there will be a heavy burden on any state claiming

[66] *Pinochet No 3.*

[67] The separate opinion of Higgins, Kooijmans and Buergenthal refers to evidence of state practice which underscores the view that 'serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform' (para 85). See also A Bianchi, 'Denying State Immunity to Violators of Human Rights',(1994), 46 *Austrian Journal of Public International Law* 195–229,expressly referred to in the separate opinion. See also the discussion of the *Letelier* case in CH Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press, Cambridge, 1988), 53. For a review of the practice concerning immunity and human rights violations amounting to international crimes see A Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', (1999), 10 *European Journal of International Law* 237–77 at 260, presenting an argument which limits immunity in the face of international crimes based on the need for courts to interpret the law in accordance with the basic principles and goals of the relevant legal system.

[68] Cassese has examined this question and concluded that the Court should not have relied on any distinction between official and private acts, but rather, the judges should have followed the 'customary rule that removes functional immunity. National case law proves that a customary rule with such content does in fact exist. Many cases where state military officials were brought to trial before foreign courts demonstrate that state agents accused of *war crimes, crimes against humanity,* or *genocide* may not invoke before national courts, as a valid defence, their official capacity .... It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes.' (footnotes and references omitted). 'When May Senior State Officials be Tried for International Crimes? Some Comments on *The Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 853–75 at 870–71.

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state immunity against another state seeking to prevent, investigate or punish crimes against humanity. International law recognises that the prohibition on crimes against humanity protects interests which are at the heart of modern international law. This recognition means that any other competing rules have to be given effect in a way that respects the primacy of the *jus cogens* rule.

UNIVERSAL JURISDICTION

The parties to the case asked the Court not to address the issue of universal jurisdiction. The judgment is, however, likely to be seen as having subjugated universal jurisdiction to immunity. It is also quite likely, based on what we can read in the separate and dissenting opinions, that many judges were heavily influenced in their approach to this case by their appreciation that this was an attempt to *assert universal jurisdiction over someone outside the territory*. The Court's President in his separate opinion focused on this issue. Judge Guillaume categorically asserted that the absence of an explicit clause in the 1949 Geneva Conventions obliging states to establish jurisdiction over grave breaches when the suspect is not on the territory meant that the Belgian judge had no jurisdiction to start the investigation 'in the eyes of international law'.

Again the issue here is one of perspective. From another point of view there is little state practice to suggest that starting an investigation for grave breaches of the Geneva Conventions when the suspect is not in the territory is a violation of international law. [69] This view is reflected in the separate opinion of Higgins, Kooijmans and Buergenthal when they state:

> If the underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction. (para 58)

The various separate opinions are likely to give rise to considerable confusion. It is important not to prise too many rules from these opinions. They are all predicated on what the judges saw as an important distinction between two different situations. The first is jurisdiction over persons outside the territory (a so-called 'classical assertion of universal jurisdiction'). The second is a situation concerning a 'State party in whose jurisdiction the alleged perpetrator of such offences is found', in that case the state 'shall prosecute him or extradite him'. This is

[69] For a discussion of cases in France where it was held that such prosecutions could not go ahead under French law, see Maison, (1995) 6 *EJIL* 260–73; B Stern, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', (1997) 40 *German Yearbook of International Law* 280–99 and B Stern, 'Universal jurisdiction over crimes against humanity under French law—grave breaches of the Geneva Conventions of 1949—genocide—torture—human rights violations in Bosnia and Rwanda [international decisions]', (1999), 93 *AJIL* 525–29.

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termed 'obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere'. It is pointed out that 'By the loose use of language [this obligatory territorial jurisdiction] has come to be referred to as "universal jurisdiction"' (Higgins *et al* at para 41). So universal jurisdiction means different things to different people.[70] These separate opinions often seem particularly concerned with policy issues; there is concern about the risk of 'creating total judicial chaos' (Guillaume) and the 'promotion of good inter-state relations' (Higgins *et al* at para 59) when delineating the law of universal jurisdiction.

What we can know with regard to universal jurisdiction, classically asserted or loosely used, is that the issue of universal jurisdiction is not dealt with by the Court's judgement. It is the state practice adopted by states in the context of their co-operation with each other in the light of the various international criminal courts which is most likely to shape international law in this area. If we look more closely at what happened before the ICJ we can pull out some pointers as to the evolving scope of universal jurisdiction.

The complaint filed by the DRC against Belgium refers to the Statute of the International Criminal Court adopted in Rome in 1998 and suggests that this treaty can in no way legitimate the Belgian law which defines the jurisdiction of the Belgian courts over certain crimes committed abroad by non-nationals. The complaint goes on to cite Article 17 of the Statute to support the idea that not all states necessarily have jurisdiction under international law for the crimes in the Statute. Article 17(1) reads:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [71]

The DRC pointed to the phrase 'a State which has jurisdiction over it' to claim that this implies that there must be limits on state jurisdiction in this field. However, the drafting history reveals that this reference to jurisdiction is in the context of national authorities starting an investigation which precludes the International Criminal Court dealing with the case. There was a fear that a challenge to admissibility could come from a state which wanted to shield a defendant from international justice. Such a state could claim that it was investigating the case when in fact the courts of that state might have no jurisdiction over the case due to the inadequacy of the challenging state's internal law. According to John Holmes, the co-ordinator of the relevant texts during the drafting of the Statute:

[70] For an extensive discussion of the writing on this topic and the practice of states see Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/003/2001.

[71] Para 10 of the Preamble reads: '*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

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> The second new condition limited the possibility of challenge to a State "which has jurisdiction over a case". It was not enough that a State had instituted national proceedings, it must establish to the Court that it had jurisdiction in the case. This addition was intended to forestall situations where a State could challenge (and delay) the Court from proceeding with a case on the ground that it was investigating when in fact the investigation or prosecution was sure to fail because the State lacked jurisdiction even as far as its own courts were concerned. [72]

The Statute was concerned to limit the number of states that could challenge the jurisdiction of the new Court. Where a state has no legislation to try the case it would be wrong to allow that state to block an international trial of the same offence. The ICC Statute, rather than suggesting limits on state jurisdiction can be seen as actually seeking to compensate for situations where states may not have taken steps to adopt the appropriate legislation.

The real question which was, as stated above, in the minds of the judges of the ICJ, was whether universal jurisdiction actually demands the presence of the accused in the territory of the state exercising jurisdiction. Even where national legislation has limited the conduct of criminal investigations and trials to accused who are actually on the territory of the state, this may be a self-imposed limit on the way in which jurisdiction is exercised, rather than a response to any supposed rule of international law which prohibits the initiation of any criminal investigation jurisdiction over people not present in the state.

In France the *Code de procédure pénale* grants the French courts jurisdiction whenever an international convention grants jurisdiction to the French courts (Article 689).[73] According to Brigitte Stern the French courts could rely on this Article to consider the Geneva Conventions 'precisely the type of convention referred to by this article, as they provide for universal jurisdiction.'[74] So far the higher French courts have refused to allow this sort of incorporation of the Geneva Conventions due to the fact that the Conventions have been considered to be too general in their wording and because there was no specific legislation on the subject.[75] Should France adopt legislation similar to the Belgian legislation at the heart of the *DRC v Belgium* case then Article 689 of the French Code could operate to grant French courts universal jurisdiction over grave breaches of the Geneva Conventions whether or not the suspect is present on French territory.

[72] JT Holmes, 'The Principle of Complementarity', in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, The Hague/London/Boston, 1999), 41–78 at 66.

[73] Art 689 : 'Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du livre 1er du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître de l'infraction' (entered into force 1 March 1994).

[74] Stern, (1999), 93 *AJIL* 529, citing Art 49 of Convention I, Art 50 of Convention II, Article 129 of Convention III, and Art146 of Convention IV.

[75] Stern, (1997), 40 *German YIL* 294.

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However, the suggestion that universal jurisdiction can only be exercised when the suspect is in the territory of the forum state needs to be examined more closely. States such as France may make it a condition that the suspect be on the territory for there to be prosecution and trial by the French courts with regard to certain international crimes.[76] The real question which was, as stated above, in the minds of judges, was whether the international rule on universal jurisdiction which allows for the prosecution of crimes under international law actually demands the territorial presence of the accused at the time an arrest warrant is issued—and not only at the time of the trial.

Although the higher French courts have chosen to make the legitimacy of all *actes d'instruction* dependent on presence on the territory,[77] it would be hard to extrapolate from these decisions concerning French law (and later decisions in Belgian law[78]) a general rule of international law that forbids states from starting an investigation while a suspect wanted for an international crime is not on the territory. The relevant authorities which start such an investigation in other countries may not be the judiciary; in fact the investigation and arrest may be in the hands of the prosecutor and the police. Any rule preventing the jurisdiction of the courts when the suspect is outside the territory would not translate to a situation where investigation was undertaken by non-judicial organs. There appears to be no evidence that there is a rule that the organs of the state can not start inquiries or make requests regarding a suspect who may eventually be extradited for trial to the requesting state. The detailed report by Amnesty International has highlighted the importance of such a wide jurisdiction:

> This broad type of universal jurisdiction [for international crimes] ensures that the courts of *any* state can act as effective agents for the international community. On the basis of such jurisdiction, a prosecutor or an investigating judge may commence an investigation when the exact whereabouts of a suspect are unknown, thus permitting the gathering of evidence, such as statements of victims and witnesses, while such evidence is fresh. The ability to exercise such jurisdiction will also enable prosecutors and investigating judges to file extradition requests directed to states where a suspect is located, but where the authorities are unable or unwilling to act, or to issue international arrest warrants.[79]

[76] See also International Law Association, *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, 2000, at 2: 'Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim. The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state.' (footnotes omitted). And see the French *Code de procédure pénale* with regard to the crime of torture, 689(1) and (2).

[77] See the cases discussed by Stern, above n 69.

[78] The Yerodia prosecution, together with a number of other prosecutions for international crimes, was dismissed due to lack of powers under domestic law to proceed due to absence from the territory in the Arrêt de la Cour d'Appel de Bruxelles, Chambre des Mise en Accusation of 16 Apr 2002, *Laurent Désiré Kabila, Didier Mumemgi, Dominique Sakambi and Ndombasi Yerodia*. On appeal, however, this decision was quashed by the Cour de Cassation, 25 Nov 2002.

[79] Amnesty International, *Universal Jurisdiction*, ch 1, 14.

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Of course once the suspect is arrested, the issue falls to be decided under extradition law and the suspect will be in the hands of the judiciary. At this point the question of whether the individual is to be tried for a crime or crimes which exist as crimes in both states (the double criminality rule) may apply. The requesting state may have to show that its law also includes this crime. There would not normally be an investigation into the requesting state's jurisdiction to try the crime (the non inquiry rule);[80] the key issue is whether both states allow prosecution for such an extraterritorial crime. This is clear from the European Convention on Extradition 1957 which in its Article 7(2) states:

> When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

Obviously Mr Yerodia was wanted for an offence committed outside the territory of the requesting state and was outside the territory of the requesting state. This Article suggests that whether or not universal jurisdiction is the basis for criminal jurisdiction is a question which is irrelevant for the decision whether to extradite. Where we are dealing with crimes under international law the issue is not, whether there is universal jurisdiction, but rather whether the relevant steps have been taken in national law to ensure a satisfactory trial in accordance with international guarantees. Crimes under customary international law such as genocide, crimes against humanity and war crimes presume universal jurisdiction in all states. Whether or not investigations can start before the suspect is on the territory of the investigating state is a question which has split the judges of the ICJ. The safest conclusion on this point is that it currently falls to be decided under national law.

It would be hard to find a rule which forbids international co-operation in the realm of the suppression of international crimes. In fact a recent session of the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2000 adopted a resolution which actually invites states to co-operate in exactly this sphere. The Sub-Commission in paragraph 1:

> Invites all Governments to cooperate in a reciprocal manner even when there is no treaty to facilitate the task of legal authorities dealing with proceedings initiated by victims acting either within the framework of the principle of universal competence as recognised in international law or under a domestic law which establishes an extraterritorial legal competence, in particular because of the nationality of the victim or of the perpetrator.[81]

[80] See MC Bassiouni, 'Law and Practice of the United States', in MC Bassiouni (ed), *International Criminal Law: Procedural and Enforcement Mechanisms*, (Transnational, Ardsley, New York, 1999), vol II, 191–275 at 233.

[81] Resolution 2000/24 of 18 Aug 2000, adopted without a vote.

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FINAL REMARKS

The International Court of Justice has applied a rule of absolute immunity for foreign ministers before the authorities of other states. It is difficult to square this result with judgements in other international courts which have proclaimed torture to be an international crime and its breach to involve a breach of a peremptory norm of international law (*jus cogens)* from which no derogation is permitted.[82]Strictly speaking the ICJs judgment is only binding on the parties to the dispute (the DRC and Belgium) in respect of this particular case.[83]It remains to be seen whether the Court's prioritisation of smooth inter-state relations over the emerging regime of international criminal law will be followed by other international courts or indeed by national courts. Some judges may feel that it is no longer appropriate to protect the dignity of a state in this way when faced with a competing good faith attempt to protect the dignity of the victims of atrocities. New precedents could quickly redefine the limits of state immunity in the face of international crimes.

The entry into force on 1 July 2002 of the International Criminal Court Statute will radically change the way immunity is perceived. Every head of state and foreign minister in the world will be potentially liable for prosecution in the new Court. It will suffice that they be nationals of a state party, or commit the acts in the territory of a state party, or that the Security Council refers a situation to the Prosecutor, or that the state of nationality or the state where the crimes occurred accepts the jurisdiction of the Court with regard to that situation. Where the accused is to be tried in this new International Criminal Court claims for immunity at the national level will be given much less weight (in particular with regard to officials from states parties to the ICC Statute).[84]Claims of immunity made by defendants who are actually before the International Criminal Court itself should be simply rejected.

* * *

Our future understanding of the notions of sovereignty, immunity and universality is uncertain. These terms will be shaped by political developments as well as legal decisions. *Justice for Crimes Against Humanity* will remain a goal for many people who are committed to ensuring better respect for the dignity of the human person. It is the efforts of these determined individuals to ensure such

[82] See International Criminal Tribunal for the Former Yugoslavia, Judgment 10 Dec 1998, IT9517, *Furundžija*; European Court of Human Rights in the *Al-Adsani v United Kingdom* judgment (21 Nov 2001), see especially the dissent of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić.

[83] Art 59 of the Statute of the ICJ reads: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

[84] Consider the UKs International Criminal Court Act 2001 s 23 as well as Art 98 of the ICC Statute.

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justice which will shape the new legal possibilities for accountability for international crimes. With this increased accountability it is to be hoped that there will be a greater sense of justice for the victims. But this is a struggle for all of us for such crimes against humanity, by definition, affect us all.

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UNE TROUBLANTE « IMMUNITÉ TOTALE » DU MINISTRE DES AFFAIRES ÉTRANGÈRES

(Sur un aspect de l'arrêt du 14 février 2002 dans l'affaire relative *au Mandat d'arrêt du 11 avril 2000*)

PAR

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L'arrêt rendu par la Cour internationale de Justice le 14 février 2002 dans l'affaire relative au *Mandat d'arrêt du 11 avril 2000* était attendu. Nombreux sont ceux qui, en Afrique notamment, redoutaient qu'un règlement diplomatique de cette affaire entre la République démocratique du Congo (ci-après « Congo ») et la Belgique empêchât la Cour de se prononcer sur une question qui irritait autant qu'elle inquiétait. Ailleurs on espérait peut-être que la Cour mondiale apporterait une caution d'autorité à un phénomène certes isolé mais qui paraissent correspondre aux perspectives nouvelles d'un droit des gens qui semblent avoir à cœur, plus que par le passé, d'assurer la protection de la personne humaine en faisant échec à l'impunité : la compétence universelle d'un juge national en matière pénale.

Qu'on le tienne pour un « arrêt de principe » (1) ou pour « très clair » ou « didactique » (2), cet arrêt suscite quelques interrogations et relance en particulier le débat sur le pouvoir normatif du juge international. Si divers aspects de l'arrêt, notamment ceux portant sur la compétence de la Cour et la recevabilité de la requête du Congo, n'étaient pas dépourvus d'intérêt au regard des questions juridiques qu'ils posaient, il est sans conteste que l'on attendait l'arrêt de la Cour principalement sur deux points : la compétence universelle d'un juge national et l'immunité du ministre des Affaires étrangères. En abandonnant le chef d'incompétence du juge belge, le Congo a privé la Cour de l'occasion de se prononcer expressément sur la question de la compétence universelle.

(1) V. Jean-Pierre QUENEUDEC, « Un arrêt de principe : l'arrêt de la CIJ du 14 février 2002 », *Actualité et Droit international*, mai 2002, [http://www.ridi.org/adi].

(2) V. Joe VERHOEVEN, « Mandat d'arrêt international et statut de ministre », *ibid*, §§ 4 et 5.

Reste l'immunité du ministre des affaires étrangères. L'analyse de l'arrêt à la lumière des circonstances de l'affaire et du droit international positif ainsi que du contexte international et des tendances actuelles du droit international autorise trois observations : la règle de l'immunité du ministre des Affaires étrangères ne paraissait pas établie en droit international positif avant que la Cour en décidât autrement (1); l'arrêt du 14 février 2002 semble se situer à contre-courrant dans la mesure où, bien qu'il s'en défende, il ouvre la porte à l'impunité; il en est ainsi en particulier parce qu'il consacre en l'occurrence le principe de l'immunité totale qui exclut toute exception à la règle (2).

1. — L'IMMUNITÉ DU MINISTRE DES AFFAIRES ÉTRANGÈRES : UNE RÈGLE POSÉE PAR LA COUR

La position de la Cour sur l'immunité du ministre des Affaires étrangères part d'un postulat plutôt qu'elle ne découle d'une démonstration. Ce postulat est posé au seuil du raisonnement de la Cour sur cette question dans les termes suivants : « La Cour observa tout d'abord qu'il est clairement établi en droit international que, de même que les agents diplomatiques et consulaires, certaines personnes occupant un rang élevé dans l'Etat, telles que le chef de l'Etat, le chef du gouvernement ou le ministre des affaires étrangères, jouissent dans les autres Etats d'immunités de juridiction, tant civiles que pénales » (3). Cette affirmation n'est nullement démontrée. La Cour fait preuve à cet égard d'un laconisme pour le moins étonnant, qu'elle ne peut justifier par le seul souci d'« économie de moyens » puisque la question de l'immunité du ministre des Affaires étrangères était au cœur du différend dont elle avait à connaître. Une fois la question de la compétence universelle du juge belge évacuée, c'est la principale question de fond qui se posait à la Cour. Elle était donc en devoir d'étayer au maximum sa position sur cette question. Au lieu de cela, elle a bâti son arrêt sur un argument axiomatique reposant sur un raisonnement par analogie qui conduit à la transposition ou la translation de l'immunité du chef de l'Etat au ministre des Affaires étrangères. A cet égard l'arrêt de la Cour n'est pas aussi clair qu'on le prétend. La Cour procède par amalgame dans son raisonnement : elle rappelle la position du Congo où le demandeur cite, d'une part, Lord Browne — Wilkinson dans l'affaire *Pinochet* pour qui l'« immunité dont jouit un chef d'Etat ou de l'Ambassadeur en exercice est une immunité totale liée à la personne du chef d'Etat ou de l'ambassadeur et qui exclut toute action ou poursuite judiciaire à son encontre... », d'autre part, la Cour de cassation française dans l'affaire *Kadhafi* qui aurait affirmé que « la coutume internationale s'oppose à ce que les chefs d'Etat en exer-

(3) Arrêt, par. 51

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cice puissent [...] faire l'objet de poursuites devant les juridictions [illegible] d'un Etat étranger » sauf dispositions contraires (4). De là, la Cour [illegible] qu'il faut bien appeler son *obiter dictum* dans cette affaire : « La Cour [illegible] miné avec soin la pratique des Etats, y compris les législations [illegible] et les quelques décisions rendues par de hautes juridictions nationales [illegible] la Chambre des lords ou la Cour de cassation française. Elle n'est [illegible] nue à déduire de cette pratique l'existence en droit international [illegible] d'une exception quelconque à la règle de l'immunité de juridiction [illegible] et l'inviolabilité des ministres des affaires étrangères en exercice [illegible]

Premièrement, si elle indique les deux décisions qu'elle a prises [illegible] dération, la Cour n'indique nullement les législations nationales [illegible] examinée. Il faudra la croire sur parole; cela est étrange comme pro[illegible] motivation d'une décision de justice. Deuxièmement, alors que le[illegible] arrêts cités par la Congo et rappelés par la Cour ne parlent expres[illegible] que de l'immunité du chef d'Etat ou de l'ambassadeur pour l'un et [illegible] munité du seul chef d'Etat pour l'autre, la Cour y ajoute subrepti[illegible] l'immunité du ministre des Affaires étrangères; cela paraît bien [illegible] comme procédé de démonstration.

Au regard de l'arrêt, le fondement d'une telle immunité est pu[illegible] fonctionnel. La Cour déclare : « En droit international coutumier, les [illegible] nités reconnues au ministre des affaires étrangères ne lui sont pas acc[illegible] pour son avantage personnel, mais pour lui permettre de s'acquitte[illegible] ment de ses fonctions pour le compte de l'Etat qu'il représente » (5). [illegible] comprend et partage dans une certaine mesure le souci de la Cour de [illegible] téger » le ministre des Affaires étrangères, « responsable de la conduite [illegible] relations de son Etat avec tous les autres Etats » (7), contre les ale[illegible] procédures judiciaires nationales aussi légitimes qu'elles peuvent [illegible] intempestives et incontrôlables. Il importe en effet qu'un ministre [illegible] Affaires étrangères puisse exercer librement sa fonction de courroie [illegible] transmission nécessaire dans les relations entre les Etats « dans l'int[illegible] bien compris tant de l'Etat qu'il représente que de la communauté in[illegible] tionale » (8). Mais, en l'occurrence, nécessité ne fait pas loi, ou plus pr[illegible] ment elle ne fait pas le droit, parce que dans l'ordre juridique interna[illegible] l'existence d'une règle de droit ne se présume pas; la règle est, soit [illegible] par les sujets de droit, soit constatée au moyen de la vérification lors[illegible] s'agit d'une norme coutumière.

(4) Arrêt, par. 57
(5) *Ibid.*, par. 57
(6) *Ibid.*, par. 53
(7) *Idem.*
(8) V. J. VERHOEVEN, art. préc. § 2.

Or, si l'immunité du chef de l'Etat est établie de façon incontestable en droit international coutumier comme le confirme la pratique des Etats (9) et la doctrine (10), il n'en est pas de même de l'immunité du ministre des Affaires étrangères. L'analogie entre les deux hauts responsables de l'Etat ne vaut pas constatation d'une règle coutumière. La Cour aurait donc dû exposer et discuter de manière approfondie la pratique qu'elle dit avoir examiné afin de laisser émerger la règle de l'immunité des ministres des Affaires étrangères; soit comme une norme coutumière, soit à tout le moins comme un principe général de droit, au lieu de la traiter par prétérition. Mais procéder de la sorte impliquait que la Cour démontrât l'existence en droit international coutumier d'une règle ou d'un principe spécifique d'immunité des ministres des Affaires étrangères, ce qu'elle ne voulait pas, sans doute parce qu'elle ne le pouvait pas (11); parce qu'il semble bien que l'immunité accordée aux ministres des Affaires l'est au titre de la simple courtoisie plutôt que d'une règle de droit international. Telle est en tout cas la position de la Commission du droit international dans ses travaux sur les immunités juridictionnelle des Etats (12) rappelée par sir A. Watts (13) ainsi que par les Juges Higgins, Kooijmans et Burgenthal dans leurs opinions individuelles (14) et le Juge *ad hoc* Van den Wyngaert dans son opinion dissidente (15), toutes jointes à l'arrêt du 14 février 2002. Au demeurant, la Cour reconnaît elle-même que les diverses conventions invoquées par les parties et qu'elle a examinées « ne contiennent toutefois aucune disposition fixant de manière précise les immunités dont jouissent les ministres des affaires étrangères » (16). Il y a donc lieu de suivre la juge Van den Wyngaert lorsqu'elle conclut que « si un ministre des affaires étrangères en exercice bénéficie bien d'immunités, celles-ci ne trouvent pas leur origine dans le droit international coutumier mais relèvent tout au plus de la courtoisie internationale » (17).

En statuant comme elle l'a fait sur cette question de l'immunité du ministre des Affaires étrangères, la Cour a incontestablement « œuvré en

(9) Par ex. l'arrêt de la Chambre des Lords britannique dans l'affaire *Pinochet* et l'arrêt de la Cour de cassation française dans l'affaire *Kadhafi* (arrêt n° 1414 du 23 mars 2001) abondamment cités par les Parties dans cette affaire et évoqués par la Cour au paragraphe 58 de l'arrêt.
(10) V. notamm. Arthur WATT, « The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers », *R.C.A.D.I.*, 1994-III, Vol. 247; Michel COSNARD, « Les immunités du chef d'Etat » *in Le chef d'Etat en droit international*, colloque de la S.F.D.I. de Clermont-Ferrand, Paris, Pedone, 2002, pp. 189-268; Florence POIRAT, « Immunité de juridiction pénale du chef d'Etat étranger en exercice et règle coutumière devant le juge judiciaire », *R.G.D.I.P.*, 2001, pp. 474-492.
(11) V. dans le même sens Philippe WECKEL, « Chronique de jurisprudence internationale », *R.G.D.I.P.*, 2002-2, p. 431.
(12) V. *An. C.D.I.*, 1989, Vol. II (2), II° partie, p. 146.
(13) V. A. WATTS, cours précité, p. 107.
(14) Opinion individuelle conjointe des trois juges, par. 81.
(15) V. opinion dissidente de Mme Van den Wyugaert, par. 17.
(16) Arrêt, par. 52.
(17) Opinion dissidente de Mme Van den Wyugaert, par. 39.

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tant que législateur » (18), bien que cette idée ait été écartée dans les pr
mières réactions à l'arrêt du 14 février 2002 (19) comme pour anticiper
exorciser toute critique sur ce point. Dans une communication inhabituel
à la presse, le Président de la Cour a indiqué que « cet arrêt fixe, *pou*
première fois, l'étendue des immunités des ministres des affaires étrangèr
De ce fait, il ne met pas seulement un terme au différend qui nous a été soum
Il constitue en outre une contribution importante de la Cour au développem
du droit international dans un domaine d'une grande actualité » (20).

Ce disant, le Président de la Cour est on ne peut plus explicite. Il dévo
la portée de l'arrêt ainsi que la façon dont la Cour elle-même perçoit
décision et son rôle dans cette affaire. C'est probablement par une certain
retenue que le Président de la Cour s'est gardé de parler de contribution
importante de la vénérable juridiction « au développement *progressif* d
droit international », sans doute afin de ne pas proclamer ouvertemen
qu'elle a confondu sa mission d'administration de la justice avec le rôle d
la Commission du droit international dont la mission statutaire est d'assu
rer « le développement progressif et la codification du droit international
Seulement, la Commission, elle, élabore des projets qu'elle soumet au
Etats, à charge pour ceux-ci de lui réserver le sort qu'ils veulent. Il en v
différemment de la Cour dont les décisions ont force contraignante pour le
parties au différend et sont à bien des égards comme des dogmes pour tou
les Etats.

Quoiqu'il en soit, la déclaration précitée du Président de la Cour confirm
que sur, cette question de l'immunité des ministres des Affaires étrangères
la Cour ne s'est pas contentée de dire le droit; elle a posé de son propre pou
voir une règle nouvelle. Jurislateur, la Cour a confirmé qu'elle l'est. En l'oc
currence, elle aurait du mal à se réfugier derrière le bouclier d'une stricte
juridictio. Il est vrai qu'il y a longtemps que, ne se contentant plus du *ju*
facere, elle s'est autorisée le *jus dicere* : elle crée le droit. Si l'arrêt du
14 février 2002 peut être considéré comme un arrêt de principe, c'est bien
parce que la Cour prend position sur la question qui lui était soumise, non
point en disant le droit, mais en établissant une règle qui n'existait pas
encore de façon évidente et incontestable, au nom du souci du bon fonction
nement des relations entre les Etats. Ici, la fonction normative du juge
défie le volontarisme étatique. On s'aperçoit en effet que la Cour n'a pas
su garder le profil modeste que son Président actuel a essayé de donner
d'elle dans son opinion individuelle jointe à l'avis consultatif du 8 juillet

(18) Mais « législateur » est-il bien le terme idoine en l'occurrence ?
(19) V. J-P. QUENEUDEC, art. préc. p. 2.
(20) CIJ affaire du *Mandat d'arrêt du 11 avril 2000*, Communiqué de presse, 21 février 2002; italiques ajoutées.

1996 relatif à la *Licéité de la menace ou de l'emploi d'armes nucléaires* (21). Pourtant, comme l'affirmait la Cour dans son arrêt dans les affaires de la Compétence en matière de pêcheries, « la Cour en tant que tribunal, ne saurait rendre la décision *sub specie legis ferendae*, ni énoncer le droit avant que le législateur l'ait édicté » (22).

Cette entreprise inavouable de jurislation ne peut être justifiée, ni par la volonté d'éviter un *non liquet*, ni par le souci de suivre la tendance actuelle du droit des gens : ni le *non liquet*, parce que l'on n'était pas dans une situation de lacune en droit international, il suffisait donc à la Cour de constater, le cas échéant, l'inexistence de la règle de l'immunité du ministre des affaires étrangères pour satisfaire aux prétentions de l'une des parties dans cette affaire; ni tendance actuelle du droit international, bien au contraire, cette tendance est au bannissement de l'impunité et au renversement de la plupart des barrières juridiques qui l'ont rendue possible par le passé.

2. — IMMUNITÉ « TOTALE » CONTRE IMPUNITÉ : UN ARRÊT À CONTRE-COURANT

Dans sa requête introductive d'instance, le Congo affirmait que l'exclusion par la loi belge sur la compétence universelle de l'immunité du ministre des Affaires étrangères alors en fonction constituait une « [v]iolation de l'immunité diplomatique du ministre des affaires étrangères d'un Etat souverain, reconnu[e] par la jurisprudence de la Cour et découlant de l'article 41, paragraphe 2, de la convention de Vienne du 18 avril 1961 sur les relations diplomatiques » (23). Mais le Congo n'a pas invoqué la jurisprudence pertinente à l'appui de ses allégations et la Cour ne relève pas cette faiblesse de l'argumentation congolaise, pas plus qu'elle ne se réfère elle-même, comme on l'a vu, à une quelconque jurisprudence consacrant le principe de cette immunité.

Le Congo va plus loin et soutient que « le ministre des affaires étrangères d'un Etat souverain bénéficie d'une inviolabilité et d'une immunité de juridiction pénale qui sont 'absolues ou intégrales', en ce sens qu'elles ne souffrent aucune exception » (24). Cette immunité « couvre *tous* les actes y compris ceux qui auraient été commis avant leur entrée en fonction »; « il importe peu que les actes commis durant l'exercice de leurs fonctions puissent être ou non qualifiées d''actes de la fonction' » (25). La Cour suit au

(21) Il réaffirmait, « solennellement » écrivait-il, « que le rôle du juge ne consiste pas à se substituer au législateur ». Et il ajoutait deux phrases plus loin : « C'est la grandeur du juge que de rester dans son rôle en toute humilité; quels que soient par ailleurs les débats intérieurs qui peuvent être les siens au plan religieux, philosophique et moral » (C.I.J, *Recueil*, 1996, p. 293, par.14)
(22) Arrêt du 25 juillet 1974, C.I.J., *Recueil 1974*, p. 23, par. 53.
(23) Arrêt, par. 17.
(24) *Ibid.*, par. 47.
(25) *Idem.*; italiques ajoutées.

mot près ces affirmations du Congo et « en conclut que les fo
ministre des affaires étrangères sont telles que, pour toute la
charge, il bénéficie d'une immunité de juridiction pénale et d'une
lité *totales* à l'étranger. Cette immunité et cette inviolabilité pro
téressé contre tout acte d'autorité de la part d'un autre Etat qui
tacle à l'exercice de ses fonctions » (26).

La Cour substitue l'adjectif « totales » à ceux d'« absolues ou in
employés par le Congo, sans toutefois critiquer ces derniers, ce qu
qu'on peut les tenir pour des synonymes. Au regard de l'arrêt du
2002, la règle de l'immunité mais aussi son étendue seraient déte
uniquement par l'objet de la « règle » : permettre au haut respons
l'Etat qu'est le ministre des Affaires étrangères de s'acquitter de
tions sans entraves (27). En effet, selon la Cour, « si un ministre des
étrangères est arrêté dans un autre Etat à la suite d'une quelconque
pation, il se trouvera à l'évidence empêché de s'acquitter des tâch
rentes à ses fonctions » (28). La Cour confirme dans ce même paragra
de son arrêt que l'inviolabilité et l'immunité « totales » doivent s'en
de l'inviolabilité et de l'immunité « absolues ou intégrales », comme le
nait le Congo, dans la mesure où elles couvrent tous les actes du mi
des Affaires étrangères, que ces actes aient été accomplis à titre « offi
ou à titre « privé », « avant » ou « durant » l'exercice des fonctions.

Cette conception absolutiste de l'inviolabilité et de l'immunit
ministre des Affaires étrangères est, quoi qu'en dise la Cour, la p
ouverte à l'impunité. Pressentant et anticipant la critique que son
pourrait susciter sur ce point, la Cour « souligne toutefois que l'*immuni*
juridiction dont bénéficie un ministre des affaires étrangères en exercice
signifie pas qu'il bénéficie d'une *impunité* au titre de crimes qu'il aurait
commettre, quelle que soit leur gravité » (29). Elle ajoute que les immuni
dont bénéficie en droit international un ministre ou un ancien ministre
Affaires étrangères n'empêchent pas que sa responsabilité pénale so
recherchée dans certaines circonstances et précise les quatre hypothès
dans lesquelles elle peut l'être : i) devant les juridictions de leur pays ; ii) d
vant une juridiction étrangère si l'Etat qu'ils représentent ou ont repr
senté décide de lever cette immunité ; iv) devant certaines juridiction
pénales internationales dès lors qu'elles sont compétentes. La troisièm
hypothèse est la plus intéressante : « dès lors qu'une personne a cessé d'o
cuper la fonction de ministre des affaires étrangères, elle ne bénéficie plu
de la totalité des immunités de juridiction que lui accordait le droit interna
tional dans les autres Etats. A condition d'être compétent selon le droit

(26) *Ibid.*, par. 54 ; italiques ajoutées.
(27) V. Philippe Weckel, « Chronique de jurisprudence internationale », *RGDIP*, 2002-1, p. 180.
(28) Arrêt, par. 55.
(29) *Ibid.*, par. 60, italiques de la Cour.

international, un tribunal d'un Etat peut juger un ministre des affaires étrangères d'un autre Etat au titre d'actes accomplis avant ou après la période pendant laquelle il a occupé ces fonctions, ainsi qu'au titre d'actes qui, bien qu'accomplis durant cette période, l'ont été à titre privé » (30).

Ainsi, selon la Cour, l'immunité totale dont bénéficie le ministre des Affaires étrangères pendant la période où il exerce ces fonctions couvre de façon absolue tous ses actes quels qu'ils soient. La fonction de ministre des Affaires étrangères crée de la sorte une parenthèse protégée par l'arme absolue de l'immunité ; elle gomme sans l'effacer le caractère délictueux de l'acte et neutralise momentanément le recours devant une juridiction pénale étrangère même compétente selon le droit international. C'est que, pour la Cour, il faut surtout éviter tout acte d'autorité de la part d'un autre Etat qui ferait obstacle à l'exercice par ledit ministre de ses fonctions (31). Déjà, dans son ordonnance du 8 décembre 2000 sur la demande en indication de mesures conservatoires introduite par le Congo, la Cour avait relevé que M. Yerodia Ndombasi avait cessé d'exercer ses fonctions de ministre des Affaires étrangères à la suite du remaniement ministériel du 20 novembre 2000 et s'était vu confier « celles de ministre de l'éducation nationale, moins exposés à des déplacements fréquents à l'étranger » (32). Et, dans son arrêt du 14 février 2002, elle indiquait que, dans l'exercice de ses fonctions, le ministre des Affaires étrangères est appelé à se déplacer à l'étranger et doit dès lors être en mesure de le faire librement dès que la nécessité s'en fait sentir » (33). Or, « le simple fait qu'en se rendant dans un autre Etat ou qu'en traversant celui-ci un ministre des affaires étrangères puisse être exposé à une procédure judiciaire peut le dissuader de se déplacer à l'étranger lorsqu'il est dans l'obligation de le faire pour s'acquitter de ses fonctions » (34). Telle semble être le motif déterminant de l'arrêt du 14 février 2002.

Observons que le ministre des Affaires étrangères a perdu de nos jours le monopole de la mise en œuvre des relations extérieures de l'Etat qu'il détenait jusqu'au milieu du XX^e^ siècle. Aujourd'hui, certaines missions qui lui étaient naguère exclusivement dévolues sont exécutées concurremment par des ministres dits « techniques ». La plupart de ces ministres négocient et signent des accords internationaux portant sur des matières relevant de leur domaine de compétence, sans contreseing du ministre des Affaires étrangères et, dans certains pays, sans avoir reçu les pleins pouvoirs, se prévalant quelquefois simplement d'une délégation générale du gouvernement. Du reste, la pratique internationale montre une tendance à attacher la même importance au ministre des Affaires étrangères et aux autres

(30) *Ibid.*, par. 61.
(31) *Ibid.*, par. 54.
(32) C.I.J., *Recueil*, 2000, p. 201 par. 72.
(33) Arrêt du 14 février 2002.
(34) *Ibid.*, par. 55.

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ministres dans la représentation de l'Etat et la capacité de l'un et des autres à engager ce dernier. Ainsi, dans l'affaire des *Essais nucléaires (Australie c. France)*, la Cour a estimé qu'en dehors de la déclaration du président français du 8 juin 1974 à propos des essais nucléaires dans le Pacifique Sud, elle devait examiner aussi les déclarations faites par les autorités françaises après la procédure orale, « à savoir le 25 juillet 1974 par le président de la République, le 16 août 1974 par le *ministre de la défense*, le 25 septembre 1974 par le ministre des affaires étrangères devant l'Assemblée générale des Nations Unies et le 11 octobre 1974 par *ministre de la défense* » (35). On peut se demander dans ces conditions pourquoi les ministres « techniques » seraient exclus de la couverture immunitaire. Un ministre « technique » ne représente-t-il pas tout autant son Etat « du seul fait de l'exercice de sa fonction » (36) dans son domaine de compétence ?

On veut bien se rallier au raisonnement de la Cour selon laquelle le ministre des Affaires étrangères « occupe une position qui fait qu'à l'instar du chef de l'Etat et du chef de gouvernement il se voit reconnaître par le droit international » (37) une qualité particulière dans la représentation de l'Etat. Cette position spéciale reposerait, d'une part sur le fait qu'il a une compétence générale de représentation de celui-ci, d'autre part et surtout, sur les pouvoirs qui lui sont reconnus en matière diplomatique : à la différence des autres ministres, il est investi des pleins pouvoirs *ab initio* et c'est lui qui signe ou contresigne, selon le cas, les pouvoirs des autres ministres et des agents diplomatiques. Toutefois, l'arrêt rendu par la Cour permanente de Justice internationale dans l'affaire du *Groënland oriental* montre que même le ministre des Affaires étrangères a un domaine de compétence sur la base duquel ses actes produiraient pleinement leurs effets. Se référant à la réponse donnée par le ministre des Affaires étrangères de la Norvège, Ihlen, à la question de la reconnaissance par toutes les puissances intéressées de la souveraineté du Danemark sur l'ensemble du Groënland, la Cour permanente déclara : « La cour considère comme incontestable qu'une telle réponse à une démarche diplomatique d'une Puissance étrangère, faite par le ministre des affaires étrangères au nom du Gouvernement, *dans une affaire qui est de son ressort*, lie le pays dont il est le ministre » (38).

Quoi qu'il en soit, décider comme l'a fait la Cour, qu'il n'est possible de poursuivre un ministre des Affaires étrangères pour ses crimes devant une juridiction nationale, compétente selon le droit international, qu'une fois qu'il a quitté ses fonctions, paraît une fausse bonne solution. Si le principe de l'immunité du ministre des affaires étrangères poursuit « le but légitime

(35) Arrêt du 20 décembre 1974, C.I.J., *Recueil*, 1974, p. 266, par.36 (italiques ajoutées) ; voir aussi par. 40.

(36) Arrêt du 14 février 2002, par. 53.

(37) *Idem.*

(38) C.P.J.I., *Statut juridique du Groënland oriental*, arrêt du 5 avril 1933, n° 53, Série A/B, p. 71 ; italiques ajoutées.

[...] de favoriser la courtoisie et les bonnes relations entre les Etats grâce au respect de la souveraineté d'un autre Etat », selon les termes de l'arrêt rendu par la Cour européenne des droits de l'homme dans l'affaire *Al-Adsani* (39), il ne peut pas, pour autant, se transformer en un mécanisme d'exonération des crimes « les plus graves qui touchent l'ensemble de la communauté internationale » (40). La nature de ces crimes commande qu'ils soient détachés de la fonction et donc des « actes officiels » du ministre des Affaires étrangères. Après tout, un ministre des Affaires étrangères — et à vrai dire un ministre quel qu'il soit — n'est pas nommé pour commettre le génocide ou les crimes contre l'humanité, ou les crimes de guerre.

Sur un plan juridique, écarter la possibilité de détacher les actes criminels, notamment ceux les plus graves, du ministre des Affaires étrangères de ses actes officiels et de le juger après mais aussi pendant l'exercice de ses fonctions pour lesdits actes criminels, c'est aller manifestement à contre-courant de la tendance lourde du droit international actuel. Même si le mandat d'arrêt lancé contre M. Yerodia l'a été par un juge national et non pas par un juge international, le principe selon lequel les individus sont personnellement responsables quelles que soient leurs fonctions officielles est maintenant établi en droit international. Non seulement il est consacré par l'article 27 de la Convention de Rome de 1998 portant statut de la Cour pénale internationale, mais il est désormais admis aussi bien dans la pratique jurisprudentielle nationale qu'internationale comme l'ont montré les poursuites exercées par les Etats-Unis à l'encontre du Général Noriega alors chef d'Etat en exercice de Panama (41) l'affaire *Pinochet* (ancien Chef d'Etat du Chili) devant la Chambre des Lords britannique et l'affaire *Milosevic* (déclenchée alors qu'il était encore président de la Yougoslavie) devant le TPIY, après avoir été établi comme un principe de droit international coutumier par ce Tribunal dans l'affaire *Furundzija* (42). A cet égard, on voit mal comment le ministre des Affaires étrangères pourrait être à l'abri de la « tendance à banalisation de la qualité de chef de l'Etat » (43) observée par M. Jorda, président du TPIY, au colloque de la Société française pour le droit international (SFDI) de Clermont-Ferrand, banalisation qui, selon lui « a commencé avec Nuremberg et [...] va jusqu'à la Cour permanente [CPI] » (44).

(39) C.E.D.H., *Al-Adsani c. Royaume Uni*, (Requête n° 35763/97), arrêt du 21 novembre 2001 ; voir « Chronique de jurisprudence internationale », *R.G.D.I.P.*, 2002-1, p. 180.

(40) Paragraphe 4 du préambule du Statut de la Cour pénale internationale et article 5 § 1 (chapeau) dudit statut.

(41) Affaire rappelée par la cour d'appel de Paris dans l'ordonnance de rejet du refus d'instruction prise par le juge d'instruction dans l'affaire *Kadhafi* (arrêt du 20 octobre 2000).

(42) T.P.I.Y., *Procureur c. Furundzija*, 10 décembre 1998, *I.L.M.*, 38, pp. 317 et s.

(43) Voir son intervention à la « Table ronde » *in Le Chef d'Etat et le droit international*, *op. cit.* p. 291.

(44) *Idem.*

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Bien plus, les crimes qui étaient reprochés à M. Yerodia, savoir la « violation grave d'obligations du droit international humanitaire » dans lesquelles on pouvait inclure pêle-mêle le meurtre, l'extermination, la torture ou les traitements inhumains, le viol, l'homicide intentionnel, le meurtre de membres du groupe etc., pouvaient recevoir la qualification de génocide ou de crime contre l'humanité, voire de crime de guerre. Or de ces crimes qui sont considérés, on l'a vu, par le Statut de la CPI comme « les plus graves », et si graves qu'ils « touchent la communauté internationale dans son ensemble » et « menacent la paix, la sécurité et le bien-être du monde » (45), les Etats participants à la Conférence de Rome de 1998 — autant dire l'ensemble de la communauté internationale (46) — disent qu'ils « ne sauraient rester impunis et que leur répression doit être effectivement assurée par des mesures prises dans le cadre national, et par le renforcement de la coopération internationale » (47); de même ils se disent « [d]éterminés à mettre un terme à l'impunité des auteurs de ces crimes et à concourir ainsi à la prévention de nouveaux crimes » (48), et rappellent « qu'il est du devoir de chaque Etat de soumettre à sa juridiction criminelle les responsables de crimes internationaux » (49). Sans préjuger de la question de la compétence universelle, il y a lieu de dire que l'immunité d'un ministre des Affaires étrangères en exercice tombe devant cette exigence partagée par tous les Etats de combattre l'impunité en sanctionnant effectivement ses crimes éventuels qui entreraient dans la catégorie des crimes « les plus graves ». Dès lors qu'est réglée la question de la compétence de la juridiction saisie l'immunité ne peut prévaloir. Ceci semble indiscutable lorsque le crime pour lequel le ministre des Affaires étrangères est poursuivi constitue la violation d'une norme impérative au sens de l'article 53 de la convention de 1969 sur le droit des traités. Il en est ainsi de façon certaine de l'interdiction de la torture dont une jurisprudence concordante considère depuis le désormais célèbre arrêt *Furundzija* (50) qu'elle constitue une norme du *jus cogens*. Or sauf à considérer que le principe de l'immunité du ministre des affaires étrangères est également une norme du *jus cogens* (51) — ce dont on peut douter sérieusement — l'interdiction de la torture — à supposer que ce soit

(45) Préambule du Statut de la C.P.I., § 3.

(46) Ces aspects du Statut et plus précisément de son préambule n'ont fait l'objet de l'opposition d'aucun Etat à la Rome, même pas des Etats qui ont voté contre le texte de la Convention.

(47) Préambule du Statut de la C.P.I., § 4.

(48) *Ibid.*, § 5.

(49) *Ibid.*, § 6.

(50) T.P.I.Y., *Procureur c. Furundzija*, 10 décembre 1998, par. 153.

(51) V. sur ce point P.M. Dupuy, « Crimes et immunités ou dans quelles mesure la nature des premiers empêche l'exercice des seconds » *R.G.D.I.P.*, 1999, pp. 289-296; Jean Yves De Cara « L'affaire Pinochet devant la Chambre des Lords », *A.F.D.I.*, 1999, pp. 94-96; M. Cosnard, « Les immunités du Chef d'Etat », Colloque S.F.D.I., de Clermont-Fernand *op. cit.* p. 212; du même « Quelques observations sur les décisions des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet », *R.G.D.I.P.*, 1999, pp. 309-328.

la seule norme de *jus cogens* en matière de droits de l'homme — doit prévaloir sur la règle de l'immunité.

Quelques arguments factuels militent également contre l'idée de la non détachabilité et de la non justiciabilité conséquente des « actes privés » criminels commis avant ou pendant l'exercice des fonctions du ministre des Affaires étrangères. Premièrement, on peut envisager le cas extrême d'un ministre des Affaires étrangères à vie, comme il y a des présidents et autres chefs d'Etat à vie : sa pérennité au pouvoir serait pour lui une garantie de l'impunité. Deuxièmement, il y a les cas plus courants, dans les pays développés comme dans les pays en développement, de ministres des Affaires étrangères d'une longévité exceptionnelle dans leurs fonctions. Il suffit de citer le cas de Hans Dietrich Genscher qui fut ministre des affaires étrangères de la RFA pendant dix-huit ans d'affilées. En fonction de l'âge auquel il accéda à ces fonctions, il pourrait les avoir quitté à un âge avancé. A quelle fin poursuivrait-on un ancien ministre des Affaires étrangères d'un très grand âge ? L'expérience montre que le temps et le poids de l'âge rendent quasiment inutiles certains procès contre les auteurs des crimes odieux. La plupart du temps, l'état de santé des prévenus rend le procès impossible (52). Et lorsqu'ils sont condamnés à des peines de prison, le poids de l'âge et leur état de santé attirent sur eux une certaine « compassion (?) » ou « compréhension (?) » ou « indulgence (?) » qui conduit à leur remise en liberté avant qu'ils n'aient purgé la totalité de leur peine (53). Encore l'ombre de l'impunité !

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L'immunité pénale du ministre des Affaires étrangères, que l'on conçoit aisément dans la perspective fonctionnaliste qui a été celle de la Cour dans cette affaire, ne peut être absolue ou « totale » dans l'ordre juridique international actuel; elle ne peut être que relative. Aussi, en statuant comme elle l'a fait sur cette question, il nous semble que la Cour a contrarié une tendance lourde du droit international humanitaire et des droits de l'homme telle qu'elle s'est dessinée depuis Nuremberg. Son arrêt du

(52) Cas du général Pinochet, ancien président du Chili; voir Jean Yves De Cara, « L'affaire Pinochet devant la Chambre des Lords », *in op. cit.*, pp. 72-100; et Maurice Kamto, « L'affaire *Pinochet*. Chronique d'un précédent révolutionnaire et problème de l'immunité juridictionnelle du Chef d'Etat en droit international », *Revue Africaine des Sciences Juridiques (R.A.S.J.)* (F.S.J.P., Université de Yaoundé II) 2000, Vol.1, n° 2, notam. pp. 268-269.

(53) Cas de M. Maurice Papon, ancien préfet de Bordeaux (Gironde, France) qui avait participé entre 1942 et 1944 à la déportation massive des Juifs vers les camps de la mort en Allemagne sous le régime nazi. Condamné à dix ans d'emprisonnement ferme en 1998, il a été remis en liberté en septembre 2002 par un arrêt de la cour d'appel de Paris à l'âge de 92 ans pour raison de santé. Dans son arrêt, la Cour d'appel a considéré que « la suspension de la peine de Maurice Papon, compte tenu de son âge et de son état de santé, n'était pas de nature à troubler l'ordre public » (cité par *Le monde*, 21 sept. 2002, p. 9). Un expert judiciaire a déclaré : « Si cet homme était sorti mourant, nous aurions été en faute ». (*ibid*).

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14 février 2002 a eu des répercussions directes sur les nouveaux développe-
ments du droit pénal international amorcés par la justice belge : dans l'af-
faire Sharon, la Cour d'appel de Bruxelles a suivi son Avocat général
Pierre Morlet, qui lui recommandait de tenir compte de l'arrêt de la CIJ
du 14 février 2002, et a invoqué l'immunité due à la qualité de Premier
ministre de M. Sharon pour annuler les poursuites pénales engagées contre
ce dernier.

On ne peut se satisfaire de l'argument (?) qu'en déclarant « l'inviolabilité
et l'immunité totales » du ministre des affaires étrangères sans toutefois se
prononcer sur la question de la compétence universelle (le Congo ayant
abandonné ce moyen en cours de procédure), la Cour aurait réalisé un com-
promis acceptable par tous (54). La Cour n'avait pas à statuer en tant
qu'instance arbitrale, ni *ex aequo et bono*; elle avait à trancher sur la base
du droit international un différend d'ordre juridique dont elle a reconnu
elle-même l'existence. Elle ne peut continuer à peindre des trompe-l'œil sur
les murs de la justice internationale chaque fois qu'elle est confrontée à une
question embarrassante à l'instar de l'affaire de la *Licéité de la menace ou
de l'emploi d'armes nucléaires* (55). L'immunité ne devrait pas servir de bou-
clier à l'impunité.

(54) V. Opinion individuelle du Juge Koroma; et Philippe WECKEL, « Chronique de jurispru-
dence internationale », *R.G.D.I.P.*, 2002-2, p. 427.

(55) Avis consultatif du 8 juillet 1996, C.I.J., *Recueil*, 1996, p. 266, par. 105, E.

REVUE BELGE DE DROIT INTERNATIONAL
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QUELQUES RÉFLEXIONS SUR L'AFFAIRE RELATIVE AU *MANDAT D'ARRÊT DU 11 AVRIL 2000*

PAR

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Toute décision judiciaire peut être intéressante par ce qu'elle dit et, le cas échéant, par ce qu'elle tait. L'arrêt du 14 février 2002 ne fait pas exception à la règle. Ce qu'il dit porte sur l'immunité de juridiction dont peut se prévaloir, devant le tribunal d'un État étranger, un ministre des Affaires étrangères en exercice; le dit-pour-droit est important, car il est indiscutablement appelé à faire jurisprudence. Ce qu'il tait concerne la compétence universelle; il demeure difficile toutefois de tirer des silences de la Cour de grands enseignements, en dépit des réflexions exprimées par certains de ses membres à ce propos.

L'immunité ne constitue pas le seul point de droit qui soit tranché dans l'arrêt. Diverses « exceptions d'incompétence, de non-lieu et d'irrecevabilité » y sont également évoquées, de même que les modalités de la réparation due pour violation de la règle d'immunité. Ces questions ne sont pas sans intérêt. Il ne paraît toutefois pas justifié de s'y attarder plus que la Cour ne le fait elle-même. Les exceptions soulevées par la Belgique n'ont en particulier guère retenu l'attention des juges qui les ont balayées du revers de la main, le juge Oda seul faisant dissidence sur ce point.

L'arrêt du 14 février 2002 est, dans l'ensemble, court et clair. Le fait mérite d'être signalé, car il est loin de se vérifier dans toutes les affaires qui ont été portées à la connaissance de la Cour internationale de justice. Que les règles relatives à l'immunité de juridiction et à l'inviolabilité pénales d'un ministre des Affaires étrangères en exercice aient fait l'objet d'un très large accord entre ses membres n'y est certainement pas étranger. Seuls deux juges en effet se dissocient sur ce point de la majorité.

Il n'est pas vraiment surprenant que le juge *ad hoc* désigné par la Belgique n'ait point en l'occurrence suivi ses collègues, ce qui ne change rien au fait qu'il statue en pleine indépendance sans être aucunement tenu de partager — même s'il lui appartient de les faire comprendre — les thèses de l'État auquel il doit son siège au sein de la Cour. M^me^ Van den Wyngaert considère que « rien ne vient étayer » la « thèse » selon laquelle « des immunités » sont coutumièrement dues aux ministres des Affaires étrangères dans