Conclusions

The decisions of the House of Lords in *Pinochet No. 1* and *Pinochet No. 3* have the potential to be persuasive authority for the interpretation of former head-of-state immunity for other courts around the world. However, given the lack of agreement on the crucial matter of whether Pinochet was acting in his official capacity coupled with the inconsistent and, at times, incomplete analysis of the issues of international law pertinent to the cases, such persuasion will be severely limited. The cases certainly provide minimal guidance on the vexed question of former head-of-state immunity in general. As a matter of UK law, all that can be said is that section 134 of the Criminal Justice Act 1988 has the effect of overriding the immunity *rationae materiae* of a former head of state either because it provides an express or implied exception to such immunity or because as a matter of statutory interpretation, section 134 has the effect of removing torture from the official functions of a head of state. For the reasons set out above, the latter position is extremely dubious while the former is limited by the express wording of section 134. Either way, the decisions will be easily distinguished in future cases involving the immunity of former heads of state.

J. CRAIG BARKER

II. *EX PARTE PINOCHET*: LACUNA OR LEAP?

THE Lords were not lost in admiration of section 20 of the State Immunity Act 1978. Lord Browne-Wilkinson described it as "strange" and "baffling". It is certainly true that (as Lord Browne-Wilkinson continued) "Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law".[1] Nor was it intended that their rights should be inadvertently curtailed. The State Immunity Bill originally introduced into the House of Lords in 1977 would, by reflecting in UK statute law the European Convention on State Immunity[2] make huge inroads into absolute sovereign immunity—tottering but not yet demolished through the repeated onslaughts of Lord Denning. The European Convention was however "essentially concerned with 'private law' disputes between individuals and States".[3] It was not intended to have any application to criminal proceedings—in so far as lawyers in 1977 even contemplated criminal proceedings in domestic courts against foreign States in their public capacity. It did not deal with the *personal* privileges or immunities of heads of state. There were no ready-made treaty rules on heads of state and no clear customary rules either.[4]

Given the perceived reluctance of many English judges to fight their way through the jungle of evolving customary law, the inability of the Foreign and

1. [1999] 2 W.L.R. 827, 845–846.
2. ETS No. 74.
3. Para.113 of Commentary on the Convention (Art.29). Art.29 is reflected in s.16(3), (4) and (5) of the Act.
4. Sir Arthur Watts, 17 years later, in the introduction to his Hague Lectures, suggested that "... Heads of State tend to conduct themselves with discretion, and relevant judicial decisions and publicly-known state practice are relatively scarce." Recueil des Cours (1994–III) 19.

Commonwealth Office to issue certificates or "executive suggestions" to UK courts on matters of law and the potential for diplomatic embarrassment, it seemed essential for the Bill to give clear guidance on heads of state in their private capacity.[5] The European Convention did contain a clear saving for diplomatic and consular privileges and immunities, which translated into express provisions in UK statutes.[6] The starting point chosen therefore as being defensible in principle as well as reasonably clear in detail was to give heads of state in their private capacity the same privileges and immunities as were enjoyed by their ambassadors.

But there were to be two differences. One was to preclude suit in the United Kingdom against the Queen in her capacity as head of state of another Commonwealth country.[7] The second was to permit the government to exclude visiting heads of state. International law permits one sovereign to refuse permission for the visit of another, but does not permit the exclusion of the second sovereign's ambassador unless he has been declared *persona non grata* before his arrival. The State Immunity Bill originally gave privileges and immunities only to heads of state in the United Kingdom at the invitation or with the consent of the government of the United Kingdom—a provision which was not apt for its purpose. It was too narrow in that it did not confer an express power to exclude a foreign sovereign intending to travel to the United Kingdom, and under UK statute law exemption from immigration control flowed from diplomatic status. It would on the other hand have failed to give statutory protection to a head of state not physically present in the United Kingdom. A Government amendment therefore replaced the limiting words with section 20(3) which gives an express power to the Secretary of State to direct exclusion of an unwanted head of state. In the absence of any such direction, arriving heads of state are by statute now exempt from immigration control. Ex-heads of state wandering the world with their attendant historical baggage are often unwanted guests, but the United Kingdom has never made express use of the power to direct exclusion of a head of state. By contrast, the United States did expressly exclude ex-President Waldheim of Austria after his wartime activities became public knowledge, and several States made public their unwillingness to receive the Shah of Iran after he was deposed.[8]

None of the Law Lords attached any importance to the fact that Senator Pinochet had never been excluded from the United Kingdom although the State Immunity Act contained statutory power to do so. They did however—with only two exceptions[9]—accept that the effect of section 20 was to confer on former heads of state the same immunity in respect of official functions wherever these were carried out, and that this reflected the position in customary international law.

5. S.14 provides that references to a State include "the sovereign or other head of that State in his public capacity".
6. Art.32, reflected in s.16(1) of the Act.
7. S.20(2).
8. 1979 RGDIP 803, 812; Watts: 1994–III Hague Recueil, at p.95.
9. Lord Millett, *supra* n.1, at p.913 and Lord Phillips, *ibid.* at pp.926–927.

"necessary modifications"

Was the UK Parliament right in 1978 to retain for foreign heads of state continuing immunity for their official acts? From the fact that a number of other European States besides Spain have issued warrants against Senator Pinochet it may be inferred that they do not regard him as entitled to continuing immunity from the criminal jurisdiction of their courts. It has been suggested that they take the view that his immunity from criminal jurisdiction lapsed with his status as head of state of Chile. But it would be anomalous if the head of state—above all others the representative of his State were to enjoy a lesser protection in respect of his official acts after loss of office than the ambassador whom he appointed to serve him abroad. Customary international law has been largely silent on the question of subjecting former sovereigns to criminal process. Heads of state who survive their downfall have been tried by a successor government, by domestic courts elsewhere with the express consent of that successor government or by international tribunals. There is no modern precedent for trial of an ex-head of state by a domestic court of another State without waiver of immunity by the successor government. To the extent that the case had never been seriously argued it could be said that there was a lacuna in international law.

Given the terms of section 20 of the State Immunity Act, the House of Lords were led to Article 39.2 of the Vienna Convention on Diplomatic Relations and to the question "whether the alleged organisation of State torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state".[10] Article 39.2 has not given rise to great difficulties in the diplomatic context. The functions of diplomatic missions are defined in Article 3 of the Vienna Convention in a way which reflects the unchanging practice of centuries. Courts have taken a flexible approach to modern methods of discharge of these broad functions. Conduct which may be not only unlawful in the receiving State but deeply threatening to the receiving State such as treason or espionage is not thereby outside the scope of official functions. What is excluded is the purely personal frolic such as drug-dealing. This author has suggested in the context of the Vienna Convention that the correct test to be applied for the interpretation of Article 39.4 is one of imputability. If the conduct in question is imputable or attributable to the sending State—even if it did not expressly order or sanction it—then continuing immunity *rationae materiae* should apply. The diplomat remains immune because his own sending State is really responsible.[11]

For heads of state a similar test was put forward by Sir Arthur Watts in his Hague Lectures when he said:

> 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 authority. If it was, it must be

10. *Ibid.* at p.846.

11. Denza, *Diplomatic Law* (2nd edn, 1998), at p.363; Salmon, *Manuel de Droit Diplomatique* 420, 580–621.

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.[12]

The Effects of the Imputability Test

The effect of applying the imputability test is that a former diplomat or head of state X entitled to immunity *rationae materiae* cannot be sued or tried personally in the domestic courts of State Y for acts which have been endorsed by the current government of State X (that is the government of X recognised either *de facto* or *de jure* by State Y). He may be sued or tried in the courts of State X, or before an international tribunal (though even here the matter has usually been dealt with by express exclusion of any immunity in the constituent instrument of the tribunal). He may also be sued or tried in the courts of State Y if State X waives his immunity or disclaims responsibility for the act in question, saying or accepting that it was not performed in the exercise of sovereign functions. If State X accepts responsibility for the act but blocks suit or trial both in State Y and in State X, the claimant or victim may expect that his own government will take up the matter as an international claim.[13] It has however been a curious feature of the long-drawn out allegations against Senator Pinochet that no mention appears to have been made at least in public either by the non-Chilean victims or by any of their governments of the possibility of international claims against the government of Chile.[14]

Official Functions—Six Lords a Leaping

In classical international law it followed from the nature of State sovereignty that the functions of a State and of its head of state were determined by that State itself. While diplomats, consuls and international organisations had functions limited by international custom or by treaty, the sovereign State itself possessed functions potentially without limit. Some of those functions or methods of carrying out those functions might be prohibited in the most absolute terms by international law. Such illegality carried consequences in terms of international responsibility and, increasingly, in terms of remedies and sanctions, but the functions themselves remained functions of the State. As Lord Hope put it: " ... the functions of the head of state are those which his own State enables or requires him to perform in the exercise of government."

Lord Browne-Wilkinson and Lord Hutton however held that notwithstanding that the applicant State Spain claimed that the alleged infliction of torture by General Pinochet was "in the performance or purported performance of his official duties" and that Chile did not disassociate itself from this statement those acts of torture taking place after the entry into force as between Spain, Chile and the United Kingdom of the Torture Convention were not functions of a head of

12. *Op. cit.*, Recueil des Cours Vol.247 (1994–III) pp.56–57. The test was expressly endorsed by Lord Slynn *supra* n.1, at p.1468.

13. See Arts 5 and 6 of International Law Commission's draft Articles on State Responsibility, and Commentary, 1975 I.L.C. Yearbook Vol.II, pp.60–70.

14. This may now be changing: it has been reported that negotiations between Spain and Chile are envisaging arbitration before the International Court of Justice under the provisions of the Torture Convention (*The Times*, 2 Aug. 1999).

state. They did not accept that imputability determined at least in this context the question of entitlement to sovereign immunity.[15] Lord Phillips—though he also held that section 20 of the State Immunity Act had no application to the conduct of a head of state outside the United Kingdom—maintained that official functions could not, as a matter of statutory interpretation, extend to acts prohibited as criminal under customary international law.[16] Lord Hope and Lord Saville held that the absence of immunity *rationae materiae* for General Pinochet followed from the express and unequivocal terms of the Torture Convention.[17] Lord Millett held that immunity *rationae materiae* could not apply to conspiracy to murder where the offence took place in the requesting State Spain and to torture and conspiracy to torture wherever and whenever carried out.[18]

Thus only three of the seven Law Lords in *Pinochet No. 3* took the route of limiting the official functions of the head of a sovereign State. They differ on the extent of the limitation. Their numbers could however, at least in the eyes of the rest of the world, be increased by the addition of the judgments of Lord Nicholls, Lord Steyn and Lord Hoffman from *Pinochet No. 1*. Lord Nicholls held that "... it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state." Lord Steyn concluded that in the case of international crimes such as genocide, torture, hostage-taking and crimes against humanity it was "... 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 judgments of these six Law Lords do amount to a leap forward in terms of limiting State sovereignty. While the number of wandering ex-heads of state with the record of Senator Pinochet may be small—and probably even smaller following general study of the implications of the judgments—the implications that immunity *rationae materiae* may be limited in the face of assertions of sovereignty and acceptance of responsibility by the government of the State concerned are very much wider—affecting all members of diplomatic and consular missions as well as state officials and agents. Even wider are the implications of the concept that the functions as well as the powers of the head of a sovereign State are limited by the international legal order. For the first time, it is suggested that not only may a head of state or state agent act *ultra vires* in terms of his domestic legal order, but that conduct on behalf of a State which is expressly endorsed by that State may be *ultra vires* in terms of the functions allowed to the State by international law.

The Effects of Discarding the Imputability Test

It may be suggested that one consequence of this finding was that the State of Chile may now in effect be subjected to criminal proceedings in the domestic courts of another State. By rejecting the imputability test as determining entitlement to immunity *rationae materiae*, the distinction between the head of state in his public and in his private capacity has been eliminated, at least in the

15. *Supra* n.1, at pp.847 and 899–901.
16. *Ibid.* p.927.
17. *Ibid.* pp.886–87, 903–904.
18. *Ibid.* pp.911–915.

special case of the Torture Convention. It does not however appear from any of the judgments of the Law Lords that this was their intention, and in several places emphasis is laid on the fact that what was in contemplation was criminal proceedings against Senator Pinochet personally. The concept of criminal responsibility of States is still a matter of controversy within the International Law Commission. Even it were to be accepted in principle, it would be unlikely to extend to trial of one State in the domestic courts of another and the extradition of a State does not seem to be an imaginable concept.

An alternative approach is to say that while on the international plane, the acts of torture were attributable to Chile and Chile is responsible for them, in the context of potential criminal proceedings in domestic courts of other States against an individual they cannot constitute official functions. It would not be difficult to say that Chile and its former head of state may be jointly and severally liable, or liable at different levels—Chile on the international level and its head of state or other agent in a criminal court at national level. This indeed is clearly contemplated by the International Law Commission in their 1996 Draft Code of Crimes against the Peace and Security of Mankind.[19] But it is more difficult to say that conduct which in the eyes of a domestic court is not a function of the State may be a public function when attribution is being considered for the purposes of State responsibility. The implications for Chile's international responsibility were not really addressed by those judges who held that General Pinochet had no immunity *rationae materiae* because his conduct was not within his official functions as head of state.

There would have been no problem of State responsibility had the Law Lords held that the negotiators of the Torture Convention in establishing universal jurisdiction and a duty to prevent and punish a crime whose essence was that it could only be committed in the exercise or purported exercise of State authority intended *ipso facto* to cut through both sovereign and diplomatic immunity. The link drawn in many of the judgments between universal jurisdiction and implied overriding of immunity applies equally strongly in the case of serving diplomats and head of state still in office. But this was not the route taken by any of the Law Lords. Without exception they held that immunity *rationae personae* was untouched by the provisions of the Torture Convention. Only immunity *rationae materiae* which is really the State's own immunity was said to be affected, even although there are no words anywhere in the Torture Convention justifying what is even to lawyers versed in immunity a complex distinction.

To maintain that Chile is internationally responsible for the conduct of General Pinochet although it did not form part of his functions as head of state of Chile it will probably be essential to assume that international responsibility may flow from acts or activities which are attributable to the State even if these acts do not constitute functions of the head of that State. An alternative analysis is to draw a sharp distinction between the State and its sovereign or other head of state in his public capacity. The terms of the judgments which would limit by reference to international law the functions of a head of state are all in terms of the head of state as a person potentially subject to criminal liability and not of the State as

19. 1996 I.L.C. Yearbook Vol.I, pp.32 and 35–46.

such. This second analysis runs counter to the wording of section 14(1) of the State Immunity Act which provides that references to a State include references to "the sovereign or other head of that State in his public capacity". It is not however contrary to the clear trend in modern international law to separate the State as an entity from the head of that State as an individual potentially subject at least to international criminal jurisdiction.[20] Under either of these approaches the State may be internationally responsible for conduct by the head of that State in his public capacity which is not merely unlawful but also *ultra vires* as a matter of international law.

The Dissenters

Outside the United Kingdom, the judgments were awaited and are being studied with enormous interest and respect—but their persuasive character in other countries is likely to be limited by the powerful and extensively reasoned dissents recorded by Lord Slynn, Lord Lloyd and Lord Goff. The judgments of the majority in *Pinochet No. 3*—particularly in view of the diversity in their legal reasoning and conclusions—may be less authoritative in the rest of the world than they appear to the eyes of a UK lawyer.

The minority judgments draw a clear distinction between international agreements and precedents for the denial of immunity as a bar to criminal proceedings before international tribunals—where the doctrine of *par in parem non habet imperium* does not strictly apply at all—and possible criminal proceedings against a head of state in a purely domestic tribunal of another State. As Lord Slynn said: "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 rule in the courts of other States is another."[21]

Secondly, the dissenters distinguish clearly between international agreements requiring States parties to prosecute offenders generally on a wider basis than territoriality or nationality and agreements removing whether expressly or by implication immunities applicable only to limited numbers of those exercising public functions. Although the outcome of each of these two processes is that a national court will have "jurisdiction", there is normally no relationship whatsoever between international agreements providing that the contracting parties should be ready to try or surrender to one another those accused of certain defined crimes and international agreements on privileges and immunities. To those who have participated actively in international negotiations raising issues of immunity, Lord Goff's careful demonstration of "how extraordinary it would be, and indeed what a trap would be created for the unwary, if State immunity could be waived in a treaty *sub silentio*" carries conviction.[22]

Thirdly, Lords Lloyd and Slynn accept the relevance of the imputability test to continuing immunity. Lord Lloyd concludes, on the immunity point, with the words: "So the answer is the same whether at common law or under the statute.

20. For examples, see Watts, *op. cit.*, Recueil des Cours Vol.247 (1994-III) at pp.82–84.
21. [1998] 3 W.L.R. 1456, 1473.
22. *Supra* n.1, at p.863.

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."[23] Lord Slynn expressly endorsed the imputability test in the terms set out by Sir Arthur Watts[24] for establishing whether acts formed part of the functions of a head of state.

As a disrespectful academic, one is tempted to wonder how the judgment on sovereign immunity would have appeared had all the Law Lords deliberated together—like the European Court of Justice and some other Supreme Courts—until a single opinion emerged. The foreign observer even if he sets aside the published judgments in *Pinochet 1* is left on the basis of the *Pinochet 3* judgments with some difficult questions. What now is the importance of imputability to a State in the context of immunity *rationae materiae*? Has Chile's international responsibility for conduct of Senator Pinochet towards non-Chilean victims been affected? If not, how is this to be squared with non-attribution of this conduct to the State of Chile? Does denial of immunity *rationae materiae* to former heads of state (and presumably diplomats, consuls and other State officials) extend more widely than the case of torture? Of course, if Spain and Chile were to agree to arbitrate under the provisions of the Torture Convention some of these questions may be addressed.[25]

Act of State

Of the 12 Law Lords giving judgment in the two *Pinochet* cases only one, Lord Lloyd, maintained that act of state, or non-justiciability, formed an additional bar to continuance of the extradition proceedings. Strictly speaking, there was no need for the three Lords who sustained the plea of sovereign immunity to proceed to the subsequent issue of non-justiciability except perhaps on the basis that their views on immunity would not be supported by their colleagues. Lord Goff indeed was silent on act of state and Lord Slynn after clearly distinguishing the doctrine from that of sovereign immunity, somewhat conflated the two by concluding that "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'."[26]

The remaining nine Lords did require, at least by implication, to surmount the act of state barrier to further extradition proceedings. Given the full argument and deployment of authority it is disappointing that their reasons for disapplying the principle are so meagre. Lord Nicholls found that "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".[27] Lord Steyn maintained that the issue must be approached on the basis that Parliament intended to deny continuing immunity for systematic torture and that the doctrine was displaced by statutory requirements. He also noted that the Lords were not asked "to investigate or pass

23. *Supra* n.21, at p.1493.
24. Quoted above, from Recueil des Cours Vol.247 (1994–III) pp.56–57.
25. See editorial comment by Charney in (1999) A.J.I.L. 452–464, at pp.457–459.
26. *Supra* n.1, at pp.1478–79.
27. *Ibid.* at p.1498.

judgment on, the facts alleged in the warrant or request for extradition"—which was true, but ignored the fact that some of the political background to the request would be capable of being deployed if normal proceedings under the Extradition Act 1989 were to continue in a Magistrates' Court. Of more general interest was his finding that it would be wrong for English courts to extend the doctrine in a way which ran counter to customary international law as it existed in 1973, his observation that it turned "on public policy as perceived by the courts in the forum at the time of the suit" and his endorsement of the statement in the Third Restatement of the Foreign Relations Law of the United States to the effect that a claim arising out of alleged torture or genocide would probably not be defeated by the act of state doctrine "since the accepted international law of human rights is well established and contemplates external scrutiny of such acts".[28]

In *Pinochet 3*, although there were some passing references to act of state, a number of the judges appear to have seen it as virtually indistinguishable from immunity *rationae materiae*. Only Lord Saville dealt with it as a separate issue, holding that arguments based on the doctrine must fail as being inconsistent with the terms of the Torture Convention.

It is curious that the most interesting analysis and application of the act of state or non-justiciability doctrine come from Lord Lloyd, who correctly pointed out at the outset that under his view of immunity it did not arise.[29] He however regarded the question as of over-riding importance in the context of the proceedings, and quite separate from sovereign immunity. He takes the matter forward on the basis of Lord Wilberforce's leading judgment in *Buttes Gas and Oil Co.* v. *Hammer*,[30] subsequent applications by the US Supreme Court[31] and by the recent UK case of *Kuwait Airways Corporation* v. *Iraqi Airways Co.*[32] He notes that "issues of great sensitivity have arisen between Spain and Chile. The United Kingdom is caught in the crossfire". He said that quite apart from any question of imperilling foreign relations "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".

This is an admirable statement of one aspect at least of the modern doctrine of non-justiciability. Lord Lloyd is in effect saying that where the underlying issue is a dispute on a question of international law between two sovereign States—not including the United Kingdom—the proper court to resolve it is an international tribunal.[33] Other act of state cases may be grouped under the principle that—at least as a general rule and where there are no overriding considerations of human rights or public policy—laws and public acts of another sovereign State are best reviewed by the courts of that State. The terms "act of state" and "non-

28. *Ibid.* at pp.1507–1508.

29. *Ibid.* at pp.1494–96. For discussion of the relationship between State immunity and act of state see Barker, "State Immunity, Diplomatic Immunity and Act of State: A Triple Protection against Legal Action" (1998) I.C.L.Q. 950, pp.956–958.

30. [1982] A.C. 888.

31. *Kirkpatrick* v. *Environmental Tectonics* 110 S.Ct. 701.

32. Judgment of 12 May 1998, *Times Law Reports* 12 May 1998.

33. Another recent case of this kind was *Westland Helicopters* v. *Arab Organisation for Industrialisation et al.* [1995] 2 All E.R. 387.

justiciability" might more appropriately be replaced by a modern "doctrine of the proper court"—parallel to the doctrine of *forum non conveniens* in private international law. That is a larger subject than can be examined here, but Lord Lloyd's findings give this theory support.

Given the test, there remained much to argue over its application in the circumstances of the extradition application for General Pinochet. It could have been said that—at a time when Chile had not directly intervened in the proceedings—the real issue was one between General Pinochet and Spain. It could have been pointed out that there was no international tribunal with jurisdiction to try the General—and indeed it was argued that Chilean courts had been barred from doing so by the terms of the 1978 amnesty, so that the only "proper court" must therefore be one in Spain. It could have been argued that the Extradition Act gives the Secretary of State opportunities at the stage of authority to proceed as well as at the stage of final surrender to take into account wider considerations of foreign relations, so that there was no need for the courts of the United Kingdom to venture into areas of international sensitivity.

It may be that if Spain and Chile agree to submit their legal dispute to determination at the international level, the route of possible extradition from the United Kingdom will be overtaken. But for the future, it would have been of lasting value to have had clearer guidance on non-justiciability from those other judges forming the majority in *Pinochet 3*.

EILEEN DENZA

III. EXTRADITION LAW ASPECTS OF *PINOCHET 3*[1]

THE prominence of the immunity issue in *Pinochet 1*[2] rather obscured the fact that the proceedings were ultimately about extradition. Perhaps that was how it should have been because immunity questions are recognised as preliminary matters, going to the very competence of a court to hear and determine the substantive claim. However, there can be questions which are, as it were, even more preliminary than ones about immunity. One example is where a party argues that there is no substance whatever to the right a State claims and which it is seeking to protect from adjudication by relying on one version or another of immunity.[3] When the extradition aspects of the case resurfaced in *Pinochet 3*, the opposite, pre-preliminary situation was presented: did the extradition crimes specified in the warrants from Spain require *any* answer from Pinochet, such that could he avoid being handed over, without it being necessary for him to raise any claim of immunity?

This question faced the House of Lords in *Pinochet 3* because of changes in the way the Crown Prosecution Service put the case against him compared with the earlier proceedings.[4] In particular, additional charges were preferred which were

1. [1999] 2 W.L.R. 827.
2. [1998] 3 W.L.R. 1456.
3. Para.113 of Commentary on the Convention (Art.29). Art.29 is reflected in s.16(3), (4) and (5) of the Act.
4. *Supra* n.1, *per* Lord Browne-Wilkinson, at p.836B–F.