CURRENT LEGAL DEVELOPMENTS

Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three

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Abstract: The third decision of the House of Lords in the Pinochet matter is significant, because the House of Lords upheld the majority view taken in the first decision: heads of state can, under certain circumstances, be held responsible for gross violations of human rights in the criminal courts of a foreign country. The decision is based on three main pillars. The Lords had, first, to clarify what constitutes an extradition crime under the Extradition Act 1989; second, to construct torture as an international crime; and, finally, to reject the plea of immunity of a former head of state in the context of the international crime of torture.

1. INTRODUCTION

It might be useful to briefly summarize the history of this remarkable case, which has now occupied the House of Lords three times. On 25 November 1998 a 3:2 majority of the Lords of Appeal at the House of Lords in London decided that General Pinochet, former military dictator and head of state of Chile, could not claim privilege and immunity from arrest in England so that he could be extradited to Spain pursuant an international warrant of arrest issued by Spanish authorities.[1] This decision was set aside by five different Judges in a second decision because the House of Lords concluded that one Judge, who had not only participated but casted the decisive vote in the first decision, was disqualified from sitting as that Judge served as a director of a registered charity of Amnesty International, which itself had intervened in the proceedings and appeared by

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1. Regina *v.* Bow Street Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte, (1998) All ER 897, 37 ILM 1302 (1998). *See also* J. Bröhmer, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator – The Case of General Pinochet and the Decision of the House of Lords*, 12 LJIL 361-371 (1999); H. Fox, *The First Pinochet Case: Immunity of a Former Head of State*, 48 ICLQ 207-216 (1999).

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counsel before the Appellate Committee.[2] This being so, the Lords had to address the matter a third time, this time with seven judges sitting, however, to no avail for General Pinochet. The decision of 24 March 1999, balanced as it attempts to be, nonetheless makes it perfectly clear that the orchestration of such hideous crimes as systematic and wide-spread torture constitutes an international crime punishable in national courts without the possibility of recourse to head of state immunity.[3]

2. THE DECISION OF THE LORDS

The Pinochet III decision is based on three main arguments:

- a UK statutory argument of what constitutes an extradition crime under the Extradition Act 1989. In this context the "double criminality rule", i.e. the definition of extradition crimes as conduct constituting a crime under both Spanish law (the state requesting extradition) and UK law,[4] played a central role;
- the construction of torture as an international crime with the implementation in the UK on 29 September 1988 of the 1984 Torture Convention[5]

2. On 17 December 1998. Written opinions delivered on 16 January 1999, *In re* Pinochet, 2 WLR 272 (1999), 38 ILM 430 (1999). Apparently this was the first time the House of Lords had set aside one of its own decisions, *see* K. Middleton & M. Mackarel, *Pinochet and the House of Lords: A turning point in international human rights law?*, 3 The Edinburgh Law Review (ELR) 380, at 381, note 2 (1999).

3. Regina *v.* Bow Street Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte, (1998) All ER 897. The decision as it appeared at the UK Parliament Stationary Website (http://www.parliament.the-stationary-office.co.uk) is also published at 38 ILM 581 (1999). Henceforth I will refer to this decision as Pinochet III and cite to the – outside of the UK – more commonly available ILM publication. On Pinochet III *see also* A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EJIL 237-277 (1999); A. Bracegirdle, *Re Pinochet*, New Zealand Law Journal 272-274 (1999); C.A. Bradley & J.L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Michigan Law Review 2129-2184 (1999); N. Bhuta, *Justice without Borders? Prosecuting General Pinochet*, 23 Melbourne University Law Review 499-532 (1999); H. Fox, *The Pinochet Case No. 3*, 48 ICLQ 687-702 (1999); Middleton & Mackarel, *supra* note 2, at 380-394; T. Rensmann, *Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit (zu Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, House of Lords, [1998] 3 WLR 1456; [1999] 2 WLR 827)*, IPRax 268-273 (1999); A. L. Paulus, *Triumph und Tragik des Völkerstrafrechts*, NJW 2644-2646 (1999).

4. Section 2(1)(a) of the 1989 Act refers to "conduct in the territory of a foreign state [...] which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state [...] is so punishable under that law [...]." Cited after Pinochet III, 38 ILM 581, at 586 (1999).

5. 1984 Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 23 ILM 535, text available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm; status available at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html. The Convention was ratified by the UK on 8 December 1988.

conveying universal and obligatory jurisdiction and creating the crime of torture committed outside the UK as a new criminal offence under UK law;[6]
- the denial of immunity of a former head of state in the context of the international crime of torture.

The Lords combined these arguments holding essentially that the extradition proceedings may continue, i.e. that Pinochet is not entitled to immunity for alleged acts of torture committed after 8 December 1988,[7] a date after which extraterritorial torture became punishable in the UK and thus an extradition crime. It was the day, furthermore, the Torture Convention was ratified by the UK, thus obliging the UK to exercise jurisdiction over torture regardless of the place where it was committed (universal jurisdiction). In the light of this obligation, the majority saw no room for an immunity *ratione materiae*, as granting such immunity would contradict the very obligation stipulated by the Torture Convention.[8]

3. TORTURE AS AN INTERNATIONAL CRIME

It is significant to note that four of the Law Lords explicitly recognized the prohibition of torture as a norm of customary international law with *ius cogens* character[9] and thus as a norm which binds all subjects of international law regardless of whether they have signed and ratified the Torture Convention or any

6. On 29 September 1988 section 134 of the Criminal Justice Act 1988 came into effect, giving effect to the Torture Convention in the UK.
7. There is some confusion on whether 8 December or 29 September is the correct date after which the alleged crimes must have been committed. Lords Browne-Wilkinson, Hope and Saville explicitly mention 8 December, Lord Hutton explicitly mentions 29 September. Lord Millett adheres to a much broader view and would have included all torture charges "whenever carried out" and Lord Phillips allowed the appeal in respect of conduct constituting extradition crimes, which seemingly points to 29 September. Of all the charges, only three torture charges remain valid for the extradition proceedings , all of which allegedly took place at a time or during a time period extending after the later of the two dates. *See* Fox, *supra* note 3, at 690. The exact date is therefore irrelevant.
8. *See* Lord Saville, 38 ILM 581, at 642-643 (1999): "So far as the states that are parties to the [Torture] Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."
9. Lord Browne-Wilkinson, 38 ILM 581, at 589 (1999): "I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense"; Lord Hope, at 626 referring to the discussion in Siderman de Blake *v.* Republic of Argentina (1992) 26 F.2d 1166; Lord Hutton, at 637; Lord Saville, at 642 in somewhat unclear terms, when, in the context of the Torture Convention, he states that "[...] torture became universally condemned as an international crime"; Lord Millet, at 650, boldly proposing that torture became an international crime by 1973.

other treaty dealing with this crime.[10] From that point of view it is – at least for the continental jurist – not easy to understand why then the date of the ratification of the Torture Convention played such a significant role. One reason is that UK criminal law apparently defines criminal conduct not only by reference to material characteristics of the conduct but also by reference to jurisdictional aspects of the conduct. In other words, to make torture an extradition crime under UK law it was not only necessary that tortious conduct constituted a crime under UK law (which it in principle did regardless of the Convention). It was also necessary that UK courts had jurisdiction to adjudicate such conduct (which they did not have before the Convention came into force because torture was only a crime if conducted within the UK). Only after the ratification of the Convention did Torture become an extradition crime because it became "an extra-territorial offence against the law of the United Kingdom".[11]

This domestic law issue led to a second consequence: The late date led to a sharp reduction of the extraditable charges. Hence, the notion of widespread, systematic torture, could not easily be upheld. The Torture Convention, however, also covers individual cases of torture, thus simplifying the task to argue that torture does constitute an international crime.[12]

4. TORTURE AS AN OFFICIAL FUNCTION OF A HEAD OF STATE

Lords Hutton and Phillips[13] regard torture as being outside the scope of the functions of a head of state.[14] They took the UK's State Immunity Act 1978 as the point of departure, Section 20 of which provides for head of state immunity to be determined in accordance with the Diplomatic Privileges Act 1964, and thus the Vienna Convention.[15] Former diplomats are granted immunity for acts

10. For a recent treatise on the Torture Convention *see* Boulesbaa Ahcene, The UN Convention on Torture and the Prospects for Enforcement (1999).
11. Lord Hope, 38 ILM 581, at 619 (1999); *but see* Lord Millett, at 650: "For my own part, therefore, I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it."
12. *See* Lord Millett, *id.*, at 650: "The Convention against Torture (1984) did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the Convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official."
13. Especially Lord Hutton, *id.*, at 638 after a lengthy analysis, also Lord Phillips, *id.*, at 663 with reference to Art. 3(1)(b) of the Vienna Convention (*see infra* note 15) which defines as a function of diplomatic missions, *inter alia*, "protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law".
14. *See also* the majority in Pinochet I (*supra* note 1), which denied immunity on the basis of the same argument.
15. 1961 Vienna Convention on Diplomatic Relations and Optional Protocols, 500 UNTS 95.

performed in the exercise of official functions. These Lords therefore thought it necessary to outmanoeuvre the official function criterion by declaring such blatant violations of international law as torture, carried out as head of state, as not belonging to the official functions of a head of state. In this way, they tried to avoid endangering the applicability of the torture Convention which does not cover private acts. If the king can do no wrong but wrong has nonetheless been done it could not have been the King. That view, however, has interesting implications. It implies that the functions of a head of state are defined by international rather than by national law. It therefore implies that heads of states – and states as such? – can act *ultra vires* under international law. Last but not least it is an argument without limit. Any conduct which is illegal under international law could, in the same manner, be regarded as being outside the scope of what a subject of international law does, which shows that this construction is hardly convincing.

5. THE IMMUNITY ISSUE

The immunity issue in Pinochet III is marked by a subtle and questionable differentiation between immunity *ratione materiae* and immunity *ratione personae*. The latter is supposed to be a personal or status defined immunity, i.e. it is attached to a certain status. The former is concerned with looking at a certain conduct and classifying that conduct as non-immune or immunity-protected conduct.[16] The distinction between immunity *ratione materiae* and *personae* stems from the rise of the restrictive approach to state immunity, which differentiates between non-immune *acta jure gestionis*, i.e. private or commercial acts and immunity protected *acta jure imperii*, i.e. sovereign acts of a state. This new approach moved the immunity question away from the status of (being) a sovereign state, a status obtained by the modern state from the absolute ruler and personal sovereign of the old days,[17] to the conduct for which the proceedings were brought and to the question whether this conduct is commercial in nature or not. However, one should not allow this distinction to lead to confusion. All immunities are tied to the possession of a certain status and thus exist *ratione personae*: Diplomatic immunity is enjoyed by (former or present) diplomats only, head of state immunity is tied to being or having served as head of state and state immunity is tied to being a state. If the immunity is absolute, no further questions need be asked. If the immunity is not absolute, if restrictions attach, the question arises what the material criteria for these restrictions are, or, in

16. *See* Lord Saville, at 641-642; Lord Millet, at 644 *et seq.*; Lord Phillips, at 653.
17. As Lord Browne-Wilkinson correctly points out at 592.

other words, whether the subject-matter in question allows for or even demands immunity to be granted.[18]

It follows from this that little can be gained from characterizing an immunity as personal or conduct based. A former head of state (or a serving head of state for that matter) either enjoys immunity or he does not. To say, as the majority of the Lords did, that a former head of state enjoys less immunity as an acting head of state with regard to certain conduct because head of state immunity is regarded as an immunity *ratione personae* and as such ceases to exist with the end of the office being transformed at the same time into a conduct based immunity, is a rather complicated attempt merely to state that the immunity of an acting head of state is absolute. Lord Hope even went so far as to state that the absolute immunity enjoyed by serving heads of state is a *ius cogens* norm of international law,[19] whereas that of a former head of state is relative and thus subject to certain restrictions such as for conduct constituting an international crime and violating a *ius cogens* norm of international law.

What is missing is a convincing answer as to why such a distinction should be made. The reference to the "dignity and sovereignty of the state" personified by the serving head of state and to a "denial of the equality of sovereign states" if immunity were removed from serving heads of state,[20] is insufficient. From a logical point of view, there is no reason why the Lords' heavy reliance on the Torture Convention[21] as removing any claim to immunity from former heads of state should not equally apply to serving heads of state.[22] A possible counter-argument could be that the conduct of international relations and the peaceful coexistence of states calls for absolute immunity of sitting heads of state. However, unlike diplomats, who by definition must leave the country and serve in foreign jurisdictions, the head of state usually remains within the confines of his country. Heads of state need not necessarily leave the country to discharge their functions and if it is necessary for them to leave they can arrange for safe passage with the host countries. This far the acting head of state is in no different a

18. Similarly Fox, *supra* note 3, at 694-696.
19. Lord Hope, at 624. If that were true and absolute immunity for serving heads of state is indeed a peremptory norm of international law, it could not be derogated by treaty law, *see* Art. 53 of the Vienna Convention on the Law of Treaties. Lord Hope's statement that the *ius cogens* character of this immunity "suggests" that this immunity "was not intended to be affected" by the Torture Convention is a rather weak statement given his presumption. Lord Hope's presumption raises interesting questions. Could head of state immunity be waived by the head of state and/or the state? Are *ius cogens* rights and privileges waivable at all? I submit that *ius cogens* rights cannot be waived but that all immunities are subject to waiver. It follows that immunities do not belong to the *ius cogens* body of law.
20. Lord Millet, at 644.
21. *See also* Bhuta, *supra* note 3, at 522-526, who divided the various opinions into those adhering to a 'restrictive', 'narrow' view of the limits to immunity relying mostly on the Torture Convention (Lords Browne-Wilkinson, Hope and Saville) and the 'broader' views which also takes into account general principles of international law not necessarily enacted in UK law (Lords Hutton, Millett and Phillips).
22. *See* Fox, *supra* note 3, at 700.

position than a former head of state who likewise must adequately prepare any travelling to other countries if prosecution for international crimes need be feared. Coincidentally this approach seems to be reflected in state practice. The heads of 'rogue states', where gross and systematic violations of core human rights are directly attributable to the head of state and his regime are not known for intensive unselective travelling.

However, if Article 7(1) of the Torture Convention[23] were construed as placing an unconditional obligation on states to prosecute or extradite torturers,[24] states would not be able to grant safe passage to a head of state. That could indeed impede the conduct of international relations. It would in effect render international negotiations largely impossible as sadly there will probably be many heads of state in regard to whom a probable cause could be construed for at least isolated and individual instances of torture attributable to that head of state. If this were so it would indeed speak in favour of head of state immunity. However, it is at least questionable whether the Torture Convention can be construed in this fashion; Article 7(2) implies that states do have some leeway. The conduct of head of state affairs is therefore not seriously impeded by removing immunity from a head of state due to the fact that the serving head of state can negotiate safe passage before travelling without the state granting safe passage violating an obligation under international law.

It should also be noted that head of state immunity differs from state immunity in one crucial point. The *raison d'être* for state immunity is the protection of the functional sovereignty of states, i.e. the capability of states to discharge their function as a state, to guarantee peace and security and the basic and welfare, including the basic freedoms and rights, of their citizens. This functional sovereignty could be jeopardized, if individual civil claims were brought in foreign courts by potentially innumerable claimants and for incalculable sums, the satisfaction of which could drain the states' resources and thus threaten its functionality. The liability of states, i.e. that of the people of that state (the taxpayers) is potentially limitless as states cannot file for bankruptcy. States, on the other hand, can as such not be criminally liable, except for imposing pecuniary penalties. The situation is very different in the case of head of state immunity. It only concerns the head of state, his private estate, or his private freedom from crimi-

23 Art. 7(1) of the Torture Convention reads: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

24. *See* Lord Millett, at 650: "Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. Any state party in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or to initiate proceedings to prosecute him."

nal sanctions.[25] The implications are therefore quite different and that makes room for a differentiating approach towards the two immunities.[26]

6. CONCLUSION

Pinochet III is markedly different from the first Pinochet decision as far as the reasoning is concerned. However, Pinochet III is closer to its predecessor regarding its consequences. The earlier decision granted a general immunity exception for international crimes such as torture by excluding such conduct from what could be regarded as exercising the functions of a head of state. Pinochet III is more restrictive by granting the immunity exception only if all states concerned have ratified the Torture Convention and – if one were to coin a general rule – only from the moment of ratification of the Torture convention by the forum state onwards. One would, of course, have hoped for a bolder approach but the reluctance of the court to come to potentially far-reaching conclusions when the goal could be reached by a more moderate approach is understandable. However, for all the effort put into the immunity issue, the opinions did nothing to extrapolate the differences between state immunity, diplomatic immunity and head of state immunity respectively. These immunities, although related, must be addressed separately, the reasons for their existence should be carefully analysed and premature inferences from one immunity to the other must be avoided. The Lords missed an opportunity to do so, perhaps because domestic law – in my view erroneously – equates head of state and diplomatic immunity despite obvious differences between the status of head of state and diplomat. It could well be that the drafters of the Sovereign Immunities Act 1978 were guided by the distinction between immunity *ratione materiae* and *ratione personae*, a distinction from which little can be gained for the solution of immunity problems.

Be that as it may, the House of Lords has remained the most prominent court to hold that heads of state can under certain circumstances be held responsible for gross violations of human rights and the Lords should be commended for this. Immunity law is customary international law and customary law can change, and – if the circumstances change as they have in international law with the increasing significance of human rights – must change, even if working for that change entails the risk of breaking the old rule before the new rule is settled in. In that respect the decision(s)[27] of the House of Lords must be regarded as a

25. It is therefore questionable whether Pinochet could really claim immunity under international law if sued for damages in civil proceedings as Lord Hutton claims at 640. The question is more complicated if Chile as a state were sued, *see infra* note 26.
26. For more detail *see* J. Bröhmer, State Immunity and the Violation of Human Rights, at 196 *et seq.* (1997).
27. It is an interesting question, whether, from the point of view of international law, the first Pinochet decision can still be cited as state practice or whether it is to be regarded as non-existent because it

significant piece of state practice elevating the sovereignty of the individual and his core physical integrity to the sovereignty of states and bringing it closer to the sovereignty of states under the guise of which so many individuals have suffered. In practice, however, this decision – as would have been the case with the first decision – will presumably only lead to more sophisticated travel plans by those who have blood on their hands and thus reason to fear foreign prosecutors.

On 2 March 2000, British Home Secretary Jack Straw ruled that former Chilean dictator Augusto Pinochet would, due to his frail medical condition, not be extradited for trial in Spain and that extradition requests from Switzerland, Belgium, and France would not be acted upon. On 3 March 2000, the former dictator was taken to Chile thus ending a sixteen-month long legal struggle. In essence, it was a struggle between international law as a primarily state and sovereignty based regime and international law reaching beyond the state and defining justice by taking into account not only the interests of the sovereign state, but also the individual human being and his or her fundamental human rights. The proceedings in London have made it a little easier for individuals to find justice than it was before Pinochet came to the United Kingdom, because the defences of international law against proceedings in foreign courts have been weakened.

has been put aside for procedural reasons. After all, the validity of the arguments of those Lords who delivered an opinion in the first decision is unblemished by the procedural fault.