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CASE AND COMMENT

FORMER HEAD OF FOREIGN STATE—EXTRADITION—IMMUNITY

SENATOR Pinochet, former President of Chile, when undergoing medical treatment in London, was arrested on warrants issued by Metropolitan Stipendiary Magistrates. The authorities of Spain had sought his extradition to Spain to stand trial, principally, for his allegedly having authorised, when President of Chile, the torture in Chile of many persons, including Spanish citizens. Pinochet challenged the warrants by way of judicial review proceedings; the Divisional Court quashed them by *certiorari* on the ground that, as former head of State, he was immune from the jurisdiction of the English courts. The House of Lords allowed an appeal in part by a bare majority (Lords Nicholls and Steyn with whom Lord Hoffmann concurred, Lords Slynn and Lloyd dissenting: *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet* [1998] 2 W.L.R. 825, henceforth *Pinochet (1)*). That ruling was set aside "on the ground that the Committee was not properly constituted" (*ex p. Pinochet (No. 2)* [1999] 1 All E.R. 577); a rehearing of the appeal took place before a differently constituted Judicial Committee (*ex p. Pinochet (No. 3)* [1999] 2 W.L.R. 827). It, by a large majority (Lords Browne-Wilkinson, Hope, Hutton, Saville, Millett and Phillips, Lord Goff dissenting), also allowed the appeal in part.

Pinochet (3) considered principally two issues, the first of which had not been fully discussed in *Pinochet (1)*: whether the alleged offences were extraditable offences and, if so, whether Pinochet was immune from the jurisdiction of the English courts.

(1) Extraditable offences

According to the Criminal Justice Act 1988, s. 134(1), which incorporates into English law the Convention against Torture and Certain Other Cruel, Inhuman or Degrading Treatment or Punishment (1984):

> A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom

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> or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his duties.

In *Pinochet (1)* Lord Slynn, dissenting, had held (p. 1476) that this provision did not include a head of State since it made no express mention of such person, unlike several other treaties. But in *Pinochet (3)* counsel for Chile "conceded correctly" (*per* Lord Browne-Wilkinson at p. 843) that the section did include a head of State. Since by the Act of 1988 the infliction of torture or entering into a conspiracy to torture had become extraterritorial offences, certain of the alleged acts prima facie disclosed offences by English law and, owing to extradition arrangements in force between the United Kingdom and Spain, such acts *after that date* satisfied the dual criminality rule and were extraditable offences under the Extradition Act 1989, ss. 2(2),(3), 20 (see especially *per* Lords Browne-Wilkinson and Hope at pp. 837, 876; Lord Millett, dissenting on the point, considered that the infliction of torture had been an extraterritorial criminal offence in English law before 1988).

(2) Immunity from the jurisdiction of the English courts

Part I of the State Immunity Act 1978, which contains a number of exceptions to the general immunity of foreign States, "does not apply to criminal proceedings" (s. 16(4)). But section 20(1) provides: "Subject … to any necessary modifications the Diplomatic Privileges Act 1964 shall apply to (*a*) a sovereign or other head of State …". The Diplomatic Privileges Act 1964, which by section 2(1) incorporates *verbatim* in Schedule 1 certain Articles of the Vienna Convention on Diplomatic Relations 1961, provides:

> The person of a diplomatic agent shall be inviolable. (Art. 29(1))
> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. (Art. 31(1))
> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease when he leaves the country … However with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist. (Art. 39(2))
> The immunity from jurisdiction of a diplomatic agent … may be waived by the sending State. (Art. 32(1))
> Waiver must always be express. (Art. 32(2))

The drafting of section 20(1) of the 1978 Act is, it is submitted, sloppy ("baffling", *per* Lord Browne-Wilkinson (p. 845), "very strange" *per* Lord Goff (p. 851)). It is regrettable that the drafters of these provisions failed to make their intention clearer. *Pinochet* contains by no means the first discussion of mismatches between the provisions of the Acts of 1964 and 1978: see *B.C.C.I. (Overseas) Ltd. (in liquidation)* v. *Price Waterhouse*

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[1997] 4 All E.R. 108, noted [1998] C.L.J. 4. The interpretation placed upon the matter by all members of the House of Lords was that the immunities afforded by section 20(1) to a head or former head of State obtain not only as regards acts in the United Kingdom but also elsewhere.

State immunity may be afforded either by reason of the defendant's status (*ratione personae*) or by reason of the nature of the act called in question (*ratione materiae*). The immunity of a head of State is of the former sort, that of a former head of State of the latter. Thus, all agreed that, had Pinochet still been President of Chile, he would have been immune from the jurisdiction of the English courts whether or not his acts had been "in the exercise of his functions as head of State" (*e.g.* Lord Millett at p. 905). But he was President no longer. He could, therefore, be immune from extradition proceedings (and from trial before an English court if extradition proceedings had not been set in train?) if and only if his conduct *after 1988* "had been performed in the exercise of his functions as head of State". Had it? A range of opinions was expressed.

Lord Browne-Wilkinson considered that since "torture is an international crime, how can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" (p.847). In other words, since the authorisation of the infliction of torture is contrary to the *ius cogens*, no immunity may attach to it *ratione materiae* in English law, at least after the entry into force of the Criminal Law Act 1988 (see, in a similar sense, Lords Hope, Hutton and Saville). Lords Millett and Phillips went further; they considered that no authorisation of torture, whether occurring before or after 1988, could attract immunity *ratione materiae* alone. Reliance was placed by all upon the views of Sir Arthur Watts, former Legal Adviser to the Foreign and Commonwealth Office: (1994–III) 247 R.C. at p. 82:

> For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are *internationally* accountable has now become an accepted part of international law. [emphasis in original]

Yet as Lord Goff emphasised (p.853), the matters to which Watts refers are all instances of proceedings before *international* tribunals, starting with the International Military Tribunal at Nuremberg in 1946. How then does a former sovereign come not to retain immunity before a *domestic* court? Lord Browne-Wilkinson's answer, like that of the others in the majority, is clear if not wholly convincing: section 134 introduces into domestic law an international crime against the *ius cogens*. The reasoning of the majority in *Pinochet (3)* at this point is somewhat different from that of the majority in

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Pinochet (1), where Lord Nicholls had stated that "these acts cannot be regarded by international law as a function of a head of state" (p. 1501, and see Lord Steyn at p.1507). In other words, international law itself directs that such acts are not aspects of the function of a head of State; Lord Goff regarded this view as being "of extreme simplicity" and one which, as such, he was "unable with all respect to accept" (pp. 849, 850). Thus, according to Lords Nicholls and Steyn, section 134 merely creates the offences in English law; immunity does not attach to them. Lord Steyn put it strikingly (p. 1507): "what [Pinochet] is alleged to have done is no more to be categorised as acts undertaken in the exercise of the functions of a head of state than [instances] of a head of state murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it".

Graphic as these examples doubtless are, it is arguable that they do not satisfactorily deal with views previously adopted by Lord Wilberforce in *I Congreso del Partido* [1983] 1 A.C. 244, 264 and by Lord Goff in *Kuwait Airways Corporation* v. *Iraqi Airways Co.* [1995] 1 W.L.R. 1147, 1160 as to the nature of acts *iure imperii*. And, as Lord Lloyd demonstrated in *Pinochet (1)* (p. 1490), there exists insufficient State practice for such a view necessarily to be tenable: *Attorney-General of Israel* v. *Eichmann* (1962) 36 I.L.R. 5 and the opinion of the late Sir Hersch Lauterpacht that the International Military Tribunal at Nuremberg had been essentially a domestic tribunal, with all respect to Lord Millett in *Pinochet (3)*, are less than adequate evidences for proof of a rule of customary international law.

The argument in *Pinochet (3)* then became, "as a result of representations by the Appellate Committee" (Lord Goff at p. 855), that section 134 in effect operated both to remove the immunity which might otherwise have attached to the acts and to confer jurisdiction over them on the domestic court. In other words, the provisions of the Torture Convention and of section 134 operated as a waiver of immunity. But as Lord Goff observed, compellingly, the Vienna Convention and the general law require any such waiver to be express and no express waiver had ever been made; indeed, the Government of Chile, which alone might have waived immunity, itself intervened in the case to seek to have the proceedings set aside. It is submitted that Lord Goff's view is unanswerable, that for a State to have become a party to an international Convention, here the Convention of 1984 which makes no mention of any submission to the jurisdiction of a *domestic* tribunal, is not a waiver of immunity. See also Rehnquist C.J. in *Argentine Republic* v. *Amerada Hess Shipping Corporation* (1989) 198 S. Ct. 683, 693: "nor do we see how a foreign State can waive its immunity under [the United States' Foreign Sovereign Immunities Act 1976] by signing an international agreement".

Whatever criticisms of the reasoning of the majority in both hearings may be made, the result of the litigation is clear as to the specific issues raised in them. For that one should be grateful. Possibly protracted extra-

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dition proceedings will now ensue. The cases show a remarkable and, as it appears, unprecedented willingness to rely upon provisions of international law, both conventional and customary, in domestic proceedings. The relationship between international and municipal law will be viewed very differently henceforth. In particular, the apparently ready acceptance by the majorities of the notion of *ius cogens* and of the provisions of the Torture Convention (and of certain other treaties) as instances of the *ius cogens* is perhaps surprising. But Lord Millett's incisive statement concerning the difference between jurisdictional immunity and the act of State doctrine is admirable (p. 906):

> State immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign State.

The case contains different styles of judicial approach to intractable issues. Perhaps Lord Millett should be regarded as the visionary, Lord Goff as the rigorously analytical lawyer, the others somewhere in between. No two persons will necessarily agree as to the "best" approach. Perhaps there is no "best" approach but simply approaches which are different.

Whilst discussion in *Pinochet* concentrated upon the position of a former head of State, what, henceforth, will be his position and that of present and former State officials as to criminal liability? His position is governed by statute as interpreted in *Pinochet*, but what about that of the others? Presumably at least officials presently in office will have some degree of immunity from criminal jurisdiction, *not* under the State Immunity Act (see section 16(4)), but by general international law. What of former officials? And will they all now "have to think twice about travelling abroad for fear of being the subject of … allegations emanating from states of a different political persuasion" (see Lord Goff at p. 861)? By way of example, might Lady Thatcher have to be wary of visiting certain States lest proceedings be taken against her in connection with her alleged complicity in war crimes, say for her having authorised the sinking of *The General Belgrano* during the Falkland conflict?

Some final questions may be asked. If, as now appears possible, Spain withdraws the request for the extradition of Pinochet, what view will the English courts take of requests for his extradition by other States parties to the Torture Convention? If, for whatever reason, Pinochet were not to be extradited at all, would he, should he, be tried before an English court? And what, if any, difference would there have been in *Pinochet* had the Human Rights Act 1998 been in force?

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