THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Review Meeting

Universal Jurisdiction

Geneva, 6-8 May 1999

EX PARTE PINOCHET A DISCUSSION OF THE RECENT PROCEEDINGS IN THE HOUSE OF LORDS IN CONNECTION WITH THE PROPOSED EXTRADITION OF SENATOR PINOCHET FROM THE UK TO SPAIN

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"In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence"

Lord Millett

INTRODUCTION

- This has proved to be a ground-breaking and extraordinary case. First, Spain, followed by three other European countries, requested the extradition of Senator Pinochet, signalling their intent to try him for human rights crimes. In his attempts to resist extradition, two House of Lords hearings, involving no less than 12 of the UK's most senior judges, have decisively dismissed his attempt to claim sovereign immunity for gross human rights violations. On two separate occasions the Home Secretary has made a very tough political decision authorizing that Pinochet's extradition to Spain can proceed, facing down the heavy-weight international support for Pinochet reportedly coming from figures such as George Bush, Henry Kissinger, the Pope, the Dalai Lama, Margaret Thatcher and former UK Chancellor, Lord Lamont.
- 2. It seems that this is the first time that a domestic court has refused a former head of state the protection of sovereign immunity in respect of international crimes. It represents a major step forward in the development of personal criminal liability of state officials for human rights atrocities and for the application of universal jurisdiction for human rights crimes. It is also the first time in the UK that the House of Lords agreed to overturn one of its own judgements and hold a complete re-hearing of a case, having found that one of the judges was disqualified from sitting because of his interests in the case and the possible appearance of bias. Furthermore, it

represents an important landmark case in the UK as regards the role of third party intervenors, a relatively unknown phenomenon in this country but likely to become much more crucial once the newly adopted Human Rights Act 1998 enters into force.

3. However, this is only the beginning for Pinochet. The proceedings which are the subject of this paper have simply resolved that the extradition process can proceed. Indeed, even before this process continues, Pinochet is intending first to challenge the Home Secretary's latest authorization to proceed in judicial review proceedings. Meanwhile he will no doubt keep his personal aircraft ready and waiting on the tarmac to whisk him away at the appropriate moment. If he fails, there are a number of other opportunities for him to mount challenges during the extradition proceedings. It could well be a couple of years before this case is finally determined, although some predict that, given its profile and the political and diplomatic strains it is creating for the UK Government, every effort will be made to speed up the process.

GENERAL PINOCHET

4. It is common knowledge that General Augusto Pinochet Ugarte (now Senator Pinochet) led a military junta in Chile which overthrew the government of President Allende in a coup on 11 September 1973. General Pinochet subsequently became head of state and his regime remained in power until 11 March 1990 when he resigned. During its years in power Pinochet's government pursued a policy of systematic and widespread human rights violations involving the detention of thousands of people without charge or trial, torture, extra-judicial executions, disappearances, abductions and political persecution. It has proved impossible to bring legal proceedings against Pinochet inside Chile. In 1978 an amnesty was set in place to protect the perpetrators of human rights violations committed between 1973 and 1978. Furthermore, the Constitution, which Pinochet was involved in drafting as part of the transition to democracy, created the system of parliamentary senators for life having complete immunity under Chilean law. On his retirement from the armed forces Pinochet himself took up the position of senator for life. Inside and outside Chile victims of human rights violations and their relatives and sympathisers have continued to campaign vigorously for justice and truth to prevail in respect of the years of military rule.

THE SEQUENCE OF EVENTS

Pinochet is arrested

- 5. In the autumn of 1998 Senator Pinochet came to the UK for medical treatment. On 16 October, shortly after his arrival, an international warrant for his arrest was issued in Spain and on the same day a London magistrate issued a warrant for his arrest under section 8 of the UK Extradition Act. Pinochet was arrested at his London clinic on 17 October. A second international warrant and a second UK arrest warrant were issued on 18 October and 22 October respectively. The warrants accused Pinochet of a series of offences involving torture and conspiracy to torture, hostage-taking and conspiracy to murder between 1976 and 1992. Many of the offences were committed in Chile but a number of the charges related to crimes or conspiracies taking in place in Spain, Italy, France and elsewhere.
- 6. Extradition is the return of a wanted criminal from a country where s/he is found to the country where s/he is accused of (or has been convicted of) a criminal offence. In Britain it is governed by the 1989 Extradition Act and the European Convention on Extradition. In urgent cases the requesting state can request provisional arrest of the accused, which must be followed by a formal extradition request within a specified time. A magistrate can issue a warrant if the conduct

alleged appears to amount to an extradition crime. The offences must also be recognised as crimes in the UK punishable by at least 12 months in prison. If extradition is requested for extraterritorial crimes - acts committed outside the territory of the requesting state - then they must also constitute extra-territorial crimes in the UK. Once the fugitive has been arrested, the Home Secretary has to issue an authority to proceed before the case can go on to the next stage in the magistrates court, which has to examine the matter and decide whether to order extradition.

- 7. Pinochet immediately challenged his arrest before the High Court. The court overturned the arrest warrants on 28 October 1998, on the grounds that Pinochet, as a former head of state, was entitled to *state immunity* in respect of the criminal charges against him. However, he was not allowed to go free because the UK prosecution authorities, acting on behalf of the Spanish Government, were permitted to lodge an appeal against this decision to the highest court the House of Lords.
- 8. While the appeal was pending, the Spanish Government submitted its Formal Request for Extradition on 11 November, greatly expanding on the list of offences which now included conspiracy to take over Chile by a coup and thereafter to commit genocide, murder, torture and hostage-taking. In addition, the Swiss and French Governments also submitted formal extradition requests on 11 and 13 November respectively, and were apparently subsequently joined by Belgium. Meanwhile Pinochet, whose medical treatment had long since been completed, left his London clinic and was allowed to go to a luxurious rented mansion in Wentworth, Surrey where he has since been held under house arrest.

The first House of Lords hearing

9. The appeal was heard by five judges in the House of Lords on 4-12 November 1998. They delivered their judgement on 25 November. They held by a majority of 3:2 that Pinochet *was not entitled to claim state immunity* in respect of any of the crimes of which he was charged. In addition to the main parties to the case, Amnesty International, on behalf of several other organisations and individuals, was permitted to intervene orally in the proceedings while Human Rights Watch was permitted to submit written observations. Assistance was also provided by a court-appointed lawyer acting as *amicus curiae* (friend of the court).

The Home Secretary's decision

10. Now that the legal challenge was dealt with, the next step required by the Extradition Act was for the Home Secretary, Jack Straw, to decide whether or not the extradition proceedings should be allowed to continue. He had to consider whether the offences are extradition crimes, whether the request was in order, whether the offences are of a political character and any compassionate circumstances such as Pinochet's age and state of health. He also looked at other factors including the possibility of trial in Chile, the effect on the stability of Chile and its future democracy and the effect on the UK national interest. On 9 December Straw signed an authority for the London magistrates to proceed. He did, however, throw out the charge of genocide as not satisfying the conditions of an extradition crime.

The House of Lords judgement is overturned

11. Now, however, yet another stumbling block took shape. One of the judges who had heard the case and joined the majority decision was Lord Hoffman. He is a director of a trust set up for tax reasons to serve as the charitable arm of Amnesty International in the UK and he had recently

put his name to a fund-raising exercise for that organisation. Although there was some question as to how far these facts were common knowledge to those involved in the case, Pinochet's lawyers launched an unprecedented challenge to set aside the House of Lord's decision on the grounds of appearance of possible bias. Such a thing had never been done before and no one was quite sure whether or how it could be done since there is no higher court to which reference can be made.

12. The challenge was heard on 17 December by five judges who announced that the Pinochet judgement must indeed be set aside. They gave their written reasons on 15 January 1999. They decided that, as an intervenor, Amnesty International was in practice a party to the appeal with a clear interest in securing a particular outcome - Pinochet's trial and possible conviction for crimes against humanity. In view of this and applying the principle that no one may be a judge in his own cause, they held that Lord Hoffman was automatically disqualified by being a director of a part of this larger entity of Amnesty International.

The second House of Lords hearing

- 13. The original appeal on the state immunity point had, therefore, to be heard all over again, this time before a new set of seven judges, including four of those who had set aside the earlier decision. Recourse to a panel of seven judges reflected the exceptional importance and complexity of the case. The case was heard on 18 January 1999 and lasted two weeks. The same intervenors were permitted to participate, but on this occasion they were joined by the Government of Chile arguing that state immunity should be upheld. Judgement was given on 24 March.
- 14. This time six out of the seven judges upheld the earlier finding that Pinochet was not entitled to claim state immunity. However, in a dramatic new departure in the case, they held that the alleged crimes had to be recognised as crimes in the UK at the time they were committed. This reduced the list of charges from over 30 to a mere handful of allegations of torture and murder. It was only in respect of these few remaining charges that they considered whether immunity was available. They held that immunity could not be claimed for the few offences of torture and conspiracy to torture taking place after 8 December 1988, when the UK ratified the Convention against Torture. As a result, the judges warned that the Home Secretary and, eventually the magistrate, would have to re-consider the extradition case against Pinochet very carefully in light of the changed circumstances.
- 15. The judgement is lengthy and confused. All the judges gave their reasons, but each of them approached the case differently and applied international law in different ways. As a result, both parties to the case immediately claimed victory.

New charges are put forward

16. Following the judgement, the Spanish judge in charge of the case, Baltasar Garzon, added a further lengthy list of specific charges of torture carried out in Chile since 1988. It has been reported that this new list includes cases of disappearance, on the grounds that, as various international human rights bodies have held, unresolved disappearances constitute a continuing form of torture. It is not clearly set out in the extradition laws how far and for how long a requesting state can continue to perfect its extradition request by adding more information or more charges. In any event, the British prosecution authorities have apparently agreed to amend the charge sheet that will eventually go before the magistrates if and when the actual extradition proceedings commence.

The Home Secretary re-considers

17. Further legal proceedings were required to resolve the difficult technical question as to whether the Home Secretary had the authority to re-consider his authorization to proceed. When it was decided that he could, Straw was placed under intensified pressure when press reports suggested that, as a young student, he had had links with the Chilean left. Notwithstanding the speculation, however, he did issue a fresh authority to proceed on 15 April. He rejected the argument that he should first have evidence before him that Pinochet had actually committed the crimes. He rejected any interpretation of the House of Lords ruling that torture had to be widespread and systematic. He did not consider that there had been any abuse of the extradition process and emphasised that, although drastically reduced in number, the remaining charges are serious. Once again, he did not find it unjust or oppressive to proceed on the grounds of Pinochet's age or health nor did he consider there were grounds for confidence that a trial would take place in Chile. For the second time the way was opened for the main extradition proceedings to begin.

THE LEGAL ISSUES

- 18. The main legal issue of general international importance in this case is the question of *state immunity*. This issue is, therefore, dealt with first in this section. Six of the judges upheld the finding of their three colleagues at the first hearing that Pinochet could not claim immunity, although only in respect of the crimes of torture and conspiracy to torture committed after 8 December 1988.
- 19. However, there was another issue which emerged as being of critical importance during the second House of Lords hearing. It has major implications for extradition law in the UK. This is the rule in extradition which requires that the conduct of the accused amounts to a crime in the UK as well as in the state requesting extradition. It is known as the *double criminality rule*. In a startling new departure the judges decided that the offences had to have been recognised as offences in the UK *at the time the acts were committed* (not at the time that the extradition request was made). As a result of this finding the number of the extraditable charges against Pinochet were reduced from over 30 to only about three, thus weakening the case against him quite dramatically. It was only in respect of this greatly reduced set of charges that the judges went on to consider the application of state immunity.
- 20. There were two critical dates which were repeatedly referred to in the judgement. The first was 29 September 1988, which was the date when the UK enacted s.134 of the Criminal Justice Act making torture an extra-territorial offence (that is an offence punishable in the UK regardless of where it was committed or the nationality of the perpetrator). Applying the new-style double criminality rule, the judges decided that, in respect of torture committed outside Spain, it was only those offences carried out after 29 September 1988 which were extraditable. The second date was 8 December 1988 when the UK ratified the UN Convention against Torture. Since most of the judges relied on the terms of this Convention in concluding that state immunity was not available, the majority of them decided that Pinochet's immunity was lifted only from this date when the UK became a state party. Spain and Chile were already parties to the Convention by this time.

State immunity

21. The concept of state immunity, most eloquently explained by Millett, recognises that all states are sovereign and equal in international law. It is an attribute of the sovereignty of the state and probably derives from the historical immunity of the monarch. The rule essentially restrains one

state from sitting in judgement on the acts of another. From it are derived two overlapping but different immunities: (1) the personal status immunity of a serving head of state or head of a diplomatic mission (known as *immunity rationae personae*); and (2) the subject-matter immunity that protects the official and governmental acts of a state from being called into question by the courts of another state (known as *immunity rationae materiae*). This was said to be more widely available to former heads of state and diplomatic missions, government ministers, military commanders and subordinate public officials.

- 22. State immunity in the UK is governed by the State Immunity Act 1978. Part I provides for immunity from civil proceedings (with some limited exceptions) but expressly excludes criminal proceedings. In Part III of the Act, s. 20 extends to heads of state the provisions of the Diplomatic Privileges Act of 1964. The Diplomatic Privileges Act enacts into English law the 1961 Vienna Convention on Diplomatic Relations and is really intended to apply to heads of diplomatic missions. The State Immunity Act is very clumsy and confusing in the short-hand way it tries to apply these principles to heads of state with what the Act calls, but does not elaborate upon, "any necessary modifications". A great deal of the ensuing confusion in this case was due to the fact there is no British statute that explicitly covers the extent of the immunity enjoyed by former heads of state.
- 23. Article 31 of the State Immunity Act gives diplomats immunity from criminal proceedings. Article 39(2) governs the situation when the diplomat's term of office ends and indicates that immunity ends when s/he leaves the country but will continue with respect to official acts undertaken during the past term of office.
- 24. It was generally agreed by the judges, without detailed argument or analysis, that the *personal immunity* of a serving head of state provides absolute protection from any civil and criminal proceedings (presumably apart from the specific exceptions set out in the State Immunity Act) and that such immunity would have been operative in this case were Pinochet still head of state. However, as this point did not strictly have to be decided here, this finding would probably not be considered part of the essential reasoning of the case and remains open for possible further argument in the future.¹
- 25. The judges were generally in agreement on the following issues:
 - Pursuant to the State Immunity Act, immunity is available to a former head of state in respect of all official and governmental acts and functions carried out while s/he was head of state.
 - One of the "necessary modifications" called for by the State Immunity Act is that the immunity of a head of state must be understood to extend to all official acts wherever they are performed. It was not intended that the Act should apply only to acts performed in the UK by a visiting head of state. Only Phillips disagreed with this and would have limited the application of the Act in this way.
 - It was necessary to consider the availability of state immunity only for the very small number of offences that were determined to be extraditable after applying the new-style double criminality rule (see below). These were torture and conspiracy to torture committed after 29 September 1988; such conspiracies *in Spain* to commit torture *in Spain* prior to that date; and murder and conspiracy to murder *in Spain* only.

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¹ Under the doctrine of binding precedent in English law, House of Lords decisions, as findings of the highest court, bind all lower courts absolutely (except in so far as the case can be distinguished in some way from a future case). Only the House of Lords itself can overturn one of its own decisions and this is not, of course, done lightly.

- 26. Pinochet *could* benefit from state immunity in respect of the charges of murder and conspiracy to murder. However, there was almost no discussion of this issue anywhere in the judgement and the judges seemed to have simply assumed that there was no basis on which murder could amount to an international crime of the requisite gravity as to lift state immunity. Browne-Wilkinson said only that "as to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity". It seems that, because most of the focus of the case was on torture, the murder allegations were rather overlooked and there was no real attempt to argue that these charges could come within the ambit of international crimes for which immunity should not be available. The only exception seems to have been Phillips who said it was wrong to separate out Pinochet's acts and that all his conduct violated international law and could not attract immunity.
- 27. The acts alleged against Pinochet were part of his official conduct as a head of state and did not amount to personal or private conduct (which would not have attracted immunity in the case of an ex-head of state). As Lord Hutton put it, "the acts of torture were carried out for the purposes of protecting the state and advancing its interests, as Senator Pinochet saw them, and were therefore governmental functions and were accordingly performed as functions of the head of state".
- 28. It is quite possible for official and governmental functions carried out by a head of state to be to some degree criminal, unconstitutional or otherwise unlawful. This does not necessarily affect their official character.

The arguments against State immunity

29. Given the general agreement on the points noted above, the key issue really came down to whether state immunity could be claimed in respect of certain serious international crimes, notably torture. The main international instrument discussed, therefore, was the UN Convention against Torture (hereinafter referred to as "the CAT").

(i) The concept of international crimes

- 30. Millett conducted the most detailed analysis of the development of crimes under international law. He found that the 1946 UN General Assembly Affirmation of the Nuremberg principles established that individuals could be held criminally responsible for war crimes and were not protected by state immunity. He traced the trends in international human rights law that led to the recognition that the way in which states treated their own citizens was a matter of legitimate international concern. Large-scale and systematic torture and murder were among the most serious international crimes and came to be regarded as an attack on the international order. He considered that the prohibition of torture as an instrument of state policy amounted to *jus cogens*² at least by 1973 when Pinochet took power.
- 31. He also determined that, pursuant to customary international law, crimes against humanity that are contrary to *jus cogens* and committed on a large scale attract universal jurisdiction (meaning that they can be prosecuted by any state regardless of where they occurred or the nationality of the perpetrator). Customary international law is part of English common law which supplements statute law. Consequently, Millett held that the English courts have always had extra-territorial

² A law which amounts to *jus cogens* is a peremptory norm of international law - a rule of special status that takes precedence over treaties and ordinary customary international law and cannot be derogated from in any circumstances.

criminal jurisdiction in respect of crimes of universal jurisdiction and was the only judge who would have allowed all the torture charges against Pinochet as extraditable offences whenever and wherever they occurred. However, he bowed to the majority and proceeded on the basis that only acts of torture committed after 29 September 1988, when s.134 of the Criminal Justice Act came into force, were relevant.

- 32. Browne-Wilkinson also held that personal liability for international law crimes has existed since the UN General Assembly's Affirmation of the Nuremberg principles. Gradually the required linkage with war and hostilities had fallen away, leaving torture as an international crime in its own right. Torture committed on a large-scale is a crime against humanity and the international law prohibition of torture amounts to *jus cogens*. On the one hand he found that *jus cogens* offences carry universal jurisdiction. However, he then went on, confusingly, to assert that until CAT was adopted there was no general jurisdiction to permit or require the punishment of torture and that in national courts state immunity was probably applicable until CAT introduced an international system to prosecute and punish torture. His view was that torture was not a properly constituted international crime until CAT was adopted and that, until then, it could have been considered as a legitimate state function protected by state immunity. Once the CAT was adopted, however, it provided a world-wide system of universal jurisdiction and required all states to ban torture.
- 33. Saville also found that the systematic or widespread use of torture was universally condemned as an international crime but held that there was no qualification or exception to the applicability of state immunity for a former head of state until the CAT came into force.
- 34. Hutton found there was a clear recognition by the end of the second World War that certain crimes are so grave and inhuman as to constitute crimes against international law and the international community is under a duty to bring the perpetrators to justice. He did not attempt to decide exactly when torture was recognised as such a crime, but considered that its prohibition was *jus cogens* by 29 September 1988 when the UK established it as an extra-territorial crime by s.134 of the Criminal Justice Act.
- 35. Hope also held that the prohibition of torture amounted to *jus cogens* and it was only in respect of crimes of this special status that customary international law immunity could be lifted. However, he considered that there was no generally recognised rule of customary international law that lifts immunity automatically and that there has to be a specific treaty or agreement in each case.
- 36. Phillips noted that this is an area "where international law is on the move" as reflected in a number of international instruments. He was not convinced that there is yet a general state practice recognising universal jurisdiction in respect of international crimes. However, he did seem to consider that torture is a crime under international law and the prohibition of torture is *jus cogens*. He thought that Pinochet's entire campaign of abduction, torture and murder was a violation of international law.

(ii) Does a head of state fall within the definition of Article 1 of CAT?

37. As the CAT does not refer explicitly to heads of state (unlike the Genocide Convention and the statutes of the international tribunals), there was some discussion as to whether Pinochet could be considered to come within its terms. Article 1 of CAT provides that torture has to be committed by or with the involvement of "a public official or other person acting in an official capacity". It was on this issue - the lack of any specific reference to heads of state - that Slynn in the first hearing had held that the CAT did not meet his conditions for lifting state immunity. This time, the three judges among the majority who addressed the issue all agreed with little debate that heads of state must be covered by the broad wording of the definition.

38. Saville considered that a head of state "would indeed to my mind be a prime example of an official torturer". Browne-Wilkinson and Hope thought it extraordinary that the CAT would provide for lesser officials to prosecuted and not the leaders who are primarily responsible. Heads of state must be included in the definition or they could never be held responsible, even in their own state, which cannot have been the intention of CAT. Even Goff, who dissented, went along with the concession by the Chilean Government that heads of state must fall within the CAT definition.

(iii) Does torture have to be widespread and systematic?

- 39. Hutton and Millett both said expressly that torture does not have to be widespread and systematic before state immunity is lifted because the CAT clearly provides that a single act of torture is punishable. However, Millett did hold that crimes against humanity have to be widespread and systematic for the exercise of universal jurisdiction under customary international law. Browne-Wilkinson also pointed out that a single act of torture was punishable under CAT.
- 40. Phillips did not address the point directly although he may have had this notion of widespread and systematic in mind when he described crimes against humanity as being "of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community" and that they are likely to involve "the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur". Lord Saville did not refer to this issue.
- 41. Only Hope stated that he thought that torture *does* have to be widespread and systematic and that state immunity would not be lifted for a single act. However, he then went on to find that, taken together, all the allegations against Pinochet (including those which were not extraditable offences) amounted to a widespread and systematic practice of torture. (Goff, dissenting, held that torture must be systematic and widespread before state immunity could be lifted).
- 42. In his second decision authorizing extradition to proceed, the Home Secretary expressly rejected Pinochet's attempt to argue that the House of Lords ruling requires torture to be widespread and systematic.

(iv) Is there a waiver of immunity?

- 43. There was a quite a lot of discussion as to whether there was an express or implied waiver of sovereign immunity in CAT. Article 32(2) of the Vienna Convention provides that any waiver of immunity has to be express. The Genocide Convention and the statutes of the international criminal tribunals which have been established (such as the Nuremberg Tribunal, the tribunals for the former Yugoslavia and Rwanda and the Statute of the new International Criminal Court) all contain express provision that heads of state or Government and government officials can be held criminally responsible. CAT does not refer specifically anywhere to heads of state and nor could any reference be found during the drafting process to a discussion of sovereign immunity.
- 44. Another argument made was that subject matter immunity applied to all state officials and yet under the terms of CAT torture could be committed only by such persons. Therefore, it was suggested that there must be a waiver in CAT to exclude the immunity of public officials otherwise a state would be able to assert immunity in respect of any potential defendant. It would make a complete nonsense of CAT to have an immunity that is co-extensive with the crime.

- 45. Only Saville held that the terms of CAT constituted an express and unequivocal waiver of state immunity. Such immunity could not possibly co-exist with CAT's provisions, he said, and states could hardly claim an immunity that is necessarily based on the official nature of the torture. "States who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty" he said.
- 46. Four of the others Browne-Wilkinson, Hope, Hutton and Millett did not consider that this situation amounted to one of a waiver of immunity, whether implied or express. Hutton and Hope agreed that any waiver would have to be express and, although Hope then went on to consider whether there was a waiver in the CAT by necessary implication, he did not rely on this in his final conclusions.
- 47. Phillips stated that when states provide for universal jurisdiction in a treaty this cannot remove any state immunity by implication. Such immunity can only be removed by express agreement or waiver. Later, he contradicted this by saying that state immunity cannot co-exist with international crimes and extra-territorial jurisdiction and that extra-territorial jurisdiction simply overrides immunity. Later still, on finding the CAT incompatible with subject matter immunity, he says that one explanation may be that the states parties expressly agreed that state immunity would not apply to torture. He did not indicate where such agreement is to be found.

(v) Is state immunity available?

- 48. It will be recalled that the judges held, without much discussion, that Pinochet could claim state immunity in relation to the charges of murder and conspiracy to murder. However, in relation to some of the crimes of torture and conspiracy to torture, six of the judges held that immunity was not available to protect Pinochet from extradition to face trial abroad. Their reasons were all slightly different as was the date they each selected as being the critical date at which immunity could no longer be claimed for the international crime of torture³:
 - They all agreed that the only extraditable offences of torture were those taking place after 29 September 1988 or those taking place in Spain.
 - Two followed the views of the majority in the first hearing and held that torture could not be considered to be an official function of a head of state.
 - Two relied on the actual provisions of CAT simply excluding any possibility of immunity. One held that sovereign immunity simply could not be applicable to torture under CAT as the immunity would apply to any potential defendant and would be coextensive with the offence, making a nonsense of CAT. The other said that the provisions of CAT amounted to an express agreement between the states parties to waive the general rule of immunity.
 - Two relied on a vaguer concept of override. They seemed to say that customary international law, in developing the concept of serious international crimes and universal jurisdiction, simply overrides claims to state immunity.
 - Two held that immunity was not available as from 8 December 1988 when the UK ratified CAT. Another thought the critical date was Chile's ratification of CAT, but agreed to go with 8 December 1988. The fourth thought the right date was 29 September 1988 and the remaining two were not clear as to a specific date.

³ For simplicity, this summary notes what each put forward as their first or primary reason. Some of the judges also joined in on other aspects of the reasoning put forward by their colleagues.

- 49. **Browne-Wilkinson**: State immunity is not available because an international crime such as torture cannot constitute a legitimate state function. "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" he said. Nor could it have been the intention that only a former head of state "the man most responsible" has immunity under CAT while inferior officials can be held liable. Subject matter immunity applies to all officials involved in the functions of state. If torture were accepted as "official business" sufficient for a head of state to claim immunity, then all state officials, the only possible defendants under the terms of CAT, could also claim immunity. This would frustrate the entire aims and objectives of CAT.
- 50. **Critical Date**: 8 December 1988 when CAT was ratified by the UK, the third of the states parties involved in this case. Spain had previously ratified CAT on 21 October 1987 and Chile on 30 October 1988.
- 51. **Hutton**: There can be no immunity as torture can never be a legitimate official function of a head of state.
- 52. **Critical Date:** 29 September 1988 when s. 134 of the Criminal Justice Act made torture an extraterritorial crime in the UK. Hutton took the first date at which the allegations of torture amounted to extraditable crimes. He thought there was no need to determine exactly at which point before that torture became an international crime, although the provisions of the CAT were clearly important to his conclusion.
- 53. **Saville**: State immunity cannot be claimed because all three states are parties to the CAT. Immunity cannot exist consistently with the provisions of CAT. CAT amounts to an express and unequivocal agreement among states parties that it is an exception to the general rule of immunity.
- 54. **Critical Date:** 8 December 1988 when the UK, the last of the three states concerned, ratified CAT.
- of immunity. The offence is one for which subject matter immunity cannot possibly be available. Since torture can only be committed by an official or someone acting in that capacity, "the official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence".
- 56. **Critical Date:** Not clear. He agrees to go along with the majority view that Pinochet could not be extradited for torture before 29 September 1988. He then bases his reasons for the lack of immunity on the specific wording of the CAT which may suggest that he agreed with 8 December 1988 as the date when immunity was lifted. However, he does not specify this.
- 57. **Phillips**: No established rule of international law requires subject matter immunity to be granted in respect of prosecution for an international crime. Such immunity cannot exist alongside international crimes and extra-territorial jurisdiction which are new arrivals in the field of public international law. Extra-territorial jurisdiction overrides the principle of non-interference in international affairs and it makes no sense to exclude official acts from such jurisdiction. He also held that CAT is incompatible with subject matter immunity. He thought that the states parties had proceeded on the premise that immunity could not exist in respect of the crime of torture or they must have expressly agreed to this. As far as the State Immunity Act is concerned, he thought that it only applies to acts of a visiting head of state in the UK. If not, then torture does not constitute one of the functions of a head of state within the meaning of s. 20 of the Act.

- 58. Critical Date: Not mentioned
- 59. **Hope**: Immunity is not available for crimes the prohibition of which amounts to *jus vogens*. However, there is as yet no general rule of international law to this effect and any such exceptions to the immunity rule must be expressly recognised in an international agreement to which the relevant states are parties and which has the force of law in the states concerned. The agreement must define the crime, provide for universal jurisdiction and make it clear that a head of state can be prosecuted and that immunity is no bar. Unlike Slynn, he did think that the CAT extends to heads of state. However, he did not consider that the CAT had, by necessary implication, removed immunity from a former head of state in respect of every single act of torture.
- 60. However, there were developments in international law towards a recognition that immunity could not be invoked in respect of widespread and systematic torture. He then arbitrarily imported the customary law rule into the terms of the treaty. Once the CAT machinery for universal jurisdiction was in place, he said, it was no longer open for any signatory of the Convention to invoke subject matter immunity in respect of widespread and systematic torture. This is not a case of waiver or an implied term of CAT. Rather, "the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *rationae materiae*".
- 61. **Critical Date:** 30 October 1988 when Chile ratified CAT. However, he was content to go along with the view of some of the others that Pinochet continued to enjoy immunity until the UK ratified CAT on 8 December 1988.
- 62. **Nicholls** and **Steyn**, the two judges in the first hearing who gave full reasons for the majority decision, took a simpler approach. They denied Pinochet the protection of sovereign immunity in respect of any of the allegations against him, regardless of when or where they were committed. They both reached their conclusion essentially on the basis that the legitimate functions of a head of state cannot include international crimes such as these offences. Steyn held that a head of state must act in accordance with the rule of law. Since Pinochet took power in 1973, international law has condemned crimes such as torture, genocide, hostage-taking and other crimes against humanity. Nicholls pointed to the statutes of the international tribunals and other instruments as evidence that international law has outlawed such conduct.

(vi) The dissenting arguments upholding State Immunity

- 63. In the High Court, where all three judges had held that state immunity prevailed, there was much less discussion or analysis of international law. Having determined that state immunity could still protect the official acts and functions of a head of state even if these were criminal, they then considered that it was impossible to draw the line between ordinary criminality and crimes so grave that state immunity could not be invoked. "Unfortunately, history shows", said Mr Justice Collins, "that it has indeed on occasions been state policy to exterminate or oppress particular groups...There is in my judgement no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists".
- 64. In the first House of Lords case Lord Lloyd agreed that it was unjustifiable and unworkable to draw a line between different degrees of criminality. He found no exceptions in the treaties because the CAT and the Convention on the Taking Of Hostages make no reference to heads of state, while the relevant provision of the Genocide Convention had not been enacted into English law. The case law, he said, showed that torture does not trump immunity, while the

practice of granting amnesties for crimes against humanity and the existence of the international tribunals only reinforces the fact that heads of state cannot be tried in ordinary courts.

- 65. Lord Slynn, on the other hand, acknowledged the beginnings of some trends towards lifting immunity for crimes against humanity but found no established rule of international law. According to him what was needed in each situation was an international treaty which clearly defines the crime, provides for universal jurisdiction, makes clear expressly or implicitly that immunity is no bar and has the force of law in the state concerned. The CAT failed his test because he thought it was not sufficiently clear that its definition included heads of state.
- 66. At the second hearing the only dissenter, Lord Goff, based most of his dissent around the fact that he could find no express waiver of immunity in the Torture Convention. It was incomprehensible to him that the matter would not have been fully discussed during the drafting if an implied waiver was intended. Unlike the others, he did not find state immunity incompatible with CAT as he thought most prosecutions would occur in the country where the acts had been committed. He also found it inconceivable that so many states parties would have signed up to the CAT if it lifted immunity.

(vii) The double criminality rule

- 67. Extradition law requires that the alleged crimes are also recognised as crimes in the UK. If the offence is extra-territorial committed outside the territory of the requesting state it must also be recognised as an extra-territorial offence in the UK. This so-called double criminality rule was a significantly complicating factor in the Pinochet case where the requesting state, Spain, was requesting extradition for many crimes actually committed in Chile or in some other country. As Hope said, "So far as the law of the United Kingdom is concerned, the only country where Senator Pinochet could be put on trial for the full range of offences which have been alleged against him by the Spanish judicial authorities is Chile".
- 68. The double criminality issue first arose in the initial application to the High Court. It was argued by Pinochet's lawyers that the crimes had to have been crimes in the UK at the time that they were committed, not as of today when the extradition request is made. The High Court held that this was really a question for the magistrate to look into when the formal extradition procedures started and was not an appropriate matter for them to decide. However, the court did state its view that the wording of the Extradition Act indicated that it was sufficient if the crimes were crimes in the UK at the time the extradition request is made.
- 69. Perhaps because of the High Court's comments and perhaps because they felt confident on winning on the question of state immunity, Pinochet's lawyers did not press this issue at the first House of Lords hearing. Only Lord Lloyd referred to it and that was only to confirm the lower court's view that the critical date was the time of the extradition request. However, by the time of the second hearing, the prosecution authorities (on behalf of Spain) had tried to strengthen their case by introducing a whole new set of charges relating to the period before Pinochet became head of state. As state immunity did not appear to be available in relation to these charges, the defence team had to come up with some alternative arguments. They reverted to the question of the double criminality rule in order to forestall the extradition proceedings.
- 70. Although this emerged as a matter of primary importance that changed the whole nature of the case, Browne-Wilkinson was the only judge to analyse and reason the question in detail. Most of the others merely agreed with his views. He held that *the offences had to have been recognised as crimes at the time that they were committed.* He rested his analysis on a highly technical construction of a few words in the 1989 Extradition Act, coming to the

completely opposite conclusion to the Lord Chief Justice in the High Court by a somewhat tortuous reading of the verb tenses. He was also persuaded by the fact that the former Extradition Act of 1870 had been quite explicit in holding that the acts had to be criminal at the time they were committed. Finding no discussion of the point in the legislative history of the 1989 Act, he did not think Parliament could have meant to make such a sweeping and fundamental change to extradition law without full debate.

- 71. The only other judge to address the issue at all was Hope who was even more cryptic. He found the language of the Act "equivocal" on the issue and held that it was necessary to look at the Extradition Act 1989 as a whole. Without citing argument or authority, he then merely concluded that, in the absence of any indication in the Act to the contrary, the principle of double criminality suggests that the time the conduct took place is the right approach.
- 72. This fundamental decision on the interpretation of the Extradition Act seems to have taken the legal community by surprise. One editorial noted that it had re-written the law and in offering ordinary criminals an array of new legal loopholes to escape extradition now makes Britain "a haven for criminal fugitives". Some of the lawyers involved in the Pinochet case felt strongly that the judges had not dealt adequately with the contrary arguments, including the case law and legislative history and intent, which had been put before the court.

(viii) Which crimes are extraditable?

- 73. Applying the new double criminality rule, Hope then conducted a highly technical and detailed analysis of all the Spanish charges to determine which of them satisfied the new rule and disclosed conduct which would have also been a crime in the UK at the time it was alleged to have been committed. The prosecution authorities had attempted to prepare a sample draft list of charges matching the Spanish allegations to crimes recognised in the UK. This is what Hope worked from and it is set out in the Appendix to this paper. The other judges all stated that they agreed with Hope's analysis.
- 74. This turned out to be a devastating exercise because many of the charges related to the early years of Pinochet's rule, many involved extra-territorial crimes and yet extra-territorial jurisdiction has only been introduced into the UK fairly recently. For example, it was not until 29 September 1988 that s.134 of the Criminal Justice Act made torture an extra-territorial offence in the UK, in implementation of the CAT which was then ratified by the UK on 8 December 1988. Pursuant to the Suppression of Terrorism Act 1978 murder is an extra-territorial offence, but only if committed after the Act came into force on 1 August 1978 in the territory of a state party to the European Convention on the Suppression of Terrorism or a designated state to which the Convention's provisions are applied. Chile is not one of these states. Although some of the charges did relate to murder or attempted murder in a Convention country (e.g. Italy), they all pre-dated 1August 1978. The whole issue of extra-territoriality was further complicated by the fact that the offences included conspiracies in different countries to carry out crimes elsewhere, which attract special rules.
- 75. As a result of his investigation, Lord Hope knocked out most of 32 charges against Pinochet. Most of the cases of torture pre-dating 29 September 1988 when torture was made an extraterritorial crime under English law were knocked out, as were the extra-territorial charges of murder and conspiracy to murder in countries other than Spain. As for the charge of hostage-taking, Hope found that the acts alleged did not conform to the definition of hostage-taking in the Taking of Hostages Act 1982 and knocked out this charge as being bad in law. As a result of

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⁴ The Economist, 27 March 1999.

this, the judges did not attempt to consider whether or not state immunity would be available in respect of the international crime of hostage-taking.

- 76. Hope's analysis left very few of the draft charges intact:
 - Those charges of conspiracy to torture in charge 2, torture and conspiracy to torture in charge 4 and torture in charge 30 which, irrespective of where the conduct occurred, became extra-territorial offences as from 29 September 1988
 - The conspiracy in Spain to commit murder in Spain in charge 9
 - Such conspiracies *in Spain* to murder *in Spain* and such conspiracies *in Spain* prior to 29 September 1988 to commit acts of torture *in Spain* as form part of the allegations in charge 4.

WHAT HAPPENS NOW?

- 77. These protracted legal and political proceedings, which have taken no less than six months to complete, represent only the very first hurdle in Pinochet's extradition. It is said that extradition proceedings in the UK are more lengthy and drawn out than in almost any other country, although extradition requests to the UK are apparently more often successful than elsewhere.
- 78. In order to challenge the Home Secretary's April authorization to proceed in judicial review proceedings Pinochet will have to show that Straw's decision was unlawful or irrational. The decision might be unlawful if, for example, it can be shown that the crimes are not extradition crimes in Spain. In judicial review irrationality already has a very high threshold. Furthermore, in an earlier challenge by Amnesty International⁵ the court held that the Home Office minister has a very wide discretion in deciding whether to authorize extradition proceedings to continue. It could be quite difficult to argue that Straw's carefully reasoned decision was irrational.
- 79. If Pinochet fails, the action shifts to the magistrate's courts where extradition proceedings are heard. Normally, for extradition to a country such as Spain, which is party to the European Extradition Treaty, it is not necessary for the UK courts to examine the evidence on which the charges are based. However, Pinochet's lawyers are expected to argue that when state immunity is to be set aside the criminal evidence can be examined. It may also be argued that there is insufficient evidence to link Pinochet to crimes essentially carried out by others.
- 80. If, after considering the charges and hearing representations from Pinochet and from Spain, the magistrate's court does commit Pinochet for extradition, then it will be open to Pinochet to bring an application for *habeas corpus*. At this stage he could argue that it would be unjust and oppressive to proceed because of the length of time since the crimes were committed and he can call into question the good faith of the Spanish Government. If his challenge fails, the Home Secretary then has to make the final decision to extradite Pinochet. Again he has a wide discretion. If he decides to order extradition, he must give Pinochet notice and his decision can be challenged in judicial review proceedings. The extradition will be stayed pending these hearings, including any appeal.
- 81. If the magistrate decides against extradition then it is also possible for Spain to appeal this decision. Even if the Spanish extradition request is ultimately unsuccessful, there are still the

⁵ Following the first House of Lords judgement, this was an attempt to secure an injunction to prevent Pinochet from leaving the country in the event that Straw were to decide against authorizing the extradition to proceed. The aim was to enable other possible legal proceedings against Pinochet to be launched and to run their course before he could leave the jurisdiction.

requests pending from Switzerland, France and Belgium although it is likely that many of those alleged charges will also fail the new double criminality test.

CONCLUSIONS

- 82. Whatever is the outcome of the extradition process, there is no doubt that this case will have an enormous legal and political impact for international human rights protection. Past and present leaders and officials of oppressive regimes which have used the weapon of serious human rights violations to maintain their power will no doubt think very carefully before setting foot abroad. The proceedings have created vital new interest in the use of universal jurisdiction which may have a favourable impact in other national courts and legislatures. The case is an important milestone for the international human rights system; insofar as some of the judges set minimum standards for the legitimate conduct of governments and heads of state that must conform to the rule of law, it represents another step away from the concept of non-interference in the internal affairs of sovereign states. It also firmly brands grave human rights violations as international crimes, not politically expedient tools available to governments to be used whenever they choose.
- 83. The symbolic importance of the Pinochet case extends far beyond the relatively narrow confines of the legal ruling on the non-availability of state immunity. In fact, the ruling on state immunity relates only to the international crime of torture, only to states parties to the UN Convention against Torture, only to acts of torture committed after the Convention come into effect in the states concerned and only to former heads of state. Even then the reasons by which the six judges determined that state immunity could not be claimed are almost all different; there is no unanimity among the six on any of the key findings except the conclusion. This makes it very difficult to try and apply the ruling to other situations or to other international crimes. The very confusion and muddle of the judgement will certainly undermine the impact of its fine print internationally and domestically. As one commentator put it, "the Law Lords have so muddied the waters that their decision will have little influence on courts elsewhere and is likely to confuse even the lower courts in Britain"6. At the same time, since some of the findings were not at all progressive from an international law perspective, the incoherence and inconsistency is not such a bad thing as it leaves the way more open for other judges to develop the law further.
- 84. It is always difficult to draw wider lessons from the specific law and facts relating to a particular case. However, some points to consider in the future might include:
 - 1. There seems to have been relatively little consideration during the drafting of human rights instruments of the impact in national courts of legal principles such as state immunity and act of state⁷ that can act as a bar to legal proceedings for human rights violations. If prosecutions are to be pursued at the national level, human rights groups should enlist their domestic legal experts in these areas to determine how these legal principles have or would be applied in their own country and to draw up a plan for legislative, political or legal action to mitigate their effects.
 - 2. There were a number of important issues which were not dealt with or handled unsatisfactorily in the case. There may be scope for developing these in future cases. They include:

⁶ The Economist, 27 March 1999.

⁷ The doctrine of "act of state" was discussed at length in the first House of Lords judgement. It is a domestic law principle that may overlap with immunity by which a court refuses to adjudicate on another state's acts as being matters outside its competence. The majority in the first hearing held that it was not applicable in this case and it was not discussed in the second judgement.

The personal immunity of a serving head of state - is it as absolute and protective as the judges suggested? Can it be argued that international crimes can never be legitimate state functions or attract immunity?

Genocide and hostage -taking - these offences were knocked out and the issue of state immunity not considered. The relevant Conventions on both these crimes give considerable scope for arguing that no immunity can apply in respect of them.

Murder - the judges held that immunity was available for murder. Much more needs to be done to develop the notion of state-sanctioned murder as an international crime, particularly since there is no specific Convention and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions do not have the same legal force as a treaty. Murder is, of course, referred to in the statutes of all the international tribunals.

- 3. This case was made infinitely more complex by the fact that it was an extradition case rather than a straight-forward domestic criminal prosecution. Such cases need the political support of the requested state and it is imperative that the criminal case is rigorously prepared by the requesting state to meet all the requirements and safeguards built into extradition proceedings.
- 4. A lot of work needs to be done to build the political will to pursue domestic prosecutions for extra-territorial offences. Previous attempts to have Pinochet prosecuted in Britain have been repeatedly rejected by the Attorney-General, including five attempts to secure such a prosecution on this occasion. The recent trials of Nazi war criminals show what can be done when the political will is there, although these also illustrate the resources required and many of the difficulties involved.
- 5. The legal and political support of the state of which the accused is a national will usually be a key factor in a successful prosecution. Human rights groups must consider the implications if this state is likely to be opposed and ways to overcome the very considerable legal, practical and diplomatic hurdles this is likely to throw up.
- 6. The inter-relationship of international human rights law, criminal law and extradition law is a highly specialised and complex area in which very few lawyers have any experience, much less the judges. If such cases are to be pursued, there is an urgent need to develop this expertise and to educate national judges. It is particularly important to share information and experience across jurisdictions.
- 7. Human rights groups are far less likely to have experience of criminal prosecutions as this is typically the task of state authorities. They need to develop this knowledge and expertise in order to ensure that cases are prepared to rigorous professional standards and in accordance with the minute detail of criminal law and procedure. They will need to draw on the assistance of criminal lawyers, particularly those with prosecution experience who may not be their natural allies. Although the state will usually have to take on the prosecution, there may still be a vital role for human rights organizations to act as intervenors and to supply international and human rights law expertise as necessary.
- 8. At the same time, the use of the criminal law must go hand-in hand with available civil remedies. If a criminal prosecution fails, a civil action possibly with lower standards of proof may be a possible alternative with greater chances of success.

- 9. Such cases will often require speedy and opportunistic action without careful planning to take advantage of the unexpected presence in a country of a foreign state official linked to human rights abuses. As far as possible, consideration should be given in advance to the legal issues, the priorities, the tactics and the major players. Human rights organizations should work together for the most effective outcome.
- 10. Such cases always have a highly charged political and personalised profile which can undermine the proceedings in the public eye and may scare off states. Every effort must be made to play down the politics and to conduct the legal proceedings in a professional and meticulous way that takes full account of the rules and regulations of the domestic legal system.

11.

APPENDIX

R. v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet R. v. Evans and Another and the Commissioner of Police for the Metropolis and Others ex parte Pinochet

THE JUDGES

HIGH COURT: The Lord Chief Justice, Lord Bingham; Mr Justice Collins; Mr Justice Richards (all three upheld the claim of state immunity in respect of all the charges)

HOUSE OF LORDS FIRST HEARING: Lord Steyn; Lord Nicholls; Lord Hoffman (all decided against the availability of state immunity for any of the alleged crimes); Lord Slynn; Lord Lloyd (both upheld state immunity)

HOUSE OF LORDS PETITION TO SET ASIDE FIRST JUDGMENT: Lord Browne-Wilkinson; Lord Goff; Lord Nolan; Lord Hope; Lord Hutton

HOUSE OF LORDS SECOND HEARING: Lord Browne-Wilkinson; Lord Hope; Lord Hutton; Lord Saville; Lord Millett; Lord Phillips (all decided against state immunity but only in respect of torture allegations after 8 December 1988); Lord Goff (upheld state immunity for the few remaining extraditable crimes)

THE SAMPLE LIST OF DRAFT CHARGES

This sample list of draft charges was prepared by the prosecution to assist the second hearing in the House of Lords by indicating how the Spanish charges would translate into crimes recognised under English law:

- (1) Conspiracy to torture between 1 January 1972 and 10 September 1973 and between 1 August 1973 and 1 January 1990 charges 1, 2 and 5
- (2) conspiracy to take hostages between 1 August 1973 and 1 January 1990 charge 3
- (3) conspiracy to torture in furtherance of which murder was committed in various countries including France, Portugal, Italy and Spain between 1 January 1972 and 1 January 1990 charge 4
- (4) torture between 1 August 1973 and 8 August 1973 and on 11 August 1973 charges 6 and 8 [there is no charge 7]
- (5) conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975 charges 9 and 12
- (6) attempted murder in Italy on 6 October 1975 charges 10 and 11
- (7) torture on various occasions between 11 September and May 1977 charges 13 to 29 and 31 to 32
- (8) torture on 24 June 1989 charge 30