CURRENT LEGAL DEVELOPMENTS

Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator

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Abstract: This decision of the House of Lords is significant because it is the first decision of a major court of an important country refusing to grant a former head of state immunity from adjudication in the context of alleged gross violations of human rights. It is shown that state immunity, diplomatic immunity and head of state immunity are to be distinguished and the rules pertaining to head of state immunity are explained. Whereas the author agrees with the result of Lords' decision, he disagrees with the reasoning because the majority circumvented the immunity question by artificially qualifying the alleged human rights violations of General Pinochet as private acts.

1. FACTS AND BRIEF SUMMARY OF THE DECISION OF THE HOUSE OF LORDS

On 25 November 1998 a 3:2 majority of the Lords of Appeal at the House of Lords in London decided[1] that Chile's former military ruler, General Pinochet, could not claim privilege and immunity from arrest in England to be extradited to Spain pursuant to an international warrant of arrest issued by the Spanish judge Garzon in Madrid on 18 October 1998 and implemented by a national arrest warrant of 22 October and executed on 23 October 1998. The arrest warrant accuses General Pinochet of having committed, *inter alia*, torture and hostage

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1. Opinions of the Lords of Appeal For Judgment in the Cause Regina *v.* Bartle and the Commissioner of Police for the Metropolis and others *Ex Parte* Pinochet (on appeal from a Divisional Court of the Queen's Bench Division); Regina *v.* Evans and another and the Commissioner of Police for the Metropolis and others *Ex Parte* Pinochet (on appeal from a Divisional Court of the Queen's Bench Division), http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pino0.htm (through pino09.htm). *See also* Home Secretary Jack Straw's "authority to proceed" with the extradition procedure of Pinochet of 9 December 1998, http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/cm981209/ text/ 81209w08.htm#81209w08.html_spnew2.

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taking, both constituting extradition crimes under the governing UK Extradition Act 1989.[2] The Chilean government protested and claimed immunity from suit on behalf of Pinochet both as a visiting diplomat and as a former head of state. However, in the proceedings before the House of Lords, diplomatic immunity proper was not discussed as counsel for Pinochet could not produce appropriate evidence for Pinochet's status as a diplomat.[3] Consequently, the opinions delivered by the Law Lords are solely concerned with head of state immunity.

The majority decision rests but on one point: That the acts of torture and hostage-taking attributed to Pinochet constitute conduct which international law characterises as "not acceptable conduct on the part of anyone" and that such conduct "cannot be attributed to the state to the exclusion of personal liability".[4] In other words, the abhorrent nature of the alleged conduct and the fact that "the taking of hostages, as much as torture, has been outlawed by the international community as an offence" disqualifies this type of conduct from being regarded as performed in the exercise of the functions of a head of state. Lord Steyn vividly illustrated this point in his opinion:

> My Lords, the concept of an individual acting in his capacity as Head of State involves a rule of law which must be applied to the facts of a particular case. It invites classification of the circumstances of a case as falling on a particular side of the line. It contemplates at the very least that some acts of a Head of State may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a Head of State. If a Head of State kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of his functions as Head of State. If a Head of State orders victims to be tortured in his presence for the sole purpose of enjoying the spectacle of the pitiful twitchings of victims dying in agony [...] that could not be described as acts undertaken by him in the exercise of his functions as a Head of State.

The minority on the other hand, represented by Lords Slynn of Hadley and Lloyd of Berwick, in more sophisticated opinions attempted to show that customary international law required the recognition of head of state immunity absent any indication to the contrary. The relevant conventions on the prohibition of torture[5] and hostage-taking[6] contain no reference to the derogation of head of

2. There had in fact been another, preceding arrest warrant, which, however, was flawed because it accused General Pinochet of the murder of Spanish citizens in Chile, which apparently does not constitute an extradition crime under the Extradition Act of 1989.
3. *See* opinion of Lord Lloyd of Berwick, Summary of Issues, issue no. 3.
4. Opinion of Lord Nicholls.
5. Torture Convention, 10 December 1984, entry into force on 26 June 1987, 1400 UNTS 85, currently 110 parties among them since 1987 Chile and since 1994 the United Kingdom. *See also* http://www.un.org/Depts/Treaty.
6. International Convention Against the Taking of Hostages, 17 December 1979, entry into force on 3 June 1983, 1316 UNTS 205, currently 83 parties among them Chile and the United Kingdom.

state immunity and any recognised exceptions to personal immunities are concerned with proceedings before international tribunals.

2. IMMUNITY OF STATES, DIPLOMATS, AND HEADS OF STATE IN INTERNATIONAL LAW

Before attempting to analyse the conclusions of the Law Lords it is necessary to recall the content of the various immunity rules of international law and reflect on their interrelationship.

The immunities relevant in this context are governed both by treaties and customary international law. With the exception of the European Convention on State Immunity,[7] some specialised conventions and bilateral treaties[8] the rules of state immunity are part of international custom. The rules of diplomatic immunity[9] are spelled out in the Vienna Convention on Diplomatic Relations[10] to which all states involved in this dispute are parties.[11] The immunity of (former) heads of state is almost exclusively governed by international custom.[12]

2.1. State immunity

The rules of state immunity[13] proper deal with the requirements and conditions under which a foreign state or a foreign state entity can be made party to legal

7. European Convention on State Immunity and Additional Protocol, 16 May 1972, 11 ILM 470 (1972), in force since 11 June 1976 and ratified *inter alia* by The Netherlands, Great Britain, and Germany.
8. *See* J. Bröhmer, State Immunity and the Violation of Human Rights 121-125 (1997) with further references.
9. Diplomatic immunity was at issue in a prominent case before the Federal Constitutional Court in Germany recently, where the Court had to decide on the admissibility of an arrest warrant for the former Syrian ambassador to East-Germany who was sought for his involvement in a terrorist bombing in former West-Berlin, *see* BVerfGE 96, 68 *et seq.*; case note by B. Fassbender, *S. v. Berlin Court of Appeal and District Court*, 92. *See also* K. Doehring & G. Ress, *Diplomatische Immunität und Drittstaaten – Überlegungen zur erga omnes-Wirkung der diplomatischen Immunität und deren Beachtung im Falle der Staatensukzession*, 37 Archiv des Völkerrechts (1999) (not yet published).
10. Vienna Convention on Diplomatic Relations, signed 18 April 1961, 500 UNTS 95, in force since 24 April 1964. *See also* Vienna Convention on Consular Relations, signed on the same day, in force since 19 March 1967, 596 UNTS 261.
11. The Vienna Convention on Diplomatic Relations has been ratified by 178 parties including Chile, the United Kingdom, and Spain.
12. *See* O. Kimminich, *Das Staatsoberhaupt im Völkerrecht*, 26 Archiv des Völkerrechts 129, at 159 *et seq.* (1988).
13. On state immunity in general *see, e.g.*, H. Steinberger, *State Immunity*, *in* R. Bernhardt, Encyclopedia of Public International Law, Instalment 10, at p. 428 *et seq.* (1988); C. Schreuer, State Immunity: Some Recent Developments (1988); J.W. Dellapenna, Suing Foreign Governments and Their Corporations (1988); B. Hess, Staatenimmunität bei Distanzdelikten (1992); the reports by G. Ress for the ILA Committee on State Immunity published in International Law Association, Report of the 64th Conference (Queensland 1990), at 393 *et seq.*, 65th Conference (Cairo 1992), at 290 *et seq.*, 66th

proceedings in a foreign forum possessing subject matter jurisdiction. The immunity of the foreign state and its entities therefore exempts that foreign state from an otherwise existing jurisdiction to adjudicate.[14] Thus it is clear that state immunity as such is irrelevant in this case because it is not the Republic of Chile which is being implicated but its former head of state personally.

However, the rules of state immunity are indirectly relevant to this case as well. First, there can be no doubt that state immunity and head of state immunity are related. In fact, state immunity proper, which is now regarded as an immunity *ratione materiae*, is an offspring of the immunity *rationae personae* formerly afforded to the sovereign ruler who personified the state.[15] From an intertemporary point of view, the former head of state still in some way personifies and represents his state for that particular period of time. It is equally clear that the state immunity rules must not be circumvented to get from the (former) head of state what cannot be obtained from the state as such. One crucial difference must, however, be kept in mind. The state as such by and large cannot be criminally liable. Its civil liability, however, is potentially unlimited as states generally do not have the option to petition for bankruptcy. The (former) head of state on the other hand as a natural person can in principle be criminally liable, but any civil liability is limited to his personal estate. This illustrates that head of state immunity is rooted more in the formal principal of sovereign equality as expressed in the phrase '*par in parem non habet imperium*'. The functional purpose of immunity, to ensure the effective discharge of head of state functions, whilst relevant in regard to acting heads of state, is largely diminished to the subsisting immunity for acts committed during tenure as head of state. In the context of state immunity on the other hand, it is the functional aspect of sovereignty which outweighs the formal aspect of sovereign equality as the withdrawal of immunity with the resulting admissibility of individual damage claims brought before the courts of potentially any country by potentially thousands of victims of human rights violations, could render states practically defunct for years to come and thus make it impossible for them to fulfil their primary functions, i.e. guaranteeing peace and security and providing some degree of minimum welfare for their citizens.[16]

Secondly, there have been important developments in the field of state immunity, notably the question whether recourse to state immunity should be precluded for those states sued in the context of (*ius cogens*) human rights violations.[17] The changing role of the individual in international law together with the

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Conference (Buenos Aires 1994), at 452 *et seq.* (draft convention at 21 *et seq.*). *See also* Bröhmer, *supra* note 8.

14. Steinberger, *supra* note 13, at 428.
15. *See* Bröhmer, *supra* note 8, at 30.
16. For more detail *see* Bröhmer, *supra* note 8, at 196 *et seq.*
17. For a detailed survey *see* Bröhmer, *supra* note 8 with further references; M. Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LJIL 9 (1998); and N. Vivekananthan, *The Doctrine*

increasing significance of human rights have put under pressure on the prevailing approach of granting state immunity for all governmental acts (*acta iure imperii*) and allow proceedings only with regard to commercial activities (*acta iure gestionis*), which effectively shields states from being sued for human rights violations as such conduct will always be governmental in nature.[18] There have been a number of cases especially in American[19] and British courts[20] demonstrating the problem of immunity and human rights violations and there have been proposals by writers to restrict immunity in such instances on the grounds of implied waivers[21] of immunity, forfeiture of immunity,[22] restricting immunity in proceedings brought by nationals in their home forum against the violating state[23] or by resorting to limitations to immunity based on a more functionally oriented understanding of the concept of sovereignty as the basis of state immunity.[24] It is evident that changes in the approach towards the problem of state immunity and the violation of human rights could have an impact on head of state immunity arising in the same context as well (and *vice versa*).[25] Thus, the decision of the Lords will also have a significant impact on the application of state immunity rules in the future.

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of State Immunity & Human Rights Violations of Foreign States, 8 Sri Lanka Journal of International Law 125 (1996).

18. This illustrates the problems of the nature-test which is applied for the distinction between governmental and private acts. Torture is regarded as governmental if and when governmental authorities engage in torture. Private individuals also engage in torture, *see* United States *v.* Alvarez-Machain, 112 S.Ct. 2188 (1992). Torture has neither a governmental nor a private nature. The question is what consequences to draw from the attribution of torture to governmental authorities and people acting on behalf of that authority.
19. *See e.g.,* Letelier *v.* Republic of Chile, 63 ILR 378 (1982), *see also* the final settlement reached by a bilateral dispute settlement Commission, *Re* Letelier and Moffitt, 88 ILR 727 (1992), Von Dardel *v.* Union of Soviet Socialist Republics, 77 ILR 258 (1988); Nelson *v.* Saudi Arabia, 30 ILM 1171 (1991), *rev'd* Saudi Arabia, King Faisal Specialist Hospital and Royspec *v.* Nelson, 113 S.Ct. 1471; Siderman de Blake *v.* Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); and Hugo Princz *v.* Federal Republic of Germany, 33 ILM 1483 (1994).
20. Al Adsani *v.* Government of Kuwait, 107 ILR 536.
21. *See* Bröhmer, *supra* note 8, at 190 with references. The implied waiver approach is an American specialty and a result of the statutory construction of state immunity in the FSIA.
22. J. Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen, in* U. Beyerlin *et al.* (Ed.), Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt 135, at 148 *et seq.* (1995).
23. M. Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 Michigan Journal of International Law 403 (1995).
24. Bröhmer, *supra* note 8, at 196 *et seq.*
25. On recent developments in the field of state immunity *see also* G. Ress, *The Changing Relationship Between State Immunity and Human Rights, in* M. de Sakvia & M.E. Villiger, The Birth of European Human Rights Law, Liber Amicorum Carl Aage Nørgaard 175 *et seq.* (1998); *see also* the US Antiterrorism and Effective Death Penalty Act of 1996, Subtitle B – Jurisdiction for Lawsuits Against Terrorist States, Sec. 221, Public Law 104-132 of 24 April 1996, amending the FSIA which is codified at 28 USC 1605. A new para. 7 was added to sec. 1605 with a new immunity exception to be applied under certain circumstances in cases of torture, extrajudicial killing, aircraft sabotage and hostage taking, *see* 38 ILM 759 (1997).

Finally it should be noted that state and head of state immunity are connected in the domestic law of the United Kingdom.[26] Under sec. 14(1)(a) SIA the immunities conferred in part I of the SIA, which deals with proceedings by or against other states, also apply to "the sovereign or other head of that state in his public capacity". Sec. 16(4) SIA provides that part I of the SIA "does not apply to criminal proceedings", which illustrates the fact that state immunity is primarily[27] concerned with matters of a civil nature.[28] Sec. 20(1)(a) SIA refers to the Diplomatic Privileges Act 1964, and thus to the rules of the Vienna Convention on Diplomatic Relations, for the rules concerning the immunity of heads of state.

2.2. Diplomatic immunity

The Chilean government also sought diplomatic immunity proper for Pinochet. In the proceedings that plea soon became insignificant due to the lack of facts supporting that claim. Suffice it to say therefore, that the fact that Pinochet travelled on a diplomatic passport and that British officials had been informed by Chilean authorities of his travel plans and arrival could by itself not convey onto Pinochet the status of a diplomat. Articles 4 (concerning the head of the mission) and 10 (concerning other diplomatic staff) of the Vienna Convention[29] require notification of that person's entry as a diplomat.[30] That makes sense because it allows the receiving state to reject that person before it would attain the far-reaching diplomatic status.

Diplomatic law also recognises the status of special emissaries or *ad hoc* diplomats as is evidenced by the Convention on Special Missions.[31] The German Supreme Court[32] had to deal with a very delicate matter in 1984 when a high official of the Iranian government had been caught with drugs and claimed immunity as a special emissary. The Iranian foreign minister only subsequently confirmed this status with a letter to his German counterpart, and the German foreign ministry accepted this representation. The German Court held that, notwith-

26. On the 1978 UK State Immunity Act *see* D. Hockl, *The State Immunity Act 1978 and its Interpretation by the English Courts*, 48 Austrian Journal of Public and International Law 121 (1995).
27. Lord Slynn of Hadley in his opinion concludes that "the number of crimes which may be committed by the State as opposed to by individuals seems likely to be limited". It is of course possible, for example, to levy fines on states for conduct defined as criminal but by and large one can only punish people and not abstract constructs.
28. It was argued and rejected in the Pinochet decision that the exclusion of criminal proceedings in sec. 16(4) SIA pertains only to the state immunity exceptions provided for in secs. 2 *et seq.* SIA but not to sec. 1 SIA, thus requiring absolute immunity for heads of state from criminal proceedings.
29. *See supra* note 10 and 11.
30. *See* C.J. Lewis, State and Diplomatic Immunity 129 (1990).
31. Convention on Special Missions, 8 December 1969, entry into force 21 June 1985, 1400 UNTS 231. Currently the Convention has 31 parties, *inter alia* Chile and the United Kingdom.
32. BGHst 32, 275 (Bundesgerichtshof, reports of criminal cases).

standing the Convention on Special Missions, which had not entered into force at the time, international customary law recognised the concept of ad hoc diplomats. These special emissaries have the same status as regular diplomats. The Court also made clear that, just as with regular diplomats, some form of (prior or subsequent) agreement between the sending state and the receiving state on person and diplomatic task is required. The British and Chilean governments could have applied the same principle in this case, thereby conveying onto Pinochet the status of an *ad hoc* diplomat with immunity protection. It seems that at least the British government was not willing to take this road.

Incidentally and in the light of the functional approach taken by the Lords in the Pinochet case, the invocation of diplomatic immunity by the Chilean government is remarkable insofar as the Chilean Supreme Court had itself in earlier decisions concerning diplomatic immunity resorted to a functional approach, stating that diplomatic immunity must be granted only for "acts performed in the exercise of official functions".[33]

2.3. Head of state immunity

Finally, the scope of the immunity to be granted to foreign heads of state must be determined. A survey of international law textbooks and other writings quickly reveals that foreign heads of state are generally regarded to be entitled to immunity and that this immunity continues after they have ceased to be head of state for acts committed while in office, however, not for acts committed in their capacity as private individuals.[34]

Head of state immunity is regarded as a functional immunity, i.e., closely connected to the exercise of the functions of a head of state. It is, however, questionable whether only the foreign state can waive the immunity of its (former) head of state.[35] In civil matters it would seem that a (former) head of state can initiate proceedings and it would be inadequate not to treat the initiation of such proceedings as a waiver by the head of state himself. Even in criminal matters, it is not inconceivable that a (former) head of state might have an interest in the proceedings to continue and thus in waiving immunity.[36] The case of the Kurdish leader Öcalan, who - before being abducted by Turkish authorities - had indicated that he might be willing to stand trial before an international tribunal, may serve as an example. His interest to shed some light on what he regards as Turkish crimes against the Kurdish people could arise in a similar fashion with regard to a head of state and national court proceedings.

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33. *See* F.O. Vicuna, *Diplomatic and Consular Immunities and Human Rights*, 40 ICLQ 34, at 39 (1991).
34. *See* the opinion of Lord Slynn of Hadley for a survey of English materials; *see also* G. Dahm, J. Delbrück & R. Wolfrum, 1 Völkerrecht 254 (1989).
35. *See* Opinion of Lord Lloyd of Berwick.
36. *See* Dahm, Delbrück & Wolfrum, *supra* note 34, at 254 stating that a head of state may waive immunity both in civil and criminal matters.

This means, in other words, that a head of state is entitled to immunity for any and all conduct while still in office[37] but only for conduct functionally related to the exercise of this office after the head of state function has been relinquished. Incidentally, head of state immunity also ceases when the state whose head the potential defendant was has ceased to exist.[38] This was affirmed by the German Constitutional Court when criminal proceedings were brought against a former East German head of state.[39]

The distinction between functional and non-functional conduct has nothing to do with the distinction between *acta iure imperii* and *acta iure gestionis* which still governs the law of state immunity. For example, the purchase of a new official limousine by a foreign head of state constitutes a commercial transaction (*iure gestionis*) in the context of state immunity. Due to the head of state's continuing functional immunity Daimler Chrysler would nonetheless be unable to sue the head of state for the purchase price even after he ceases to be in office. Instead the company would have to turn to the state which would not be protected by immunity as the purchase of a car is considered a commercial transaction.

However, it must be noted that there is very little practice from which to draw because (former) heads of state have rarely been implicated before foreign courts. Prominent recent cases have been marked by distinct specialties. In the *Noriega* case,[40] ensuing from the abduction of Panama's *de facto* leader, General Noriega, by US forces and his subsequent indictment for drug related charges, the defendants claim to head of state immunity was disputed on the grounds that General Noriega lacked recognition as head of state both by the US and by the Panamanian Constitution and that such immunity would have to be invoked by the Panamanian government, which apparently did not do so.[41] In the case of former Philippine strongman Ferdinand Marcos, whose departure to the United States caused a series of litigation there, the government of the Philippines, while not expressly waiving immunity, made it clear that they had no objections to the suit.[42]

The limited attention given to head of state immunity is not only due to the fact that its principle necessity was never really disputed nor its scope seriously challenged but also with the fact that it is closely related to the concept of state immunity on one hand and diplomatic immunity on the other. Some see a closer

37. But *see* Dahm, Delbrück & Wolfrum, *supra* note 34, at 253 arguing in favour of immunity only for *acta iure imperii*.
38. K. Ipsen, Völkerrecht 344-345 (1990); and Dahm, Delbrück & Wolfrum, *supra* note 34, at 254.
39. German Federal Constitutional Court, 2 BvR 1662/91, Decision of 21 February 1992, Deutsch-Deutsche Rechtszeitschrift (DtZ) 1992, 216; *see* K. Hailbronner, *in* Graf Vitzthum (Ed.), Völkerrecht 198, para. 38 (1997).
40. United States of America *v.* Noriega, 746 F.Supp. 1506, at 1519 (S.D.Fla. 1990).
41. *See* C.E. Hickey, *The Dictator, Drugs and Diplomacy by Indictment: Head of State Immunity in United States v. Noriega*, 4 Connecticut Journal of International Law 729, at 752 (1989).
42. Hilao *v.* Marcos, 25 F. 3d 1467 (1994).

relationship to diplomatic immunity,[43] others regard head of state immunity as the true source[44]. I submit that both approaches must be taken with a grain of salt. The question is not whether head of state immunity leans more towards diplomatic immunity or whether it is more closely related to state immunity. As with the other two immunities, one must primarily focus on their respective purposes and objectives. In order to identify the purposes and objectives behind the concept of head of state immunity it is insufficient to merely quote the sovereignty of states or derivatives such as sovereign equality. The concept of sovereignty in international law is as important as it is broad and all too often it is used to choke all argument.

What then is meant by sovereignty in the context of head of state immunity? It is clear that the functions of a head of state cannot be properly discharged if that head of state is entangled in proceedings in foreign courts be they of a criminal or civil nature. If this were allowed undue influence could be exerted at the very least and the peaceful coexistence of states would be jeopardised. It should also be noticed that an acting head of state will most likely be unable to even participate in meaningful legal proceedings. It would be very difficult to depose a head of state, it would be difficult if not impossible for him to follow the law suit in person. As is the case for diplomats, it is generally impossible to discharge the functions of a head of state and at the same time be subjected to all kinds of legal proceedings all over the world. As a result it seems justifiable that the criminal (and civil) jurisdiction of the potential forum state must subside even in the light of the most serious allegations of criminal conduct.

However, things are quite different for former heads of state. All functional aspects in the narrow sense, i.e., everything connected to the actual discharge of functions of a head of state are irrelevant now. What remains is a potential threat to the peaceful coexistence of nations, which is not to be taken lightly. However, and in contrast to diplomatic immunity, where the former diplomat's immunity remains in place for official acts,[45] the head of state primarily acts in his home country and not abroad. The continuous immunity of the diplomat can at least be justified with a view to guaranteeing the unrestricted exercise of diplomatic functions for the succeeding diplomats in that state. This consideration is irrelevant in the case of former heads of state. There is no necessary contact between former heads of state and foreign states. And if there is the need for a former head of state to travel abroad, his home state and the receiving state are free to work out an agreement by which either the former head of state is granted ad hoc diplomatic status or by which the receiving state genuinely guarantees safe

43. *E.g.*, Kimminich, *supra* note 12, at 161 and, of course, sec. 20(1) of the UK SIA.
44. *E.g.*, A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RdC 89 (1994).
45. *See* Art. 39 sec. 2 of the Vienna Convention on Diplomatic Relations, 500 UNTS 95.

conduct. Put bluntly, there is no need for international law to secure the freedom to travel for abdicated dictators.

3. CONCLUSION AND OUTLOOK

From this point of view, the result reached by the majority of the House of Lords is to be lauded. However, that is not true for the reasoning. It is artificial to argue that the crimes alleged to have been committed by Pinochet are outside the functions of a head of state. In the words of Lord Steyn, who is to say that Pinochet had victims tortured to enjoy "the spectacle of the pitiful twitchings of victims dying in agony" or "in a fit of rage"? Whereas it is not inconceivable and perhaps not even uncommon for dictators to use their power to rid themselves of personal enemies, the main force behind the systematic torture and repression is the perceived threat of the nation by some more or less defined enemy. That does not excuse anything but speaks against the notion that Pinochet acted privately. Lord Lloyd of Berwick rightly concluded that it does not make any sense to treat the most serious of all crimes as private crimes, not attributable to the state. However, one must keep in mind the inherent difficulty of changing customary international law, the risk to appear as violating the existing rule. On the face of it, the majority of the Lords attempted to circumvent that risk by leaving the continuing immunity for functional head of state acts in place and just removing the alleged crimes from the scope of these functions. However, there is hardly a substantial difference between the approach of the majority and the proclamation of an immunity exception for certain (international) crimes.

Finally, I submit that the decision should not be overrated. With regard to former dictators now to be taken to justice, the decision will presumably only lead to more sophisticated travel plans by those who have reason to fear foreign prosecutors. Where a former dictator has left his home country for fear of prosecution he will either have chosen a friendly country or he will face extradition to his home country.

It should also be noted that the majority decided with a clear view to the fact that their decision will not necessarily lead to Pinochet's extradition because the final word will be spoken by the executive branch. The Lords made it clear that it is for the government to review the political implications and decide accordingly.

Last but not least, the decision must not be overrated with a view to state immunity. It does not follow from the non-immunity of a former head of state for alleged acts of torture that there should not be immunity in civil proceedings arising from the same conduct. Again it must be emphasised that the liability for damages of states is potentially unlimited. That must have implications in the determination of whether such conduct is regarded immune or not. General immunity exceptions for violations of core human rights would jeopardise that

state's functional sovereignty by making it very difficult or even impossible for that state to discharge its functions properly for a long time to come.[46] There is no room for such considerations in the context of head of state immunity.

46. *See* Bröhmer, *supra* note 8, at 196 *et seq.*