Överthusets övervägande av överklagandet av underättens beslut att senator Augusto Pinochet Ugarte ska anses ha statsrättslig immunitet vad avser spansk domstols om begärande av hans utlämning för eventuell rättegång om brott begångna under senatorns tid som Chiles statsöverhuvud

Den engelska texten återges i sin helhet. Förvisso har många synpunkter på beslutet i den ena eller andra riktningen. Vi ska inte här uttrycka någon sådan åsikt annat än vår respekt för lordernas förmåga att klart formulera de juridiska frågeställningarna, vilket bjärt kontrasterar mot de pekoral som brukar produceras av svenska domare, även på hög nivå.

Contras redaktion

House of Lords Session 1998-99

Judgments - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)

HOUSE OF LORDS

Lord Slynn of Hadley Lord Lloyd of Berwick Lord Nicholls of Birkenhead Lord Steyn Lord Hoffmann

ON 25 NOVEMBER 1998

UNAMENDED

LORD SLYNN OF HADLEY

My Lords,

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, eleven 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, however, 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 respondent 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.

The Proceedings

The proceedings have arisen in this way. On 16 October 1998 Mr. Nicholas Evans, a Metropolitan Magistrate, issued a provisional warrant for the arrest of the respondent 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 31 December 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 Magistrate, on 22 October 1998 on the application of the Spanish Government, but without the respondent 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 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;

(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 respondent 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 respondent issued a summons applying for an order of Habeas Corpus. Mr. Michael Caplan, a partner in the firm of solicitors, deposed that the plaintiff 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 respondent was "President of the Government Junta of Chile" according to Decree 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 respondent 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 on 26 and 27 October. On 28 October leave was given to the respondent 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 5 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 intervenors, 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, Q.C. on behalf of these intervenors being heard. Leave was also given to other intervenors 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, 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 1989 Act 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 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 respondent'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 respondent'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 respondent 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 respondent 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 1970 Act and Article 39 of the Vienna Convention 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 respondent, 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent] 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 State Immunity Act 1978, on the evidence at all relevant times until March 1990 the respondent was Head of State of Chile.

The protection claimed by the respondent 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 Argentina v. Amerado Hess 488 U.S. 428, Filartiga v. Pena-Irala (1984) 577 F.Supp. 860, Siderman de Blake v. Republic of Argentina(1992) 965 F 2d 699, and

Al Adsani v. Kuwait 107 I.L.R. 536.

The Claim of Immunity

Chronologically, it is the procedural bar which falls to be considered first. Can the respondent 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:”(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”.

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 (hereinafter referred to as a separate entity) which is distinct from the executive organs of the government of the State and capable of suing or of 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, Q.C. 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 Federal State Immunity Act 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 1978 Act.
Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)continued

(back to preceding text) 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(1), "Heads of State", it is provided that:

"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 1978 Act, provides in section 1 that the provisions of the Act, "with respect to the matters dealt with 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 the Schedule, "shall have the force of law in the United Kingdom."

The Preamble to the Vienna Convention (which though not part of the Schedule may 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 the 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."

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 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."

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 1978 Act 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, Q.C. 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 1978 Act 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 Mrs. Denza suggests, the two should be read in the same way [see Diplomatic Law, 2nd Edition, 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 at pp. 56-57:

”A Head 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 authority90. 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.91"

In the present case it is accepted in the 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 [he] 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. The provisions of the Act ”fall to be considered against the background of those principles of public international law as are generally recognised by the family of nations” (Alcom Ltd. v. Republic of Columbia [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, Suchariktul in his report to the International Law Commission (1980) Vol. II Doc. A (LN 4—331 and Add.J.) Marshall C.J. in the Schooner Exchange v. M’Faddon (1812) 11 US (7 Cranch) 116.

In the Duke of Brunswick v. The 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. The Lord Chancellor said:

”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:

”If it be a matter of sovereign authority, we cannot try that 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 shew, 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 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” (p. 932). 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:

”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, it 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.”

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(back to preceding text) Jurists since have regarded this principle as still applying to the position of a former Head of State. Thus in the 9th edition of Oppenheim’s International Law (1992 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 the State enjoy continuing immunity.”

Satow in Guide to Diplomatic Practice, Fifth Edition, is to the same effect. Having considered the Vienna Convention on Diplomatic Relations of 1961, the New York Convention on Special Missions of 1969 and the European Convention on State Immunity, the editors conclude at page 9:

”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. 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. 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 on "The Legal Position in International Law on Heads of States et al", Sir Arthur Watts, Q.C. wrote that a former Head of State had no immunity in respect of his private activities taking place whilst he was Head of State. "A Head 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, Nobili v. Charles I of Austria (1921) (Annual Digest of Public International Law Cases, Volume I 1932, Case No. 90, page 136). On the other side, in France is the case of Mellerio v. Isabel de Bourbon ex Queen of Spain, Journal of International Law (1974) (page 32); 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 (Review Critique 1964, page 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 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] 1 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 Congresso del Partido [1983] A.C. 244). One must therefore ask is there "sufficient evidence to show that the rule of international law has changed?" (p. 556).

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, the International Convention against the Taking of Hostages 1979 provides that:

"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 to 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." 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 the Genocide Convention of 1948,

"the Contracting Parties confirmed that genocide (being any of the acts specified in article II 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 punish".

By article IV,

"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."

The Genocide Act 1969 made the acts specified in article II of the Convention the criminal offence of genocide, but it is to be noted that article IV 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 VI that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory in 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 in 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. 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. 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.” The same clause as to Head of State as in the Yugoslav tribunal is in this Statute.

The Rome Statute of the International Criminal Court 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. 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 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 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 of 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 Nuremburg 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 adopted by the United Nations General Assembly in December 1945, the International Law Commission reports and the European Convention on Human Rights and Fundamental Freedoms 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 the Eichmann Case held that they had jurisdiction to deal with international crimes (see also Re Honecker (1984) 80 I.L.R. 36, and Demanjanjuk 776 F 2d 511).

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 (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. Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division

Jurists since have regarded this principle as still applying to the position of a former Head of State. Thus in the 9th edition of Oppenheim's International Law (1992 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 the State enjoy continuing immunity."

Satow in Guide to Diplomatic Practice, Fifth Edition, is to the same effect. Having considered the Vienna Convention on Diplomatic Relations of 1961, the New York Convention on Special Missions of 1969 and the European Convention on State Immunity, the editors conclude at page 9:

"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. 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. 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."

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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. Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)continued

(back to preceding text) 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 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?

The Torture Convention of 10 December 1984 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 under its jurisdiction and it does not extradite 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(1) and (2) 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 enquiry. 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 the Nuremberg Charter 1945 (Article 7), the official position of defendants "whether as Heads of State or responsible officials" does not free them from responsibility. In the Genocide Convention (1948) persons committing the act shall be punished "whether they are constitutionally responsible rulers, public officials or private individuals". In the Yugoslav and Rwanda Tribunals,

"The official position of any accused person, whether as Head of State or Government or as a responsible Government official"

is not a defence (Article 7). 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 Government official" is not exempted from criminal responsibility.

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. A Head 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

meeting show the difficulties which arose in seeking to deal with the position of a Head of State.

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 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 of 1948. Whether or not your Lordships are concerned with the second international warrant and the request for extradition (and Mr. Nicholls, Q.C. submits that you are not), the Genocide Convention does not therefore satisfy the test which I consider should be applied.

The Taking of Hostages Convention which came into force in 1983 and the Taking of Hostages Act 1982 clearly make it a crime for "any person, whatever his nationality" who "in the United Kingdom or elsewhere to take hostages for one of the purposes specified." This again indicates the scope both of the substantive crime and of jurisdiction, but neither the Convention nor the Act contain 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 respondent would risk unsettling what has been achieved, the length of time since the events took place, that prosecutions have already been launched against the respondent in Chile, that the respondent 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 the Schooner Exchange v. M'Faddon (supra). See also Underhill v. Hernandez 168 US 250. In Banco National de Cuba v. Sabbatino 307F 2d 845 (1961) it was said that "the Act of State Doctrine briefly stated 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" (page 855) see also the 3rd Restatement of the Law paragraph 443/444. In International Association of Machinists v. Opec (649F 2d 134) [1981] the 9th circuit Court of Appeals took the matter further

"The doctrine of sovereign immunity is similar to the Acts 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 statutes. 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 Sovereignty Immunities Act (28 USSC-1602) ("F.S.I.A.") 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 F.S.I.A. 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" (Kravitch S.C.J. in US v. Noriega (7 July 1997)).

In Kirkpatrick v. Environmental Tectonics (493 U.S. 403 110 S. Ct. 701 (1990)) 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 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" (p. 705).

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 9th edition, page 365). In Buttes Gas (supra), 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, only a year before Sabatino, Lord Wilberforce asked 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 'acts 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 respondent was entitle>

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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 Q.C. 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.

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(back to preceding text) I return to the narrative. 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 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 of 1957, 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. 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. Alun 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.

Returning again 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, 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 1 of the State Immunity Act 1978? If not, does Part 1 of the State Immunity Act 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 3 of the State Immunity Act, and the articles of the Vienna Convention as set out in the schedule 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 Q.C. 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 immun-

ity 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 one: 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 9th ed. 1992, 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 para. 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 para. 27 of their written case. Like para. 26 it has the authority of Professor Greenwood; and like para. 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 on the Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers (1994) Recueil des Cours vol. 247 at p. 89 says:

"A head 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 5th ed. 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 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."

In Oppenheim's International Law 9th ed. 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."

(back to preceding text) It was suggested by Professor Brownlie that the American Restatement of the Foreign Relations Law of the United States was to the contrary effect. But I doubt if this is so. In vol. 1, para. 464 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 (1848) 2 H.L. Cas. p. 1, a case discussed by Professor F. A. Mann in his illuminating article published in 59 L.Q.R. (1943) p. 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.”

In Hatch v. Baez (1876) 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 p. 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. At p. 599 Gilbert J. said:

”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 (1897) 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 Chief Justice Fuller said, at 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.”

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. 2 547. 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. At p. 557, they said:

”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 (1990) 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. 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.

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 coordination 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 coordinate 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 coordination 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 cooperation 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 (1996) 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. observed that the draftsman of the State Immunity Act must have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the convention against torture in 1984). 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. Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)continued

(back to preceding text) The same conclusion has been reached in the United States. In Siderman de Blake v. Republic of Argentina (1992) 965F 2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the Government of Argentina. It was held by the 9th Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing Filartiga v. Pena-Irala (1980) 630F 2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunity Act.

Admittedly these cases were civil cases, and they turned on the terms of the Sovereign Immunity Act in England and the Foreign Sovereign Immunity 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 1 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. Professor 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 Nuremburg, 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.

Issue two: Immunity under part 1 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 Columbia [1984] 4 A.C. 580 at p. 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 as follows:

”1. General immunity from jurisdiction

(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.

”14. States entitled to immunities and privileges

”(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; . . .

”16. Excluded matters

(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. Nichols 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 2-11, and that the immunity covers criminal as well as civil proceedings. Faced with the objection that part 1 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 2-11. 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 1 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. Nichols referred us to an observation of the Lord Chancellor in moving the Second Reading of the Bill in the House of Lords: Hansard 17 January 1978 col. 52. In relation to part 1 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 1 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 1 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 at 542 Stuart Smith L.J. referred to the State Immunity Act 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 1 of the Act.

Issue 3: Immunity under part 3 of the State Immunity Act

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 are identical to the immunities which he enjoys at common law.

The Vienna Convention provides as follows:

"Article 29: The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.. . .

"Article 31: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.. . .

"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 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 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? 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 round-about 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. Alun 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. Alun Jones's first submission.

Mr. Alun 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. Alun Jones hits the mark. His formulation was accepted as correct by Mr. Nicholls and Miss Clare Montgomery on behalf of the respondents, and by Mr. David 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, the Duke of Brunswick v. The King of Hanover. 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. At 932 he said:

”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. (1918) 246 U.S. 297 and Banco Nacional de Cuba v. Sabbatino (1964) 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 W.S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International (1990) 493 U.S. 400. 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 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.

(back to preceding text) 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. (1918) 246 U.S. 297 at 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. 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.

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 (as Lord Wilberforce pointed out it is an obligation, and not a discretion) if the circumstances of the case so require. 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 imunity, 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

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(b)(i) of the Extradition Act 1989 for the arrest of the respondent 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 as follows:

"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 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.

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 1 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 Q.C., 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 1 of the Act does not apply to criminal proceedings (section 16(4)). On this section 16(4) is unambiguous. Contrary to the contentions of Mr. Nicholls Q.C., 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 (1996) 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 (1989) 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 (9th Cir. 1992), 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 (1848) 2 H.L.Cas. 1 and Underhill v. Hernandez (1897) 169 U.S. 456) 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 Chief Justice Fuller in Underhill v. Fernandez (1897) 169 U.S. 456:

”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: W. S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation, International (1990) 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 1978 Act 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. A head 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. The Lord Chief Justice 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, the Lord Chief Justice 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 1978 Act 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 1978 Act, 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 Nurnberg 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." Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)continued

(back to preceding text) 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 1978 Act. 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 1984) as a crime committed by public officials and persons acting in a public capacity. As already noted, the 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 hostage-taking 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.

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 particularized 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 16 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 as 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'etat 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 the Lord Chief Justice summarized 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 Direction de Inteligencia Nacional (DINA), the secret police. The subsequent re-naming of this organization is immaterial. The case is that agents of DINA, 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 DINA committed the acts of torture and that DINA was directly answerable to General Pinochet rather than to the military junta. And the case is that DINA 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. óKó óKThe 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 of the Act of 1978. It provides as follows:

”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 as follows:

"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 as follows:

"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 of the 1978 Act, read with the relevant provisions of the schedule to the 1964 Act, 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. The Lord Chief Justice 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’etat, 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.

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 civilized 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 DINA 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 categorized 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 recognizes 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 Buttes Gas, 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 the Third Restatement of The Foreign Relations Law of the United States, published in 1986 by the American Law Institute, Volume 1, at 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.

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 speech of my noble and learned friend Lord Nicholls of Birkenhead and for the reasons he gives I too would allow this appeal.