The United Kingdom ("UK") thanks the International Law Commission ("Commission") for the opportunity to submit written comments in response to its request for information contained in Chapter 3 of the Commission's Report of its 65th Session The UK has the following comments

Immunity of State officials from foreign criminal jurisdiction

"The Commission requests States to provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction "

United Kingdom response.

The meaning of the phrases "official acts" and "acts performed in an official capacity" were considered in the following UK judicial decisions which are enclosed·

1 *Jones v Saudi Arabia*, House of Lords, 14 June 2006[1]
2 *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)*, House of Lords, 24 March 1999[2]
3. *Propend Finance Pty Ltd v Sing*, Court of Appeal, 14 March 1996[3]
4. *Zoernsch v Waldock*, Court of Appeal, 24 March 1964[4]

[1] [2006] UKHL 26, [2007] 1 A.C 270; [2006] 2 W L R 1424; [2007] 1 All E R 113, [2006] H R L.R. 32, [2007] U K H R R 24, 20 B H R C. 621, (2006) 156 N L J 1025, (2006) 150 S J L.B 811, Times, June 15, 2006, Independent, June 22, 2006, Official Transcript, there was a related judgment of the European Court of Human Rights which was published on 14 January 2014 http //hudoc echr coe int/sites/eng/pages/search aspx?i=001-140005#{"itemid" ["001-140005"]}

[2] [2000] 1 A.C 147; [1999] 2 W L.R 827, [1999] 2 All E R 97, 6 B H R C 24, (1999) 96(17) L S G 24, (1999) 149 N L J 497, Times, March 25, 1999,

[3] (1997) 111 ILR 611, CA,

[4] [1964] 1 W L R 675, [1964] 2 All E R 256, (1964) 108 S J 27,

Jones v Ministry of Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and others intervening)

Mitchell and others v Al-Dali and others

[2006] UKHL 26

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND LORD CARSWELL

24–27 APRIL, 14 JUNE 2006

Constitutional law – Foreign sovereign state – Immunity from suit – Right to a fair trial – Civil claims against foreign state and state officials for damages for torture in foreign state – Whether foreign state immune from suit – Whether state officials immune from suit – Whether immunity from suit breach of right to a fair trial – State Immunity Act 1978, s 1 – Human Rights Act 1998, Sch 1, Pt I, art 6 – United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, art 14.

The claimant in the first action, J, issued High Court proceedings against the Kingdom of Saudi Arabia and A, a Saudi official. He claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom. The Kingdom applied to set aside service of the proceedings and to dismiss J's claim on the ground of state immunity under the State Immunity Act 1978. Section 1(1)[a] of that Act provided that a state was immune from the jurisdiction of the courts of the United Kingdom (except as provided in Pt I of the Act). On that ground, the master set aside service of the proceedings on the Kingdom and refused permission to serve A, who had not been served, by an alternative method. J appealed to the Court of Appeal, contending that Pt I of the 1978 Act was incompatible with the right of access to the court guaranteed by the right to a fair trial contained in art 6[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The claimants in the second action issued High Court proceedings against four defendants. The first two defendants were sued as officers in the Kingdom's police force. The third defendant was sued as a colonel in the Ministry of Interior of the Kingdom and deputy governor of a prison in which the claimants had been confined. The fourth defendant was sued as head of the Ministry of Interior. They claimed aggravated damages for assault and negligence, contending that they had been subjected to torture in the Kingdom by the first two defendants, which the third and fourth defendants had caused or

a Section 1, so far as material, is set out at [7], below

b Article 6, so far as material, provides: '(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .'

permitted or negligently failed to prevent. The master refused the claimants' application to serve the proceedings out of the jurisdiction on the ground of state immunity under the 1978 Act. The claimants appealed to the Court of Appeal. The Court of Appeal dismissed J's appeal against the dismissal of all his claims against the Kingdom on the ground of state immunity, but allowed his appeal against refusal of permission to serve A out of the jurisdiction by an alternative method. It allowed the appeal of the three claimants in the second action against the refusal of permission to serve all four defendants out of the jurisdiction (save in respect of the claimants' allegations of negligence). The applications for permission to serve out of the jurisdiction in both actions were remitted to the master. J appealed against the dismissal of his claims against the Kingdom and the Kingdom appealed against the refusal of state immunity for the individual defendants in both cases. J and the other claimants relied on the proscription of torture by the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 to which both the United Kingdom and the Kingdom were parties. Article 14[c] of the Torture Convention provided that each state party was to ensure in its legal system that the victim of an act of torture obtained redress and had an enforceable right to fair and adequate compensation. They contended, inter alia, that the proscription of torture by international law precluded the grant of immunity to states or individuals sued for committing acts of torture since such could not be governmental acts or exercises of state authority entitled to the protection of state immunity.

Held – The Kingdom and the individual defendants were protected by state immunity under Pt I of the 1978 Act. On the assumption that art 6 of the European Convention was engaged by the grant of state immunity, the grant of immunity did deny the claimants access to the English court. The claimants' argument was that the restriction was not directed to a legitimate objective and was disproportionate as the grant of immunity was inconsistent with a peremptory norm of international law superior in effect to other rules of international law which required that the practice of torture should be suppressed and the victims of torture compensated. However, although the Torture Convention had established a universal criminal jurisdiction it did not provide for universal civil jurisdiction. Article 14 of the Torture Convention required a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. Moreover, there was no evidence that states had recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor was there any consensus of judicial or learned opinion that they should. That lack of evidence was not neutral: since the rule on immunity was well understood and established, and no relevant exception was generally accepted, the rule prevailed. It followed that Pt I of the 1978 Act had not been shown to be disproportionate. It was not for a national court to develop international law by unilaterally adopting a version of that law which however desirable was simply not accepted by other states. There was no basis to deny immunity to individuals who were alleged to have committed acts of torture because torture could not constitute an official act. A state would incur responsibility in international law if one of its officials, under

c Article 14 is set out at [16], below

colour of his authority, tortured a national of another state, even though the acts were unlawful and unauthorised. The same act could not be official for the purposes of the definition of torture but not for the purposes of immunity. The Court of Appeal had been wrong to depart from the principle that a foreign state was entitled to claim immunity for its servants as it could if sued itself. Accordingly, J's appeal would be dismissed and the Kingdom's appeal would be allowed (see [13]–[15], [17], [24]–[36], [40], [41], [46], [63], [64], [78], [79], [81], [85], [101]–[105], below).

Al-Adsani v Government of Kuwait (1996) 107 ILR 536 followed.

Al-Adsani v UK (2001) 12 BHRC 88, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97 and *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 considered.

Notes

For the International Human Rights Codes, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 103, 104, for jurisdiction under International Conventions and for state immunity and the meaning of state, see 18(2) *Halsbury's Laws* (4th edn reissue) paras 809, 826, 827.

For the State Immunity Act 1978, s 1, see 10 *Halsbury's Statutes* (4th edn) (2001 reissue) 830.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

Cases referred to in opinions

A v Secretary of State for the Home Dept (No 2) [2005] UKHL 71, [2006] 1 All ER 575, [2005] 3 WLR 1249.

Al-Adsani v Government of Kuwait (1996) 107 ILR 536, CA.

Al-Adsani v UK (2001) 12 BHRC 88, ECt HR.

Alcom Ltd v Republic of Colombia [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL.

Bouzari v Islamic Republic of Iran (2004) 71 OR (3d) 675, Ont CA; *affg* (2002) 124 ILR 427, Ont SC.

Buchanan (Peter) Ltd v McVey [1954] IR 89, [1955] AC 516n, Ir SC.

Cabiri v Assasie-Gyimah (1996) 921 F Supp 1189, US DC (SD NY).

Capital (AIG) Partners Inc v Republic of Kazakhstan [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, [2006] 1 WLR 1420.

Church of Scientology Case (1978) 65 ILR 193, Germ SC.

Cia Naviera Vascongada v Steamship Cristina [1938] 1 All ER 719, [1938] AC 485, HL.

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Holland v Lampen-Wolfe [2000] 3 All ER 833, [2000] 1 WLR 1573, HL.

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Kalogeropoulou v Greece App No 50021/00 (12 December 2002, unreported), ECt HR.
Mallén v United States of America (1927) IV RIAA 173.
Marcos, Ferdinand, Estate of, Re, Hilao v Estate of Ferdinand Marcos (1994) 25 F 3d 1467, US Ct of Apps (9th Cir).
Margellos v Germany (17 September 2002, unreported), Hellenic Anotato Eidiko Dikasterio.
Owners of the ship Philippine Admiral v Wallem Shipping (Hong Kong) Ltd [1976] 1 All ER 78, [1977] AC 373, [1976] 2 WLR 214, PC.
Prefecture of Voiotia v Federal Republic of Germany Case No 11/2000 (4 May 2000, unreported), Greek Ct of Cass.
Propend Finance Pty Ltd v Sing (1997) 111 ILR 611, CA.
Prosecutor v Blaskic (1997) 110 ILR 607, ICTY.
Prosecutor v Furundžija (1998) 38 ILM 317, Internatl Trib.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) [1999] 2 All ER 97, [2000] 1 AC 147, [1999] 2 WLR 827, HL.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte [1998] 4 All ER 897, [2000] 1 AC 61, [1998] 3 WLR 1456, HL.
Schmidt v Home Secretary (1994) 103 ILR 322, Ir HC.
Siderman de Blake v Republic of Argentina (1992) 965 F 2d 699, US Ct of Apps (9th Cir).
Sosa v Alvarez-Machain (2004) 542 US 692, US SC.
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Xuncax v Gramajo (1995) 886 F Supp 162, US DC (Mass).
Zoernsch v Waldock [1964] 2 All ER 256, [1964] 1 WLR 675, CA.

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A-G of the Government of Israel v Eichmann (1962) 36 ILR 277, Isr SC.
Airey v Ireland (1979) 2 EHRR 305, [1979] ECHR 6289/73, ECt HR.
Al-Adsani v Government of Kuwait (1995) 100 ILR 465
Arce v Garcia (2006) 434 F 3d 1254, US Ct of Apps (11th Cir).
Argentine Republic v Amerada Hess Shipping Corp (1989) 488 US 428, US SC.
Bankovic v Belgium (2001) 123 ILR 94
Brind v Secretary of State for the Home Dept [1991] 1 All ER 720 sub nom *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588, HL.
Brunswick (Duke of) v King of Hanover (1848) 2 HL Cas 1, HL.
Buttes Gas and Oil Co v Hammer (Nos 2 & 3), Occidental Petroleum Corp v Buttes Gas and Oil Co (Nos 1 & 2) [1981] 3 All ER 616, [1982] AC 888, [1981] 3 WLR 787, HL.
Capital Bank v Bulgaria App No 49429/99 (24 November 2005, unreported), ECt HR.
Case concerning the Barcelona Traction, Light and Power Co Ltd (1970) ICJ Rep 3
Chuidian v Philippine National Bank (1990) 912 F 2d 1095, US Ct of Apps (9th Cir).
Connors v UK App No 66746/01 (27 May 2004, unreported), ECt HR.
Controller v Sir Ronald Davison [1996] 2 NZLR 278, NZ CA.
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Farouk (ex-King of Egypt) v Christian Dior (1957) 24 ILR 228
Fogarty v UK (2001) 12 BHRC 132, ECt HR.
Garland v British Rail Engineering Ltd [1983] 2 AC 751, [1982] 2 WLR 918, HL.
Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.
Gil v Spain (2005) 40 EHRR 55, ECt HR.
Higgs v Minister of National Security [2000] 2 LRC 656, [2000] 2 AC 228, [2000] 2 WLR 1368, PC.
Ielo v Italy App No 23053/02 (6 December 2005, unreported), ECt HR.
Kadic v Karadzic (1995) 70 F 3d 232, US Ct of Apps (2nd Cir).
Kay v Lambeth London BC, Leeds City Council v Price [2006] UKHL 10, [2006] 2 FCR 20, [2006] 2 WLR 570.
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Osman v UK (1998) 5 BHRC 293, ECt HR.
Pini v Romania (2005) 40 EHRR 312, ECt HR.
Princz v Germany (1994) 26 F 3d 1166, US Ct of Apps (DC).
R v Lyons [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.
R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
R (on the application of Anderson) v Secretary of State for the Home Dept [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.
R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.
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Salomon v Comrs of Customs and Excise [1966] 3 All ER 871, [1967] 2 QB 116, [1966] 3 WLR 1223, CA.

Saudi Arabia v Nelson (1993) 507 US 349, US SC.

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Settebello v Banco Totta & Acores [1985] 2 All ER 1025, [1985] 1 WLR 1050, CA.

Sheldrake v DPP, A-G's Ref (No 4 of 2002) [2004] UKHL 43, [2005] 1 All ER 237, [2005] 1 AC 264, [2004] 3 WLR 976.

Smith v Socialist People's Libyan Arab Jamahiriya (1996) 101 F 3d 239, US Ct of Apps (2nd Cir).

Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.

Waite v Germany (1999) 6 BHRC 499, ECt HR.

Williams & Humbert Ltd v WH Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd [1986] 1 All ER 129, [1986] AC 368, [1986] 2 WLR 24, HL.

Z v UK [2001] 2 FCR 246, ECt HR.

Appeals

Ronald Grant Jones appealed with permission of the Court of Appeal (Lord Philips of Worth Matravers MR, Mance and Neuberger LJJ) from the court's decision on 28 October 2004 ([2004] EWCA Civ 1394, [2005] 4 LRC 599) dismissing his appeal from the decision of Master Whitaker on 30 July 2003 dismissing his claim against the Ministry of Interior Al-Mamlaka Al-Arabiya As Saudiya (the Kingdom of Saudi Arabia) for aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom between March and May 2001. The Kingdom also appealed with permission of the Court of Appeal from the court's decision ([2004] EWCA Civ 1394, [2005] 4 LRC 599) (i) allowing Mr Jones's appeal from the master's decision on 30 July 2003 refusing his application for permission to serve Lieutenant Colonel Abdul Aziz, sued in the same proceedings as servant and agent of the Kingdom, by an alternative method; and (ii) allowing the appeal of Alexander Mitchell, William Sampson and Leslie Walker from the decision of the master on 18 February 2004 refusing permission to serve Ibrahim Al-Dali, Khalid Al-Salah, Colonel Mohammed Said and Prince Naif, the defendants in proceedings claiming aggravated damages for assault and negligence, outside the jurisdiction. The Secretary of State for Constitutional Affairs appeared as intervener. REDRESS, Amnesty International, INTERIGHTS and JUSTICE intervened by written submissions. The facts are set out in the opinion of Lord Bingham of Cornhill.

Michael Crystal QC, Jonathan Crystal, Julian Knowles and *Hannah Thornley* (instructed by *Stock Fraser Cukier*) for Mr Jones.

Edward Fitzgerald QC and *Richard Herner* (instructed by *Bindman & Partners*) for Mr Mitchell, Mr Sampson and Mr Walker.

David Pannick QC and *Joanna Pollard* (instructed by *Baker & McKenzie*) for the Kingdom.

Christopher Greenwood QC and *Jemima Stratford* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

14 June 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[**1**] My Lords, the issue at the heart of these conjoined appeals is whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state. The issue turns on the relationship, in these circumstances, between two principles of international law. One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another. The second principle, of more recent vintage but of the highest authority among principles of international law, is one that condemns and criminalises the official practice of torture, requires states to suppress the practice and provides for the trial and punishment of officials found to be guilty of it. Thus, like the Court of Appeal of Ontario in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 at 696 (para 95), the House must consider the balance currently struck in international law 'between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction'.

THE PROCEEDINGS

[**2**] On 6 June 2002 Mr Jones, the claimant in the first action giving rise to this appeal, issued High Court proceedings against two defendants: the Ministry of Interior of the Kingdom of Saudi Arabia (the Kingdom), which (it is accepted) is for present purposes the Kingdom itself; and Lieutenant Colonel Abdul Aziz, sued as servant or agent of the Kingdom. He claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom between March and May 2001. Permission was granted by Master Whitaker ex parte to serve the Kingdom out of the jurisdiction, and service was duly effected. Further permission was granted to serve Colonel Abdul Aziz, but he was not served. The Kingdom then applied to set aside service of the proceedings and to dismiss Mr Jones's claim on the ground of state immunity under the State Immunity Act 1978. On that ground, on 30 July 2003, Master Whitaker set aside service of the proceedings and refused permission to serve Colonel Abdul Aziz by an alternative method. With the master's permission, Mr Jones appealed to the Court of Appeal (see [2004] EWCA Civ 1394, [2005] 4 LRC 599, [2005] QB 699), contending that Pt 1 of the 1978 Act was incompatible with art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) (as set out in Sch 1 to the Human Rights Act 1998).

[**3**] Messrs Mitchell, Sampson and Walker are the claimants in the second action giving rise to this appeal. They issued High Court proceedings on 12 February 2004 against four defendants. The first two defendants were sued as officers in the Kingdom's police force. The third defendant was sued as a colonel in the Ministry of Interior of the Kingdom and deputy governor of a prison in which the claimants were confined. The fourth defendant was sued as head of the Ministry of Interior. They claimed aggravated damages for assault and negligence, contending that they had been subjected to torture by the first two

defendants, which the third and fourth defendants had caused or permitted or negligently failed to prevent. On 18 February 2004 Master Whitaker refused the claimants' ex parte application to serve the proceedings out of the jurisdiction on the ground of state immunity under the 1978 Act. With the master's permission, the claimants appealed to the Court of Appeal.

[4] The claimants in both actions have pleaded particulars of severe, systematic and injurious torture which they claim to have suffered, and annexed medical reports which appear to substantiate their claims. But the facts have not been investigated in these proceedings at all, and the stage has not been reached at which the defendants can be called on to answer these very serious allegations. The Kingdom has indicated through counsel that the allegations are denied.

[5] In the Court of Appeal the Secretary of State for Constitutional Affairs intervened, supporting the legal submissions of the Kingdom. The REDRESS Trust intervened in support of the claimants. In the House, the Secretary of State again intervened for the same purpose. The REDRESS Trust, Amnesty International Ltd, INTERIGHTS and JUSTICE made joint submissions in writing.

[6] The Court of Appeal dismissed Mr Jones's appeal against the dismissal of all his claims against the Kingdom, including his claim based on torture (but not including his claim in false imprisonment, which he had abandoned). But it allowed Mr Jones's appeal against refusal of permission to serve Colonel Abdul Aziz out of the jurisdiction by an alternative method, and it allowed the appeal of the three claimants in the second action against the refusal of permission to serve all four defendants out of the jurisdiction (save in respect of the claimants' allegations of negligence). The applications for permission to serve out of the jurisdiction in both actions were remitted to Master Whitaker for him to consider whether, in the exercise of his discretion, to grant permission to serve out. Mr Jones, the Kingdom and the claimants in the second action have all appealed against those parts of the Court of Appeal's orders which were adverse to them, save that none of the claimants has challenged the dismissal of his claims not based on torture. The main issues which the House must now resolve are twofold: first, whether the English court has jurisdiction to entertain Mr Jones's claim based on torture against the Kingdom; and secondly, whether it has jurisdiction to entertain the claims based on torture against Colonel Abdul Aziz in the first action and against the four defendants in the second.

THE LAW

[7] Section 1(1) in Pt 1 of the 1978 Act is headed 'General immunity from jurisdiction' and provides: 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' The following provisions referred to, found in ss 2–11 of Pt 1, specify proceedings in which a state is not immune. Section 14(1) provides that references to a state 'include references to—(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government'. Section 16(4) provides that Pt 1 does not apply to criminal proceedings.

[8] Part 1 of the 1978 Act represented a marked relaxation of the absolutist principle, described by Lord Atkin in *Cia Naviera Vascongada v Steamship Cristina* [1938] 1 All ER 719 at 718–719, [1938] AC 485 at 490, as 'well established' and 'beyond dispute', that:

> 'the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.'

It was a relaxation prompted partly by decisions such as *Owners of the ship Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1976] 1 All ER 78, [1977] AC 373 and *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529, and partly by the European Convention on State Immunity (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081) (the Immunity Convention) signed on behalf of seven European states, including the United Kingdom, in May 1972, which together showed that the British absolutist position had ceased to reflect the understanding of international law which prevailed in most of the rest of the developed world. As compared with the 1978 Act, the Immunity Convention was differently set out. It provided in art 15 that 'A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14'. But arts 1–14 covered very much the same ground as ss 2–11 of the 1978 Act. Much more recently, in the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (A/RES/59/38) (the UN Convention) adopted by the General Assembly on 16 December 2004, the same approach is adopted. Article 5 provides that 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention', and a number of exceptions are again specified. This convention is not in force, and has not been ratified by the United Kingdom. But, as Aikens J observed in *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm) at [80], [2006] 1 All ER 284 at [80], [2006] 1 WLR 1420:

> '. . . its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point . . .'

[**9**] Thus the rule laid down by s 1(1) of the 1978 Act is one of immunity, unless the proceedings against the state fall within a specified exception. This rule conforms with the terms of the international instruments already referred to. It also conforms with a number of domestic statutes elsewhere, such as s 1604 of the United States Foreign Sovereign Immunities Act 1976, s 3(1) of the Singapore State Immunity Act 1979, s 3(1) of the Pakistan State Immunity Ordinance 1981, s 2(1) of the South African Foreign States Immunities Act 1981, s 3(1) of the Canadian State Immunity Act 1982 and s 9 of the Australian Foreign States Immunities Act 1985. It is not suggested on behalf of Mr Jones that any of the exceptions in the 1978 Act covers his claim against the Kingdom for damages for mental and personal injury caused by torture inflicted there.

[**10**] While the 1978 Act explains what is comprised within the expression 'State', and both it and the Immunity Convention govern the immunity of separate entities exercising sovereign powers, neither expressly provides for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state (servants or agents) in respect of acts done by them as such in the foreign state. There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by

suing its servants or agents. Domestic authority for this proposition may be found in *Twycross v Dreyfus* (1877) 5 Ch D 605 at 618–619, [1874–80] All ER Rep 133 at 135; *Zoernsch v Waldock* [1964] 2 All ER 256 at 266, [1964] 1 WLR 675 at 692; *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 at 669; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97 at 170–171, 185, [2000] 1 AC 147 at 269, 285–286; *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 843, [2000] 1 WLR 1573 at 1583. Courts in Germany, the United States, Canada and Ireland have taken the same view: see *Church of Scientology Case* (1978) 65 ILR 193 at 198; *Herbage v Meese* (1990) 747 F Supp 60 at 66; *Jaffe v Miller* (1993) 13 OR (3d) 745 at 758–759; *Schmidt v Home Secretary* (1994) 103 ILR 322 at 323–325. The International Criminal Tribunal for the Former Yugoslavia has also taken the same view: *Prosecutor v Blaskic* (1997) 110 ILR 607 at 707. In the UN Convention already referred to, this matter is expressly addressed in art 2 where 'State' is defined in (1)(b)(iv) to mean 'representatives of the State acting in that capacity'. It is further provided, in art 6(2)(b), that 'A proceeding before a court of a State shall be considered to have been instituted against another State if that other State . . . (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State'.

[11] In some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct. But these are not borderline cases. Colonel Abdul Aziz is sued as a servant or agent of the Kingdom and there is no suggestion that his conduct complained of was not in discharge or purported discharge of his duties as such. The four defendants in the second action were public officials. The conduct complained of took place in police or prison premises and occurred during a prolonged process of interrogation concerning accusations of terrorism (in two cases) and spying (in the third). There is again no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties.

[12] International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies. In 2001 the International Law Commission promulgated Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Article 4 provides:

> '*Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

The commentary on para (2) of this article observes (see note (13)):

> 'A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing

public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.'

Article 7 takes the matter further:

'*Excess of authority or contravention of instructions*

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

This article also is considered in the commentary (see note (8)):

'The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority.'

This approach was indorsed by the International Court of Justice in *Democratic Republic of the Congo v Uganda* (19 December 2005, unreported) paras 213, 214; see also James Crawford *The International Law Commission's Articles on State Responsibility* (2002) pp 106–109. The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity. As Lord Wilberforce pointed out in *I Congreso del Partido* [1981] 2 All ER 1064 at 1078, [1983] 1 AC 244 at 272:

'It was argued by the [appellants] that even if the Republic of Cuba might appear to be entitled to plead state immunity, it should be denied that right on various grounds: that its acts were contrary to international law, or to good faith, or were discriminatory, or penal. On the view which your Lordships take these arguments do not arise, but I would wish to express my agreement with the judge and with Waller LJ as to their invalidity. The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another.'

[13] Pausing at this point in the analysis, I think that certain conclusions (taking the pleadings at face value) are inescapable: (1) that all the individual defendants were at the material times acting or purporting to act as servants or agents of the Kingdom; (2) that their acts were accordingly attributable to the Kingdom; (3) that no distinction is to be made between the claim against the Kingdom and the claim against the personal defendants; and (4) that none of these claims falls within any of the exceptions specified in the 1978 Act. Save in the special context of torture, I do not understand the claimants to challenge these conclusions, as evidenced by their acquiescence in the dismissal of their

claims not based on torture. On a straightforward application of the 1978 Act, it would follow that the Kingdom's claim to immunity for itself and its servants or agents should succeed, since this is not one of those exceptional cases, specified in Pt 1 of the 1978 Act, in which a state is not immune, and therefore the general rule of immunity prevails. It is not suggested that the Act is in any relevant respect ambiguous or obscure: it is, as Ward LJ observed in *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536 at 549, 'as plain as plain can be'. In the ordinary way, the duty of the English court is therefore to apply the plain terms of the domestic statute. Inviting the House to do otherwise, the claimants contend, as they must, that to apply the 1978 Act according to its natural meaning and tenor by upholding the Kingdom's claim to immunity for itself and the individual defendants would be incompatible with the claimants' well-established right of access to a court implied into art 6 of the European Convention. To recognise the claimants' convention right, the House is accordingly asked by the claimants to interpret the 1978 Act under s 3 of the 1998 Act in a manner which would require or permit immunity to be refused to the Kingdom and the individual defendants in respect of the torture claims, or, if that is not possible, to make a declaration of incompatibility under s 4.

[14] To succeed in their convention argument (and the onus is clearly on them to show that the ordinary approach to application of a current domestic statute should not be followed) the claimants must establish three propositions. First, they must show that art 6 of the European Convention is engaged by the grant of immunity to the Kingdom on behalf of itself and the individual defendants. In this task they derive great help from *Al-Adsani v UK* (2001) 12 BHRC 88 where, in a narrowly split decision of the Grand Chamber, all judges of the European Court of Human Rights held art 6 to be engaged. I must confess to some difficulty in accepting this. Based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give. This was the opinion expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 847, [2000] 1 WLR 1573 at 1588, and it seems to me persuasive. I shall, however, assume hereafter that art 6 is engaged, as the European Court held. Secondly, the claimants must show that the grant of immunity to the Kingdom on behalf of itself and the individual defendants would deny them access to the English court. It plainly would. No further discussion of this proposition is called for. Thirdly, the claimants must show that the restriction is not directed to a legitimate objective and is disproportionate. They seek to do so by submitting that the grant of immunity to the Kingdom on behalf of itself or its servants would be inconsistent with a peremptory norm of international law, a jus cogens applicable erga omnes and superior in effect to other rules of international law, which requires that the practice of torture should be suppressed and the victims of torture compensated.

[15] As the House recently explained at some length in *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 1 All ER 575, [2005] 3 WLR 1249, the extreme revulsion which the common law has long felt for the practice and fruits of torture has come in modern times to be the subject of express agreement by the nations of the world. This new and important consensus is expressed in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (New York, 10 December 1984;

TS 107 (1991); Cm 1775) (the Torture Convention), which came into force in June 1987 and to which both the United Kingdom and the Kingdom (with the overwhelming majority of other states) are parties. It is common ground that the proscription of torture in the Torture Convention has, in international law, the special authority which the claimants ascribe to it. The facts pleaded by the claimants, taken at face value, like other accounts frequently published in the media, are sufficient reminder, if such be needed, of the evil which torture represents.

[**16**] Four features of the Torture Convention call for consideration in the present context. First is the definition of torture in art 1:

> 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . .'

Thus, for purposes of the Torture Convention, torture is only torture if inflicted or connived at for one of the specified purposes by a person who, if not a public official, is acting in an official capacity. Secondly, the Torture Convention requires all member states to assume and exercise criminal jurisdiction over alleged torturers, subject to certain conditions, a jurisdiction fairly described as universal. Thirdly, the Torture Convention provides in art 14:

> '1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.'

Fourthly, the Torture Convention provides in Pt II for establishment of an expert Committee against Torture which has the function, under art 19, of receiving reports by states parties on their compliance with the Torture Convention and of making such comments as it considers appropriate on such reports. The significance of these features is considered below.

[**17**] The claimants' key submission is that the proscription of torture by international law, having the authority it does, precludes the grant of immunity to states or individuals sued for committing acts of torture, since such cannot be governmental acts or exercises of state authority entitled to the protection of state immunity ratione materiae. In support of this submission the claimants rely on a wide range of materials including: the reasoning of the minority of the Grand Chamber in *Al-Adsani v UK* (2001) 12 BHRC 88; observations by members of the House in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* [1998] 4 All ER 897, [2000] 1 AC 61 and *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97, [2000] 1 AC 147 (hereinafter *Pinochet (No 1)* and *Pinochet (No 3)*); a body of United States authority; the decision of the International Criminal Tribunal for the former Yugoslavia in

Prosecutor v Furundžija (1998) 38 ILM 317; the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04; 87 Rivista di diritto internazionale 539; and a recommendation made by the Committee against Torture to Canada on 7 July 2005 (see Conclusions and recommendations of the Committee against Torture: Canada (CAT/C/CR/34/CAN). These are interesting and valuable materials, but on examination they give the claimants less support than at first appears.

[18] The Grand Chamber's decision in *Al-Adsani v UK* is very much in point, since it concerned the grant of immunity to Kuwait under the 1978 Act, which had the effect of defeating the applicant's claim in England for damages for torture allegedly inflicted upon him in Kuwait. The claimants are entitled to point out that a powerful minority of the court found a violation of the applicant's right of access to a court under art 6 of the European Convention. The majority, however, held that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty (see (2001) 12 BHRC 88 at 102–103 (para 54)); that the European Convention should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to the grant of state immunity (see para 55); and that some restrictions on the right of access to a court must be regarded as inherent, including those limitations generally accepted by the community of nations as part of the doctrine of state immunity (see para 56). The majority were unable to discern in the international instruments, judicial authorities or other materials before the court any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in the courts of another state where acts of torture were alleged (see 104 (para 61)). While noting the growing recognition of the overriding importance of the prohibition of torture, the majority did not find it established that there was yet acceptance in international law of the proposition that states were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state (see 105 (para 66)). It is of course true, as the claimants contend, that under s 2 of the 1998 Act this decision of the Strasbourg court is not binding on the English court. But it was affirmed in *Kalogeropoulou v Greece* App No 50021/00 (12 December 2002, unreported), when the applicant's complaint against Greece was held to be inadmissible, and the House would ordinarily follow such a decision unless it found the court's reasoning to be unclear or unsound, or the law had changed significantly since the date of the decision. None of these conditions, in my opinion, obtains here.

[19] It is certainly true that in *Pinochet* (*No 1*) and *Pinochet* (*No 3*) certain members of the House held that acts of torture could not be functions of a head of state or governmental or official acts. I have some doubt about the value of the judgments in *Pinochet* (*No 1*) as precedent, save to the extent that they were adopted in *Pinochet* (*No 3*) , since the earlier judgment was set aside, but references may readily be found in *Pinochet* (*No 3*) (see, for example, [1999] 2 All ER 97 at 113–114, [2000] 1 AC 147 at 205 per Lord Browne-Wilkinson, [1999] 2 All ER 97 at 163–164, [2000] 1 AC 147 at 261–262 per Lord Hutton). I would not question the correctness of the decision reached by the majority in *Pinochet* (*No 3*) . But the case was categorically different from the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Pt 1 of the 1978 Act. The essential ratio of the decision, as I understand it, was that international law

could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected (see [1999] 2 All ER 97 at 166, [2000] 1 AC 147 at 264 per Lord Hutton, [1999] 2 All ER 97 at 178–179, [2000] 1 AC 147 at 278 per Lord Millett and [1999] 2 All ER 97 at 180, 181, 186, [2000] 1 AC 147 at 280, 281, 287 per Lord Phillips of Worth Matravers). It is, I think, difficult to accept that torture cannot be a governmental or official act, since under art 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. The claimants' argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity.

[**20**] The claimants rely on a substantial body of United States authority as showing that United States courts will not entertain claims against states, irrespective of the subject matter, because of the terms of the Foreign Sovereign Immunities Act 1976; that United States courts recognise that individual officials are able to enjoy the immunity afforded to their states where they are acting in an official capacity; but that United States courts will not recognise acts performed by an individual official, contrary to a jus cogens prohibition, as being carried out in an official capacity for the purposes of immunity under the 1976 Act. The Kingdom replies that in the latter cases the states concerned did not claim immunity for their officials, and that appears to be so. But the claimants refer to and rely on the doubts expressed by Breyer J in *Sosa v Alvarez-Machain* (2004) 542 US 692 at 762–763, about the need for a strict demarcation in the immunity context between criminal and civil cases. I do not, with respect, think it necessary to examine these United States authorities in detail, for two reasons. First, the decisions are for present purposes important only to the extent that they express principles widely shared and observed among other nations. As yet, they do not. As Judges Higgins, Kooijmans and Buergenthal put it in their joint separate opinion in *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 at 76 (para 48):

> 'In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.'

Secondly, when notifying its ratification of the Torture Convention in December 1984 the United States expressed its understanding 'that article 14 requires a State Party to provide a private right of action for damages only for acts

of torture committed in territory under the jurisdiction of that State Party'. This understanding, which was not a reservation, provoked no dissent, but was expressly recognised by Germany as not touching upon the obligations of the United States as a party to the Torture Convention. Twenty years have passed, but there is no reason to think that the United States would now subscribe to a rule of international law conferring a universal tort jurisdiction which would entitle foreign states to entertain claims against United States officials based on torture allegedly inflicted by the officials outside the state of the forum.

[21] In the course of my opinion in *A v Secretary of State for the Home Dept (No 2)* [2006] 1 All ER 575 at [33], [2005] 3 WLR 1249, I quoted with approval a long passage from the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundžija* (1998) 38 ILM 317. The passage quoted included para 155 where the tribunal, discussing the possibility that a state might authorise torture by some legislative, administrative or judicial act, said:

> 'If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.'

I do not understand the tribunal to have been addressing the issue of state immunity in civil proceedings; but if it was, its observations, being those of a criminal tribunal trying a criminal case in which no such issue arose, were, on that issue, plainly obiter, as was my citation of them.

[22] In *Ferrini v Federal Republic of Germany*, the Italian Court of Cassation entertained a civil claim based on war crimes committed in 1944–1945, partly in Italy but mainly in Germany. In para 9 of its judgment the court found 'no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes'. In reaching this decision the court distinguished *Al-Adsani v UK* (2001) 12 BHRC 88 and *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427, and placed some reliance on a Greek decision which was later effectively overruled. It may be, despite the court's closing statement to the contrary, that the decision was influenced by the occurrence of some of the unlawful conduct within the forum state. The decision has been praised by some distinguished commentators (among them Andrea Bianchi in a case note in (2005) 99 Am Jo Int Law 242), but another (Andrea Gattini 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) 3 Jo Int Crim J 224, 231) has accused the court of 'deplorable superficiality'; see also Hazel Fox QC 'State Immunity and the International Crime of Torture' (2006) 2 EHRLR 142. The *Ferrini v Federal Republic of Germany* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law. The more closely-reasoned decisions in *Bouzari v Islamic Republic of Iran* (2002) 124 1LR 427 and (2004) 71 OR (3d) 675 are to the contrary effect.

[23] In commenting on periodic reports by Canada received in 2002 and 2004, the Committee against Torture established under art 17 of the Torture Convention noted as a subject of concern, on 7 July 2005, the absence of effective

measures to provide civil compensation to victims of torture in all cases, and recommended that Canada should review its position under art 14 of the Torture Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture. I would not wish to question the wisdom of this recommendation, and of course I share the Committee's concern that all victims of torture should be compensated. But the Committee is not an exclusively legal and not an adjudicative body; its power under art 19 is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of art 14 of the Torture Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.

[**24**] In countering the claimants' argument the Kingdom, supported by the Secretary of State, is able to advance four arguments which in my opinion are cumulatively irresistible. First, the claimants are obliged to accept, in the light of the decision of the International Court of Justice in *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 that state immunity ratione personae can be claimed for a serving foreign minister accused of crimes against humanity. Thus, even in such a context, the international law prohibition of such crimes, having the same standing as the prohibition of torture, does not prevail. It follows that such a prohibition does not automatically override all other rules of international law. The International Court of Justice has made plain that breach of a jus cogens norm of international law does not suffice to confer jurisdiction (*Democratic Republic of the Congo v Rwanda* (3 February 2006, unreported) para 64). As Hazel Fox put it (*The Law of State Immunity* (2002) p 525):

> 'State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.'

Where state immunity is applicable, the national court has no jurisdiction to exercise.

[**25**] Secondly, art 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the United States understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of art 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction.

[**26**] Thirdly, the UN Convention provides no exception from immunity where civil claims are made based on acts of torture. The Working Group in its 1999 Report makes plain that such an exception was considered, but no such exception was agreed. Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or

jus cogens exception is wholly inimical to the claimants' contention. Some British commentators have welcomed the UN Convention and urged its ratification by the United Kingdom: see, for example, Eileen Denza 'The 2005 UN Convention on State Immunity in Perspective' (2006) 55 ICLQ 395, pp 397, 398; Hazel Fox 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important' (2006) 55 ICLQ 399, p 403; Richard Gardiner 'UN Convention on State Immunity: Form and Function' (2006) 55 ICLQ 407, p 409. Other commentators have criticised the UN Convention, and opposed ratification, precisely because (in the absence of an additional protocol, which they favour) the UN Convention does not deny state immunity in cases where jus cogens norms of international are said to have been violated outside the forum state: see Christopher Keith Hall 'UN Convention on State Immunity: The Need for a Human Rights Protocol' (2006) 55 ICLQ 411; Lorna McGregor 'State Immunity and Jus Cogens' (2006) 55 ICLQ 437. But these commentators accept that this area of international law is 'in a state of flux', and they do not suggest that there is an international consensus in favour of the exception they would seek. It may very well be that the claimants' contention will come to represent the law of nations, but it cannot be said to do so now.

[27] Fourthly, there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should. This is significant, since these are sources of international law. But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.

[28] It follows, in my opinion, that Pt 1 of the 1978 Act is not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application does not infringe the claimants' convention right under art 6 of the European Convention (assuming it to apply). It is unnecessary to consider any question of remedies.

THE COURT OF APPEAL DECISION

[29] I would respectfully agree with the Court of Appeal that Mr Jones's claim against the Kingdom should be dismissed on the ground of state immunity for the reasons given by Mance LJ in paras [10]–[27] of his closely-reasoned leading judgment, with which Neuberger LJ and Lord Phillips of Worth Matravers MR agreed (see [2005] 4 LRC 599 at [100], [102], [2005] QB 699). I also agree that the non-torture claims against the individual defendants were rightly dismissed on the same ground (see [98], [100], [101]). But in my respectful opinion the Court of Appeal's conclusion on the torture claims against the individual defendants cannot be sustained.

[30] First, the Court of Appeal departed from the principle laid down in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 and the other authorities cited at [10], above, despite following it, correctly, in relation to the non-torture claims. Mance LJ thought it correct to ignore the description of Colonel Abdul Aziz as a 'servant or agent' (see [2005] 4 LRC 599 at [28], [2005] QB 699). Lord Phillips MR considered this description 'irrelevant and arguably embarrassing' (see [103]). But there was no principled reason for this departure. A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error had the effect that while the Kingdom was held to be

immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of Interior (the fourth defendant in the second action) was not, a very striking anomaly.

[31] This first error led the court into a second: its conclusion (at [76]) that a civil claim against an individual torturer did not indirectly implead the state in any more objectionable respect than a criminal prosecution. A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a servant or agent for an act of torture within art 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party.

[32] Both these errors, in my respectful opinion, sprang from what I think was a misreading of *Pinochet* (*No 3*) [1999] 2 All ER 97, [2000] 1 AC 147. Despite Lord Phillips MR's change of mind in this case (see [2005] 4 LRC 599 at [128], [2005] QB 699), the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which were not) was fundamental to that decision. This is not a distinction which can be wished away.

[33] Fourthly, the court appears to have ruled that the exercise of jurisdiction should be governed by 'appropriate use or development of discretionary principles' (see [96]; and see also [135]). This is to mistake the nature of state immunity which, in this and most countries, is governed by the law, not by executive or judicial discretion (Hazel Fox 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important' (2006) 55 ICLQ 399, pp 403–406). Where applicable, state immunity is an absolute preliminary bar, precluding any examination of the merits. A state is either immune from the jurisdiction of a foreign court or it is not. There is no half-way house and no scope for the exercise of discretion. There may be dispute whether acts, although committed by an official, were purely private in character, but that is not a question which arises here.

[34] It is, I think, hard to resist the suggestion by Hazel Fox ('Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture' (2005) 121 LQR 353, p 359) that the Court of Appeal's decision represented a 'unilateral assumption of jurisdiction by one national legal system'. The court asserted what was in effect a universal tort jurisdiction in cases of official torture (see Yang 'Universal Tort Jurisdiction over Torture?' (2005) 64 CLJ 1, pp 3–4), for which there was no adequate foundation in any international convention, state practice or scholarly consensus, and apparently by reference to a consideration (the absence of a remedy in the foreign state: para 86 of the judgment) which is, I think, novel. Despite the sympathy that one must of course feel for the claimants if their complaints are true, international law, representing the law binding on other nations and not just our own, cannot be established in this way.

DISPOSAL

[35] In admirably clear and succinct judgments given on 30 July 2003 and 18 February 2004 Master Whitaker gave his reasons for upholding the claims to state immunity made on behalf of the Kingdom and the individual defendants. In my opinion he reached the right decisions for essentially the right reasons.

For these reasons, and those given by my noble and learned friend Lord Hoffmann, with which I agree, I would dismiss Mr Jones's appeal and allow the Kingdom's. Pursuant to undertakings given by the Kingdom to the Court of Appeal, there will be no order for costs.

LORD HOFFMANN.

[**36**] My Lords, the question is whether the claimants, who allege that they were tortured by members of the Saudi Arabian police, can sue the responsible officers and the Kingdom of Saudi Arabia itself. The Court of Appeal held that they could sue the officers but that the Kingdom was protected by state immunity (see [2004] EWCA Civ 1394, [2005] 4 LRC 599, [2005] QB 699). In my opinion both are so protected.

[**37**] Mr Ronald Jones, who alleges that in 2001 he was held in solitary confinement and systematically tortured for 67 days, appeals against the decision of the Court of Appeal that the Kingdom is immune from suit. The language of s 1(1) of the State Immunity Act 1978 is unequivocal: 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' It is not suggested that this case falls within the terms of any other provision of the 1978 Act.

[**38**] In *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536, on similar facts, the Court of Appeal held that the state was immune. Ward LJ said (at 549) 'the Act is as plain as plain can be'. But Mr Crystal QC, who appeared for Mr Jones, submitted that s 1(1) should be read subject to an implied exception for claims which allege torture.

[**39**] The argument in support of this submission involves three steps. First, art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereafter 'the European Convention') (as set out in Sch 1 to the Human Rights Act 1998) guarantees a right of access to a court for the determination of civil claims and that right is prima facie infringed by according immunity to the Kingdom. Secondly, although the right is not absolute and its infringement by state immunity is ordinarily justified by mandatory rules of international law, no immunity is required in cases of torture. That is because the prohibition of torture is a peremptory norm or jus cogens which takes precedence over other rules of international law, including the rules of state immunity. Thirdly, s 3 of the 1998 Act requires a court, so far as it is possible to do so, to read legislation in a way which is compatible with the convention rights. This can be done by introducing an implied exception. I do not accept any of these steps in the argument but will postpone consideration of the first and third until I have discussed the second.

[**40**] The second and crucial step was rejected by the European Court of Human Rights in *Al-Adsani v UK* (2001) 12 BHRC 88. The majority opinion said (at 103 (para 56)) that measures taken by a member state which 'reflect generally recognised rules of public international law' could not in principle be regarded as imposing a disproportionate restriction on access to a court. State immunity was such a rule. As for the alleged exception for torture, the court said (at 104 (para 61)):

> 'Notwithstanding the special character of the prohibition of torture in international law, the court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a state no longer enjoys immunity from civil suit in the courts of another state where acts of torture are alleged.'

[**41**] Mr Crystal submitted that the decision of the majority was wrong. The House should prefer the reasoning of the minority. But in my opinion the majority was right.

[**42**] A peremptory norm or jus cogens is defined in art 53 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) (which provides that a treaty is void if, at the time of its conclusion, it conflicts with such a norm) as: 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .'

[**43**] As the majority accepted, there is no doubt that the prohibition on torture is such a norm: for its recognition as such in this country, see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97, [2000] 1 AC 147. Torture cannot be justified by any rule of domestic or international law. But the question is whether such a norm conflicts with a rule which accords state immunity. The syllogistic reasoning of the minority in *Al-Adsani v UK* (2001) 12 BHRC 88 at 111 (para 3) simply assumes that it does:

> 'The acceptance therefore of the jus cogens nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.'

[**44**] The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. As Hazel Fox QC has said (*The Law of State Immunity* (2002), p 525):

> 'State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite.'

[**45**] To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani v UK*, it is not *entailed* by the prohibition of torture. (See also Swinton J in *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427 at 443 (para 62).)

[**46**] Whether such an exception is now recognised by international law must be ascertained in the normal way from treaties, judicial decisions and the writings of reputed publicists. Two treaties are relevant. First, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (New York, 10 December 1984; TS 107 (1991); Cm 1775) (hereafter 'the Torture Convention') which formed the basis of the decision in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* that the prohibition of torture was jus cogens. It deals with universal criminal jurisdiction over individuals who have been guilty of torture and, in art 5(2)

applies the principle aut dedere aut prosequi to states in whose territory an alleged offender is present. Article 14 requires every state party to ensure that a victim of an act of torture obtains redress and has a right to a fair and adequate compensation. But this article is, as the Court of Appeal held, plainly concerned with acts of torture within the jurisdiction of the state concerned: see [2005] 4 LRC 599 at [18]–[25], [2005] QB 699; Swinton J in *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427, paras 44–54; Goudge JA (2004) 71 OR (3d) 675 at 691–693 and Andrew Byrnes, in *Torture as Tort* (2001) pp 537–550. There is nothing in the Torture Convention which creates an exception to state immunity in civil proceedings.

[47] The other relevant treaty is the United Nations Convention on Jurisdictional Immunities of States and Their Property (A/RES/59/38) (hereafter 'the Immunity Convention') which has been signed but not yet ratified by the United Kingdom and a number of other states. It is the result of many years work by the International Law Commission and codifies the law of statute immunity. Article 5, in terms similar to s 1(1) of the 1978 Act, provides that: 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.' There follows a number of exceptions but none for cases in which there is an allegation of torture.

[48] The next source of international law is judicial decisions. I shall start with international tribunals. In *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 the Congo complained of the issue by Belgium of a warrant for the arrest of its then serving Foreign Minister on charges of war crimes and crimes against humanity. The International Court of Justice accepted that the law prohibiting the commission of such crimes was jus cogens but held that this did not entail an exception to the rule of state immunity for a head of state and certain other high state officials including a foreign minister. In addition:

> '58. The court has carefully examined state practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity . . .
>
> 60. The court emphasises, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they may have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.'

[49] What this case shows is that the jus cogens nature of the rule alleged to have been infringed by the state or one of its officials does not provide an automatic answer to the question of whether another state has jurisdiction. It is necessary carefully to examine the sources of international law concerning the

particular immunity claimed. Thus *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (*No 3*) derived from the terms of the Torture Convention (and in particular, the definition of torture) the removal from torturers of an immunity from criminal prosecution which was based simply on the fact that they had acted or purported to act on behalf of the state. But *Democratic Republic of the Congo v Belgium* confirms the opinion of the judges in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (*No 3*) that General Pinochet would have enjoyed immunity, on a different basis, if he had still been head of state.

[**50**] In a separate concurring opinion, Judges Higgins, Kooijmans and Buergenthal speculated about possible future developments in international law. They said (at para 48) that in civil matters they saw 'the beginnings of a very broad form of extraterritorial jurisdiction'. Such a jurisdiction had been exercised in torture cases by Federal Courts in the United States under the terms of the Alien Tort Claims Act (hereafter 'ATCA'). I shall discuss some of these cases later, but the comment of the judges in *Democratic Republic of the Congo v Belgium* was chilly: 'While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of states generally.' (See para 48.)

[**51**] The judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundžija* (1998) 38 ILM 317 contains an interesting discussion of the international law which prohibits torture. First (see 348) the prohibition covers potential breaches. That does not concern us here. Secondly (see 348–349), it imposes obligations erga omnes. That means that obligations are—

> 'owed towards all the other members of the international community, each of which then has a correlative right [which] gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.'

[**52**] This presumably means that a state whose national has been tortured by the agents of another state may claim redress before a tribunal which has the necessary jurisdiction. But that says nothing about state immunity in domestic courts.

[**53**] Thirdly (see 349–350), the prohibition has acquired the status of jus cogens. As to this, the tribunal said:

> '155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a state say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent

> international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.'

[**54**] The observations about the possibility of a civil suit for damages are not directed to the question of state immunity. They assume the existence of a 'competent international or national judicial body' before which the claimant has locus standi and are concerned to emphasise that a national measure purporting to legitimate torture will be disregarded.

[**55**] Next, there is the decision of the European Court of Human Rights in *Al-Adsani v UK* (2001) 12 BHRC 88, which was followed by the same court in *Kalogeropoulou v Greece* App No 50021/00 (12 December 2002, unreported). The latter case arose out of Greek proceedings, to which I shall shortly refer in my discussion of national decisions, by which some Greek nationals sued the German government for damages for war crimes committed in 1944. The Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany* Case no 11/2000 (4 May 2000, unreported) held that a Greek court could assume jurisdiction on the ground that a country which committed war crimes must be deemed to have waived its sovereign immunity. The claimants accordingly obtained a judgment for damages. But the judgment could be enforced against German state property in Greece only with the consent of the Minister of Justice, which could not be obtained. Proceedings to enforce the judgment without consent on the ground that the claimants were being deprived of a remedy, contrary to art 6 of the European Convention, were dismissed by the Greek Court of Cassation. In *Kalogeropoulou v Greece* App No 50021/00 (12 December 2002, unreported) a petition to the European Court of Human Rights was held, applying *Al-Adsani v UK* (2001) 12 BHRC 88, to be 'manifestly ill-founded'.

[**56**] Finally, at the international level, there are some comments of the Committee against Torture, set up under the Torture Convention to monitor its workings, on the reports submitted by Canada in 2005. The committee has various functions, including (under art 19) to receive reports from state parties on the measures they have taken to give effect to their undertakings under the Torture Convention and to 'make such general comments . . . as it may consider appropriate'. During the course of discussion on the Canadian report, an American member, Ms Felice Gaer, raised the question of whether art 14 did not require Canada to provide a civil remedy for victims of torture in foreign states. The Canadian representatives said that their understanding of the effect of art 14 was that it did not. As I have said earlier, that is the general understanding of art 14 and the United States in particular accompanied its ratification of the Torture Convention with a statement that:

> 'it is the understanding of the United States that article 14 requires a state party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that state party.'

[**57**] No one has ever objected to that statement of understanding by the United States and similar views have been expressed in reports to the committee by New Zealand and Germany (see Andrew Byrnes *Torture as Tort* (2001), p 544, n 18). Nevertheless, in its comments on the Canadian report, the committee expressed concern at 'the absence of effective measures to provide civil compensation to victims of torture in all cases' and recommended that Canada

should 'review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture' (see Conclusions and recommendations of the Committee against Torture: Canada, 7 July 2005 (CAT/C/CR/34/CAN), para 5(f)). Quite why Canada was singled out for this treatment is unclear, but as an interpretation of art 14 or a statement of international law, I regard it as having no value. The nearest approach to reasoning in support of the committee's opinion is a remark of Ms Gaer in the course of discussion (Committee Against Torture, 34th session, Summary Record of 646th Meeting, 6 May 2005 (CAT/C/SR.646/Add.1)), when she said (para 63) that 'given that there was an exception to State immunity in legislation for business deals, it seemed unclear why an exception could not be considered for torture'. The short answer is that an exception for acts jure gestionis is recognised by international law and an exception for torture is neither recognised by international law nor required by art 14. Whether it should be is another matter. The committee has no legislative powers.

[**58**] Ms Gaer's concerns may have been influenced by the existence of the United States Torture Victim Protection Act of 1991, which establishes civil liability against an individual who 'under actual or apparent authority, or color of law, of any foreign nation', subjects an individual to torture (see s 2). This represents a unilateral extension of jurisdiction by the United States which is not required and perhaps not permitted by customary international law. It is not part of the law of Canada or any other state.

[**59**] I turn next to the decisions of national courts. In *Siderman de Blake v Republic of Argentina* (1992) 965 F 2d 699 the United States Court of Appeals decided that Argentina was entitled to state immunity in an action alleging torture. The reasoning of the court (at 718) left open the possibility that there might be such an exception in customary international law, derived from the jus cogens nature of the prohibition on torture ('the . . . argument carries much force') but held that the court was bound by the unequivocal terms of the Foreign Sovereign Immunities Act 1976 (the FSIA). While *Siderman de Blake v Republic of Argentina* turned upon the terms of national legislation, the legislation itself is evidence against a state practice of having an exception to state immunity in torture cases.

[**60**] In *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427 the question of whether customary international law recognised a torture exception to state immunity was specifically raised. In the Superior Court Swinton J examined the authorities, including *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 and *Al-Adsani v UK* (2001) 12 BHRC 88 and concluded ((2002) 124 ILR 427 at 446 (para 73)) that:

> 'the decisions of state courts, international tribunals and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state.'

[**61**] This conclusion was upheld by the Ontario Court of Appeal (see (2004) 71 OR (3d) 675 at 694–696).

[**62**] The decision of the Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany* Case No 11/2000 (4 May 2000, unreported), which I have already mentioned, went upon a theory of implied waiver which has received no support in other decisions. It was undermined by the court's own refusal to order enforcement of the judgment and held to be wrong by a

judgment of a special Supreme Court (the Anotato Eidiko Dikasterio) convened to decide cases involving the interpretation of international law: *Margellos v Germany* (17 September 2002, unreported). The original judgment was coldly received by the German Supreme Court when the claimants attempted to enforce it directly in Germany: *Greek Citizens v Federal Republic of Germany* (*The Distomo Massacre Case*) (2003) 42 ILM 1030. The court said (at 1033):

> 'There have recently been tendencies towards a more limited principle of state immunity, which should not apply in case of a peremptory norm of international law (ius cogens) has been violated . . . According to the prevailing view, this is not international law currently in force.'

[63] That leaves the Italian *Ferrini* case, *Ferrini v Federal Republic of Germany*, which exhibits the same bare syllogistic reasoning as the judgment of the minority in *Al-Adsani v UK* (2001) 12 BHRC 88. In a thoughtful comment on the case by Pasquale De Sena and Francesca De Vittor ('State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 EJIL 89) the authors acknowledge these shortcomings and accept that a jus cogens prohibition of torture does not *entail* a corresponding exception to state immunity. But they say that the *Ferrini* case should be seen rather as giving priority to the *values* embodied in the prohibition of torture over the values and policies of the rules of state immunity. I think that this is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as 'activist' but would have been well within the judicial function. As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states. (See *Al-Adsani v UK* (2001) 12 BHRC 88, para O-II9 in the concurring opinion of judges Pellonpää and Bratza.)

[64] In my opinion, therefore, Mr Crystal has failed to make good the second and essential step in his argument. I can deal relatively briefly with the first and third steps. On the question of whether art 6 is engaged at all, I am inclined to agree with the view of Lord Millett in *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 847, 848, [2000] 1 WLR 1573 at 1588 that there is not even a prima facie breach of art 6 if a state fails to make available a jurisdiction which it does not possess. State immunity is not, as Lord Millett said, a 'self-imposed restriction on the jurisdiction of [the] courts' but a 'limitation imposed from without'. However, as the European Court of Human Rights in *Al-Adsani v UK* (2001) 12 BHRC 88 proceeded on the assumption that art 6 was engaged and the rules of state immunity needed to be justified and as it makes no difference to the outcome, I will not insist on the point. On the third step, I do not think that the implication of an exception into s 1(1) of the 1978 Act can be described as a possible interpretation of the section. If I had accepted the first two steps in the argument, it would have been necessary to make a declaration of incompatibility. But the point does not arise. I would dismiss Mr Jones's appeal.

[65] The appeal of the Kingdom in the case of Mitchell, Sampson and Walker raises the question of whether the same immunity covers the individual agents of the state allegedly responsible for the infliction of torture upon the claimants.

The Court of Appeal concluded that it did not and I must at the outset pay tribute to the careful judgment of my noble and learned friend Lord Mance, which meticulously confronts and deals with every objection to his view of the case; a tribute no less sincere for the opinion I have formed that he was wrong.

[**66**] I start with the proposition that, as a matter of international law, the same immunity against suit in a foreign domestic court which protects the state itself also protects the individuals for whom the state is responsible. Article 2(1)(b)(iv) of the Immunity Convention defines 'state' to include 'representatives of the State acting in that capacity'. The traditional way of expressing this principle in international law is to say that the acts of state officials acting in that capacity are not attributable to them personally but only to the state. Thus in *Prosecutor v Blaskic* (1997) 110 ILR 607 at 707 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, presided over by the distinguished international lawyer Professor Antonio Cassese, said:

> 'Such officials are mere instruments of a state and their official action can only be attributed to the state. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a state. In other words, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the state on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law going back to the 18th and 19th centuries, restated many times since.'

[**67**] Similarly, in the *Church of Scientology Case* (1978) 65 ILR 193 at 198 the German Federal Supreme Court, in according immunity to the Commissioner of the Metropolitan Police for acts done pursuant to the Federal Republic of Germany–United Kingdom Agreement on Mutual Assistance in Criminal Matters 1961, said:

> 'Scotland Yard—and consequently its head—was acting as the expressly appointed agent of the British State so far as performance of the treaty in question between the United Kingdom and the Federal Republic was concerned. The acts of such agents constitute direct state conduct and cannot be attributed as private activities to the person authorised to perform them in a given case . . . Any attempt to subject state conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign states in respect of sovereign activity.'

[**68**] Despite the undoubted authority for expressing the rule in this way, I do respectfully think that it is a little artificial to say that the acts of officials are 'not attributable to them personally' and that this usage can lead to confusion, especially in those cases in which some aspect of the immunity of the individual is withdrawn by treaty, as it is for criminal proceedings by the Torture Convention. It would be strange to say, for example, that the torture ordered by General Pinochet was attributable to him personally for the purposes of criminal liability but only to the state of Chile for the purposes of civil liability. It would be clearer to say that the Torture Convention withdrew the immunity against criminal prosecution but did not affect the immunity for civil liability. I would therefore prefer to say, as Leggatt LJ did in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 at 669, that state immunity affords individual employees or officers

of a foreign state 'protection under the same cloak as protects the state itself'. But this is a difference in the form of expression and not the substance of the rule.

[69] What is important, however, is that, as Lord Diplock said in *Alcom Ltd v Republic of Colombia* [1984] 2 All ER 6 at 8, [1984] AC 580 at 597, the provisions of the 1978 Act 'fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations'. That means that 'state' in s 1(1) of the 1978 Act and 'government', which the term 'state' is said by s 14(1)(b) to include, must be construed to include any individual representative of the state acting in that capacity, as it is by art 2(1)(b)(iv) of the Immunity Convention. The official acting in that capacity is entitled to the same immunity as the state itself.

[70] In his judgment in the Court of Appeal, Mance LJ says more than once that the 1978 Act does not expressly mention officials (see [2005] 4 LRC 599 at [24], [31], [2005] QB 699). True, it does not use the words 'officials' or 'representatives' or the like. But the question is not what words the 1978 Act uses but what it means. If, against the background of established rules of international law, 'the state' or 'the government' includes individual officials, then they are entitled to the same immunities as if they had been expressly mentioned. The absence of express reference may make it easier, if s 3 of the 1998 Act applies, to construe references to the state as not including officials. (Even that would have its difficulties, since there is no suggestion that the state should not include officials other than in cases of torture or other jus cogens prohibitions.) But before one gets to s 3 of the 1998 Act, it is necessary to establish that the immunity of an official would infringe the right of access to a court guaranteed by art 6 of the European Convention and therefore be inconsistent with a convention right. For that purpose it is necessary, as in the case of the immunity of the state itself, to show that international law does not require immunity against civil suit to be accorded to officials who are alleged to have committed torture.

[71] Once again, it is impossible to find any such exception to the immunity of representatives of the state in a treaty. The Immunity Convention does not contain one. The Torture Convention, which defines torture as the infliction of severe pain and suffering for various purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a public capacity' was held in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97, [2000] 1 AC 147, by necessary implication, to remove the immunity from criminal prosecution which would ordinarily attach to acts performed by individuals in a public capacity. But the Torture Convention says nothing to remove the immunity of such individuals from civil process.

[72] The essence of the reasoning of the Court of Appeal in denying immunity to individuals who are alleged to have committed acts of torture is that torture cannot constitute an official act. It is so illegal that it must fall outside the scope of official activity.

[73] This argument is based upon judicial dicta; first, in the *Pinochet* litigation and secondly in a series of United States cases under ATCA. But before I come to these dicta, I will examine the proposition in principle.

[74] It has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an

international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.

[75] So for example in *Mallén v United States of America* (1927) IV RIAA 173, a United States deputy constable in El Paso, Texas boarded a street car, showing his badge, beat up the Mexican consul and took him to the county jail. The assault was in pursuit of a private grudge but an international arbitration tribunal held that the United States was liable because the deputy constable had acted under colour of public authority.

[76] The International Law Commission is in the process of preparing a draft with a view to a United Nations treaty on the responsibility of states for intentionally wrongful acts. Article 4 of the 2001 draft (see the Draft Articles on the Responsibility of States for Internationally Wrongful Acts) provides that the conduct of any state organ shall be considered an act of that state under international law and that an organ includes a person or entity which has that status in accordance with the internal law of that state. In its commentary, the commission says (see note (13)):

> 'It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.'

[77] The commission went on to say that the distinction between unauthorised conduct of a state organ and purely private conduct had been 'clearly drawn in international arbitration decisions' and referred to *Mallén v United States of America*. Article 7 of the draft dealt specifically with the point:

> 'The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

[78] It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

[79] Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity. Lord Millett in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97 at 174, [2000] 1 AC 147 at 273 drew attention to this feature of the definition:

> 'The very official or governmental character of the acts, which is necessary to found a claim to immunity ratione materiae and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime.'

[80] It was this feature which made Lord Millett conclude (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97

at 178, [2000] 1 AC 147 at 278) that the Torture Convention must, by necessary implication, have removed the immunity which would ordinarily attach to an act of official or governmental character:

> 'In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.'

[81] In my opinion, this reasoning is unassailable. The reason why General Pinochet did not enjoy immunity ratione materiae was not because he was deemed not to have acted in an official capacity; that would have removed his acts from the Torture Convention definition of torture. It was because, by necessary implication, international law had removed the immunity.

[82] In the Court of Appeal, Mance LJ met the charge of inconsistency by saying ([2005] 4 LRC 599 at 640, [2005] QB 699 at 742):

> 'the requirement that the pain or suffering be inflicted by a public official does no more in my view than identify the author and the public context in which the author must be acting. It does not lend to the acts of torture themselves any official or governmental character or nature, or mean that it can in any way be regarded as an official function to inflict, or that an official can be regarded as representing the state in inflicting, such pain or suffering. Still less does it suggest that the official inflicting such pain or suffering can be afforded the cloak of state immunity.'

[83] I do not, with respect, find this answer satisfactory. The acts of torture are either official acts or they are not. The Torture Convention does not 'lend' them an official character; they must be official to come within the Torture Convention in the first place. And if they are official enough to come within the Torture Convention, I cannot see why they are not official enough to attract immunity.

[84] The notion that acts contrary to jus cogens cannot be official acts has not been well received by eminent writers on international law. Professor Antonio Cassese, who presided over the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, described it as 'unsound and even preposterous': see 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 EJIL 853, p 869 (hereafter 'International Crimes'), while Professor Andrea Gattini gave it short shrift in a footnote: see 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) Journal of International Criminal Justice 224, p 234, n 41 ('an argument which can be easily discarded'). More moderately, in a comment on the present case, Hazel Fox QC said that it was 'directly contrary to current international law' (see (2005) 121 LQR 353, p 355).

[85] In principle, therefore, I would reject the argument that torture or some other contravention of a jus cogens cannot attract immunity ratione materiae because it cannot be an official act. I must now examine some of the dicta which have been relied upon in support.

[86] First, the dicta in the *Pinochet* litigation. In order to understand some of the passages in the judgments of the Law Lords, it is necessary to bear in mind

that General Pinochet did not only claim immunity at common law by virtue of the official nature of his acts. He also claimed a special statutory immunity for former heads of state by virtue of s 20(1) of the 1978 Act, which provides that 'Subject to . . . any necessary modifications' the Diplomatic Privileges Act 1964 shall apply to a head of state as it applies to a head of a diplomatic mission. The 1964 Act gave effect to the Vienna Convention on Diplomatic Relations 1961 (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565), art 39 of which provided that when the functions of a diplomat came to an end, immunity continued to subsist 'with respect to acts performed . . . in the exercise of his functions as a member of the mission'. If one applied that article with the necessary modifications to a Head of State, it would (on the broadest possible construction) mean that immunity would continue to subsist with respects to acts performed in the exercise of his functions as head of state.

[**87**] Section 20(1) of the 1978 Act therefore gave rise to the question of whether torturing people could be an exercise of the functions of a head of state, which is a very different question from whether it could be an official act for the purposes of common law immunity ratione personae. It is in this context that one must read some of the dicta on which the Court of Appeal relied.

[**88**] The judgments of the majority in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* [1998] 4 All ER 897, [2000] 1 AC 61 concentrated almost entirely upon the question of whether General Pinochet was entitled to immunity under s 20(1) of the 1978 Act. Reliance upon ordinary immunity ratione materiae was summarily rejected on the ground that it was inconsistent with the universal jurisdiction over torture as an official act created (pursuant to the Torture Convention) by s 134 of the Criminal Justice Act 1988. It was in relation to art 39 of the Vienna Convention that Lord Nicholls of Birkenhead said ([1998] 4 All ER 897 at 939, [2000] 1 AC 61 at 109) that 'torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state'. Although it is true that Lord Steyn ([1998] 4 All ER 897 at 946, [2000] 1 AC 61 at 116) expressed some doubt about whether 'what was allegedly done in secret in the torture chambers of Santiago' could be regarded as official acts, he founded his judgment upon the failure to satisfy the 'further essential requirement' that the acts were part of the functions of a head of state.

[**89**] In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97, [2000] 1 AC 147 the argument was rather different. Lord Browne-Wilkinson appeared to assimilate the immunity under s 20(1) with common law immunity ratione materiae, expressed doubts as to whether torture was a 'state function' but concluded that in any event the universal criminal liability created by the Torture Convention would be inconsistent with the existence of immunity ratione materiae. There are passages which can be read as saying that torture therefore cannot be an official act, but nothing to explain why, if that is the case, it satisfies the definition of torture in the Torture Convention. His conclusion ([1999] 2 All ER 97 at 114, [2000] 1 AC 147 at 205) is simply that 'continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention', which is consistent with Lord Millett's view that, though the acts are official, the Torture Convention lifts the immunity.

[**90**] Lord Goff of Chieveley formulated the argument against immunity ([1999] 2 All ER 97 at 121, [2000] 1 AC 147 at 213) with great clarity:

> 'In broad terms I understand the argument to be that, since torture contrary to the convention can only be committed by a public official or

other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity ratione materiae, it would be inconsistent with the obligations of state parties under the convention for them to be able to invoke state immunity ratione materiae in cases of torture contrary to the convention.'

[**91**] Lord Goff went on to point out that since the Torture Convention did not expressly lift the immunity, the argument must be that it did so by necessary implication. He went on to reject the implication, but his formulation of the argument shows that he did not understand it as a claim that the same act could be official for the purposes of the Torture Convention and not official for the purposes of immunity.

[**92**] Lord Hope of Craighead said in terms ([1999] 2 All ER 97 at 146, [2000] 1 AC 147 at 242) that in principle the immunity ratione materiae protected all acts which the head of state has performed in the exercise of the functions of government. He was willing to allow only two exceptions under customary international law: 'criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit' and war crimes. I would respectfully doubt the first exception: if the act is done under colour of official authority, the purpose of personal gratification (as in *Mallén v United States of America* (1927) IV RIAA 173) should be irrelevant. The second is well established. But Lord Hope doubted whether customary international law had brought torture within the second exception. It was the Torture Convention which had done so: see [1999] 2 All ER 97 at 151, [2000] 1 AC 147 at 247.

[**93**] Lord Hutton concentrated on s 20 of the 1978 Act and said, like Lord Nicholls and Lord Steyn in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte,* that torture was not a function of a head of state. But he must have regarded it as an official act for the purposes of the common law ratione materiae rule, because he said ([1999] 2 All ER 97 at 166, [2000] 1 AC 147 at 264):

> 'I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages . . .'

[**94**] Lord Saville of Newdigate clearly based his opinion on the proposition that the Torture Convention had removed the immunity ratione materiae and Lord Millett, as I have already noted, did the same. Lord Phillips of Worth Matravers likewise said ([1999] 2 All ER 97 at 189, [2000] 1 AC 147 at 290) that the Torture Convention was 'incompatible with the applicability of immunity ratione materiae' but ([1999] 2 All ER 97 at 181, [2000] 1 AC 147 at 281) that in civil proceedings against General Pinochet for damages, the state of Chile could claim immunity on his behalf. In the Court of Appeal in this case Lord Phillips of Worth Matravers MR said that he had changed his mind on the latter point but I respectfully think that his first thoughts were correct.

[**95**] The respondents next rely on cases decided in the United States under ATCA. This Act, passed in 1789, confers jurisdiction upon Federal Courts in 'all causes where an alien sues for a tort only [committed] in violation of . . . the law of nations'. There are dicta and some lower court decisions which support the view that, for the purposes of the act of state doctrine and the FSIA, torture cannot be an official act. For example, *Filartiga v Peña-Irala* (1980) 630 F 2d 876

concerned the torture and killing of a Paraguayan citizen in Paraguay by a Paraguayan policeman who was served with process in New York. The court assumed jurisdiction under ATCA on the ground that torture was a tort contrary to the law of nations. There was no reference to the immunity of an 'agency or instrumentality of a foreign state' under the FSIA and only a brief reference to the act of state doctrine, which the court said (at 889) was 'not before us on this appeal'. It was in this context that Kaufman J said:

> 'We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state.'

[**96**] *Re Estate of Ferdinand Marcos, Hilao v Estate of Ferdinand Marcos* (1994) 25 F 3d 1467, in the United States Court of Appeals (Ninth Circuit), was an application to strike out a claim for damages for torture and killing by ex-President Marcos on the ground, inter alia, that he had been an agent or instrumentality of the state for the purposes of the FSIA. The court said (at 1470–1471) that for the purposes of the application, the claimants' allegations must be taken as true, including the allegation that his actions were 'taken without official mandate pursuant to his own authority'. The government of the Philippines made no claim to immunity. But the judgment does contain an extensive discussion of authorities which are said to support the proposition that unlawful or very unlawful acts cannot be official.

[**97**] *Xuncax v Gramajo* (1995) 886 F Supp 162, a judgment of the United States District Court for Massachusetts, was a judgment in default, the defendant (a former Guatemalan Minister of Defence) having been served with process while attending a course at Harvard and thereafter taken no part in the proceedings. Woodlock J followed cases in the Ninth Circuit such as *Re Estate of Ferdinand Marcos* and held (at 175) that although immunity under the FSIA extended to an individual official of a foreign state acting in his official capacity: 'an individual official of a foreign state is *not* entitled to immunity under the FSIA in an action brought against him for acts beyond the scope of his authority . . .' (See also, for a similar ruling, *Cabiri v Assasie-Gyimah* (1996) 921 F Supp 1189, a decision of a district judge in the Second Circuit.)

[**98**] The approval (or at any rate, lack of disapproval) of *Filartiga v Peña-Irala* (1980) 630 F 2d 876 by the Supreme Court in *Sosa v Alvarez-Machain* (2004) 542 US 692 was solely concerned with the assumption of jurisdiction under the ATCA and not with any question of state immunity. In a concurring opinion, Breyer J speculated (at 762) that international acceptance of universal criminal jurisdiction over certain criminal offences by state officials (as in the *Pinochet* cases) may in due course lead to an acceptance of a similar tort jurisdiction. But there is no suggestion that this represents current international law.

[**99**] Although, as Professor Cassese says, the ATCA cases may be 'meritorious' as 'a practical expedient for circumventing the [FSIA]' (see International Crimes, at p 869) and were, as I have noted, described by Judges Higgins, Kooijmans and Buergenthal in *Democratic Republic of the Congo v Belgium* (*Case concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 at 76 (para 48), as a 'unilateral exercise of the function of guardian of international values', they are in my opinion contrary to customary international law and the Immunity Convention and not in accordance with the law of England.

[**100**] The Court of Appeal, having held that the English court had jurisdiction to entertain proceedings alleging torture against foreign officials, drew back from allowing the court to exercise that jurisdiction on ordinary principles. It recognised that such proceedings could create difficulties about both proof and enforcement and could cause difficulties with foreign governments. It therefore proposed that the power to allow service out of the jurisdiction or to stay proceedings on grounds of forum non conveniens should be exercised with due regard to the potential sensitivity of the subject-matter (the word 'sensitive' appears six times in the concluding pages of the judgment).

[**101**] In my opinion this approach is inappropriate for questions of state immunity. As Lord Millett said in *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 847–848, [2000] 1 WLR 1573 at 1588, state immunity is not a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another. It would be invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another. As Kingsmill Moore J said in a different but not wholly unrelated context, 'Safety lies only in universal rejection': see *Peter Buchanan Ltd v McVey* [1954] IR 89 at 107, [1955] AC 516n at 529.

[**102**] I would therefore allow the appeal of the Kingdom and restore the order of Master Whitaker. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, with which I agree.

LORD RODGER OF EARLSFERRY.

[**103**] My Lords, I have had the advantage of considering the complementary speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, in draft. I agree with them and there is nothing which I can usefully add. For the reason they give I would dispose of the appeals as they propose.

LORD WALKER OF GESTINGTHORPE.

[**104**] My Lords, I have had the privilege of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. I am in full agreement with them, and I would dispose of the appeals in the way in which Lord Bingham proposes.

LORD CARSWELL.

[**105**] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. For the reasons which they give I too would dismiss Mr Jones's appeal and allow the Kingdom's appeal.

Mr Jones's appeal dismissed. The Kingdom of Saudi Arabia's appeal allowed.

Kate O'Hanlon Barrister.

R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD GOFF OF CHIEVELEY, LORD HOPE OF CRAIGHEAD, LORD HUTTON, LORD SAVILLE OF NEWDIGATE, LORD MILLETT AND LORD PHILLIPS OF WORTH MATRAVERS

18–21, 25–28 JANUARY, 1–4 FEBRUARY, 24 MARCH 1999

Extradition – Extradition crime – Definition – Conduct which if it occurred in the United Kingdom, would constitute an offence – Date when conduct must constitute an offence – Spanish government accusing former head of state of conspiracy to torture and torture outside United Kingdom between 1972 and 1990 – Torture abroad only becoming offence in United Kingdom in 1988 – Whether sufficient that torture an offence at date of extradition request – Criminal Justice Act 1988, s 134(1) – Extradition Act 1989, s 2.

Extradition – Immunity from extradition – Former head of state – Immunity for acts performed in exercise of official functions as head of state – Whether torture part of official functions of a head of state – Whether former head of state entitled to claim immunity from extradition for crime of torture – State Immunity Act 1978, s 20.

The applicant was the former head of state of Chile. Following his arrival in the United Kingdom in 1998, the Spanish government issued a request for his extradition, and the metropolitan stipendiary magistrate issued a warrant for his arrest charging the applicant, inter alia, with offences of torture or conspiracy to torture. Under s 134(1)[a] of the Criminal Justice Act 1988, which was enacted to implement the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention), torture by a public official or person acting in a public capacity was a criminal offence in the United Kingdom after 29 September 1988. The applicant applied for judicial review to quash the warrant. That application was allowed by the Queen's Bench Divisional Court which held that, as a former head of state, the applicant was entitled to immunity from extradition proceedings in the United Kingdom in respect of acts committed when he was head of state under s 20[b] of the State Immunity Act 1978. Accordingly, the warrant was quashed and the Commissioner of Police and the Spanish government appealed to the House of Lords. The Spanish government submitted further material in the form of draft charges in order to define more clearly the subject of its extradition request. Those charges included conspiracy to torture between January 1972 and September 1973 and between August 1973 and January 1990 (charge 2), conspiracy to torture between January 1972 and January 1990 (charge 4) and torture in June 1989 (charge 30). Two issues arose on the appeal: (i) whether the applicant had been accused of any extradition crimes within the meaning of s 2 of the Extradition Act 1989, and (ii) if so, whether the applicant enjoyed immunity in respect of such crimes.

a Section 134(1), so far as material, is set out at p 137 *j* to p 138 *a*, post

b Section 20, so far as material, is set out at p 118 *h*, post

Held – (1) On the true construction of s 2 of the 1989 Act, the references to conduct which 'if it occurred in the United Kingdom, would constitute an offence' required that conduct to be an offence in the United Kingdom at the date it took place and not merely at the date of the request for extradition. It followed, in the instant case (Lord Millett dissenting), that only those parts of the conspiracy to torture alleged in charges 2 and 4 which related to the period after 29 September 1988 and the act of torture alleged in charge 30 were extradition crimes (see p 107 *c d f*, p 118 *a c* to *e*, p 136 *j*, p 143 *h* to p 144 *a* p 145 *e* to *g*, p 153 *f g* p 168 *b*, p 178 *h* and p 180 *j*, post).

(2) (Lord Goff dissenting) Having regard to the provisions of the Torture Convention, the applicant had no immunity in respect of acts of torture and conspiracy to torture which he had allegedly committed after that Convention had been ratified by Spain, Chile and the United Kingdom. Such a conclusion was not affected by s 20(1)(a) of the 1978 Act, by which former heads of state enjoyed immunity in respect of acts done by them as part of their official functions. Accordingly, the extradition proceedings could continue in respect of the extradition crimes to which no immunity attached, and to that extent the appeal would be allowed (see p 113 *d e*, p 114 *g h*, p 115 *d to f*, p 152 *b* to *j*, p 153 *a* to *c*, p 163 *b*, p 165 *d*, p 166 *e j*, p 167 *h*, p 169 *h*, p 170 *d*, p 179 *e f*, p 180 *j*, p 190 *c* to *e j* and p 192 *b c g*, post).

Notes

For crimes which are extradition crimes, see 18 *Halsbury's Laws* (4th edn) paras 215–216.

For immunity of foreign states and sovereigns, see 18 *Halsbury's Laws* (4th edn) para 1548.

For the State Immunity Act 1978, s 20, see 10 *Halsbury's Statutes* (4th edn) (1995 reissue) 771.

For the Criminal Justice Act 1988, s 134, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1079.

For the Extradition Act 1989, ss 2, 8, see 17 *Halsbury's Statutes* (4th edn) (1993 reissue) 560, 570.

Cases referred to in opinions

A-G of Israel v Eichmann (1961) 36 ILR 5, Jerusalem District Ct and Israel SC.

Al Adsani v Kuwait (1996) 107 ILR 536, CA.

Alcom Ltd v Republic of Colombia (*Barclays Bank plc, garnishees*) [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL.

Argentina v Amerada Hess Shipping Corp (1989) 109 S Ct 683, US SC.

Bingham's Case, McNair's International Law Opinions, Vol 1, p 196.

Brunswick (*Duke*) *v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993.

Buck v A-G [1965] 1 All ER 882, [1965] Ch 475, [1965] 2 WLR 1033, CA.

Demjanjuk v Petrovsky (1985) 603 F Supp 1468, US District Ct (ND of Ohio); *affd* (1985) 776 F 2d 571, US Ct of Apps (6th Cir).

Duff Development Co Ltd v Kelantan Government [1924] AC 797, [1924] All ER Rep 1, HL.

Ex-King Farouk of Egypt v Christian Dior, SARL (1957) 24 ILR 228, Paris Ct of Appeal.

Former Syrian Ambassador to the German Democratic Republic, Re (unreported, 10 June 1997), German Fed Constitutional Ct.

Hatch v Baez (1876) 7 Hun 596, NY SC.

I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, [1981] 3 WLR 328, HL.

Jaffe v Miller (*No 2*) (1993) 95 ILR 446, Ont CA.

Jimenez v Aristeguieta (1962) 311 F 2d 547, US Ct of Apps (5th Cir).
Lafontant v Aristide (1994) 844 F Supp 128, US District Ct (ED of New York).
Loftus Case, The, PCIJ, Series A, No 10.
Marcos v Federal Dept of Police (1990) 102 ILR 198, Swiss Fed Trib.
Persinger v Islamic Republic of Iran (1984) 729 F 2d 835, US Ct of Apps (DC Cir).
Piracy Jure Gentium, Re [1934] AC 586, [1934] All ER Rep 506, PC.
Princz v Federal Republic of Germany (1994) 26 F 3d 1166, US Ct of Apps (DC Cir).
Prosecutor v Anto Furundzija (10 December 1998, unreported), Int Trib.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International and ors intervening) [1998] 4 All ER 897, [1998] 3 WLR 1456, HL.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577, [1998] 2 WLR 272, HL.
R v Sansom [1991] 2 All ER 145, [1991] 2 QB 130, [1991] 2 WLR 366, CA.
Rahimtoola v The Nizam of Hyderabad [1957] 3 All ER 441, [1958] AC 379, [1957] 3 WLR 884, HL.
Republic of Ireland v UK (1978) 2 EHRR 25, ECt HR.
Saltany v Reagan (1988) 702 F Supp 319, US District Ct (DC); *affd* (1992) 960 F 2d 1060, US Ct of Apps (DC Cir).
Sampson v Federal Republic of Germany (1997) 975 F Supp 1108, US District Ct (ND Ill).
Schooner Exchange v McFaddon (1812) 11 US (7 Cranch) 116, US SC.
Siderman de Blake v Argentina (1992) 965 F 2d 699, US Ct of Apps (9th Cir).
Smith v Libya (1995) 886 F Supp 306, US District Ct (ED NY); *affd* (1996) 101 F 3d 239, US Ct of Apps (2nd Cir).
Société Jean Dessès v Prince Farouk (1963) 65 ILR 37, Tribunal de grande instance of the Seine.
Liangsiriprasert v US Government [1990] 2 All ER 866, [1991] 1 AC 225, [1990] 3 WLR 606, PC.
Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.
Underhill v Hernandez (1897) 168 US 250, US SC.
US v Noriega (1990) 746 F Supp 1506, US District Ct (SD of Florida).
US v Noriega (1997) 117 F 3d 1206, US Ct of Apps (11th Cir).

Appeal

The Commissioner of Police of the Metropolis and the Spanish government appealed with leave from the decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill CJ, Collins and Richards JJ) ([1998] All ER (D) 509) delivered on 28 October 1998 allowing an application by Senator Augusto Pinochet Ugarte for judicial review by way of an order of certiorari to quash provisional warrants issued for his arrest under s 8(1) of the Extradition Act 1989. The Divisional Court certified that a point of law of general public importance was involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state, and ordered that the applicant was not to be released from custody pending an appeal to the House of Lords. On 25 November 1988 the appeal was allowed ([1998] 4 All ER 897), but on 15 January 1999 the House of Lords set that decision aside and ordered the matter to be reheard ([1999] 1 All ER 577). Amnesty International and the Republic of Chile applied for and were granted leave to intervene in the proceedings before the House. Leave was also granted to Human Rights Watch to present written submissions. The facts are set out in the opinion of Lord Browne-Wilkinson.

Alun Jones QC, Christopher Greenwood, James Lewis and *Campaspe Lloyd-Jacob* (instructed by the *Crown Prosecution Service*, International Divison) for the Commissioner of Police and the government of Spain.

Clive Nicholls QC, Clare Montgomery QC, Helen Malcolm, James Cameron and *Julian Knowles* (instructed by *Kingsley Napley*) for Senator Pinochet.

David Lloyd Jones (instructed by the *Treasury Solicitor*) as amicus curiae.

Ian Brownlie QC, Peter Duffy QC, Michael Fordham and *David Scorey* (instructed by *Bindmans*) for Amnesty International.

Lawrence Collins QC of *Herbert Smith* for the Republic of Chile.

Their Lordships took time for consideration.

24 March 1999. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, as is well known, this case concerns an attempt by the government of Spain to extradite Senator Pinochet from this country to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was head of state in Chile. The interaction between the various legal issues which arise is complex. I will therefore seek, first, to give a short account of the legal principles which are in play in order that my exposition of the facts will be more intelligible.

Outline of the law

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an 'extradition crime' is now contained in the Extradition Act 1989. That Act defines what constitutes an 'extradition crime'. For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593). The obligations placed on the United Kingdom by that convention (and on the other 110 or more signatory states who have adopted the convention) were incorporated into the law of the United Kingdom by s 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention 'all' torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before s 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that s 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be

a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*. If, on the other hand, the double criminality rule only requires the conduct to be criminal under UK law *at the date of extradition* the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

In these circumstances, the first question that has to be answered is whether or not the definition of an 'extradition crime' in the 1989 Act requires the conduct to be criminal under UK law at the date of commission or only at the date of extradition.

This question, although raised, was not decided in the Divisional Court. At the first hearing in this House it was apparently conceded that all the matters charged against Senator Pinochet were extradition crimes. It was only during the hearing before your Lordships that the importance of the point became fully apparent. As will appear, in my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case—is a former head of state entitled to sovereign immunity from arrest or prosecution in the UK for acts of torture—applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes. But first I must state shortly the relevant facts.

The facts

On 11 September 1973 a right-wing coup evicted the left-wing regime of President Allende. The coup was led by a military junta, of whom Senator (then General) Pinochet was the leader. At some stage he became head of state. The Pinochet regime remained in power until 11 March 1990 when Senator Pinochet resigned.

There is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals, all on a large scale. Although it is not alleged that Senator Pinochet himself committed any of those acts, it is alleged that they were done in pursuance of a conspiracy to which he was a party, at his instigation and with his knowledge. He denies these allegations. None of the conduct alleged was committed by or against citizens of the United Kingdom or in the United Kingdom.

In 1998 Senator Pinochet came to the United Kingdom for medical treatment. The judicial authorities in Spain sought to extradite him in order to stand trial in Spain on a large number of charges. Some of those charges had links with Spain. But most of the charges had no connection with Spain. The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all

of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasise too strongly that that is no concern of your Lordships. Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.

On 16 October 1998 an international warrant for the arrest of Senator Pinochet was issued in Spain. On the same day, a magistrate in London issued a provisional warrant (the first warrant) under s 8 of the Extradition Act 1989. He was arrested in a London hospital on 17 October 1998. On 18 October the Spanish authorities issued a second international warrant. A further provisional warrant (the second warrant) was issued by the magistrate at Bow Street Magistrates' Court on 22 October 1998 accusing Senator Pinochet of:

> '… Between 1st January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties—
>
> (2) Between the 1st day of January 1988 and 31.12.92 being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties.
>
> (3) Between the 1st day of January 1982 and 31st January 1992, he detained other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages
>
> (4) Between the 1st day of January 1982 and 31st January 1992, conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages.
>
> Between January 1976 and December 1992 conspired together with persons unknown to commit murder in a convention country …'

Senator Pinochet started proceedings for habeas corpus and for leave to move for judicial review of both the first and the second provisional warrants. Those proceedings came before the Divisional Court (Lord Bingham of Cornhill CJ, Collins and Richards JJ) which on 28 October 1998 quashed both warrants. Nothing turns on the first warrant which was quashed since no appeal was brought to this House. The grounds on which the Divisional Court quashed the second warrant were that Senator Pinochet (as former head of state) was entitled to state immunity in respect of the acts with which he was charged. However, it had also been argued before the Divisional Court that certain of the crimes alleged in the second warrant were not 'extradition crimes' within the meaning of the 1989 Act because they were not crimes under UK law at the date they were committed. Whilst not determining this point directly, Lord Bingham CJ held that, in order to be an extradition crime, it was not necessary that the conduct

should be criminal at the date of the conduct relied upon but only at the date of request for extradition.

The Crown Prosecution Service (acting on behalf of the government of Spain) appealed to this House with the leave of the Divisional Court. The Divisional Court certified the point of law of general importance as being: '… the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.' Before the appeal came on for hearing in this House for the first time, on 4 November 1998 the government of Spain submitted a formal request for extradition which greatly expanded the list of crimes alleged in the second provisional warrant so as to allege a widespread conspiracy to take over the government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, such conduct taking place primarily in Chile but also elsewhere.

The appeal first came on for hearing before this House between 4 and 12 November 1998. The committee heard submissions by counsel for the Crown Prosecution Service as appellants (on behalf of the government of Spain), Senator Pinochet, Amnesty International as interveners and an independent amicus curiae. Written submissions were also entertained from Human Rights Watch. That committee entertained argument based on the extended scope of the case as put forward in the request for extradition. It is not entirely clear to what extent the Committee heard submissions as to whether all or some of those charges constituted 'extradition crimes'. There is some suggestion in the judgments that the point was conceded. Certainly, if the matter was argued at all it played a very minor role in that first hearing. Judgment was given on 25 November 1998 (see [1998] 4 All ER 897, [1998] 3 WLR 1456). The appeal was allowed by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann, Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) on the grounds that Senator Pinochet was not entitled to immunity in relation to crimes under international law. On 15 January 1999 that judgment of the House was set aside on the grounds that the committee was not properly constituted (see [1999] 1 All ER 577, [1999] 2 WLR 272). The appeal came on again for rehearing on 18 January 1999 before your Lordships. In the meantime the position had changed yet again. First, the Home Secretary had issued to the magistrate authority to proceed under s 7 of the 1989 Act. In deciding to permit the extradition to Spain to go ahead he relied in part on the decision of this House at the first hearing that Senator Pinochet was not entitled to immunity. He did not authorise the extradition proceedings to go ahead on the charge of genocide: accordingly no further arguments were addressed to us on the charge of genocide which has dropped out of the case.

Secondly, the Republic of Chile applied to intervene as a party. Up to this point Chile had been urging that immunity should be afforded to Senator Pinochet, but it now wished to be joined as a party. Any immunity precluding criminal charges against Senator Pinochet is the immunity not of Senator Pinochet but of the Republic of Chile. Leave to intervene was therefore given to the Republic of Chile. The same amicus, Mr Lloyd Jones, was heard as at the first hearing as were counsel for Amnesty International. Written representations were again put in on behalf of Human Rights Watch.

Thirdly, the ambit of the charges against Senator Pinochet had widened yet again. Spain had put in further particulars of the charges which they wished to advance. In order to try to bring some order to the proceedings, Mr Alun Jones QC,

for the Crown Prosecution Service, prepared a schedule of the 32 UK criminal charges which correspond to the allegations made against Senator Pinochet under Spanish law, save that the genocide charges are omitted. The charges in that schedule are fully analysed and considered in the speech of my noble and learned friend, Lord Hope of Craighead who summarises the charges as follows: Charges 1, 2 and 5: conspiracy to torture between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990. Charge 3: conspiracy to take hostages between 1 August 1973 and 1 January 1990. Charge 4: conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990. Charges 6 and 8: torture between 1 August 1973 and 8 August 1973 and on 11 September 1973. Charges 9 and 12: conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975. Charges 10 and 11: attempted murder in Italy on 6 October 1975. Charges 13–29; and 31–32: torture on various occasions between 11 September 1973 and May 1977. Charge 30: torture on 24 June 1989.

I turn then to consider which of those charges are extradition crimes.

Extradition crimes

As I understand the position, at the first hearing in the House of Lords the Crown Prosecution Service did not seek to rely on any conduct of Senator Pinochet occurring before 11 September 1973 (the date on which the coup occurred) or after 11 March 1990 (the date when Senator Pinochet retired as head of state). Accordingly, as the case was then presented, if Senator Pinochet was entitled to immunity such immunity covered the whole period of the alleged crimes. At the second hearing before your Lordships, however, the Crown Prosecution Service extended the period during which the crimes were said to have been committed: for example, see charges 1 and 4 where the conspiracies are said to have started on 1 January 1972, ie at a time before Senator Pinochet was head of state and therefore could be entitled to immunity. In consequence at the second hearing counsel for Senator Pinochet revived the submission that certain of the charges, in particular those relating to torture and conspiracy to torture, were not 'extradition crimes' because *at the time the acts were done* the acts were not criminal under the law of the United Kingdom. Once raised, this point could not be confined simply to the period (if any) before Senator Pinochet became head of state. If the double criminality rule requires it to be shown that at the date of the conduct such conduct would have been criminal under the law of the United Kingdom, any charge based on torture or conspiracy to torture occurring before 29 September 1988 (when s 134 of the 1988 Act came into force) could not be an 'extradition crime' and therefore could not in any event found an extradition order against Senator Pinochet.

Under s 1(1) of the 1989 Act a person who is accused of an 'extradition crime' may be arrested and returned to the state which has requested extradition. Section 2 defines 'extradition crime' so far as relevant as follows:

> '(1) In this Act, except in Schedule 1, "extradition crime" means—(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony 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, Commonwealth country or colony, is so punishable under that law; (b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is

punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies—(i) the condition specified in subsection (2) below; or (ii) all the conditions specified in subsection (3) below.

(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.

(3) The conditions mentioned in subsection (1)(b)(ii) above are—(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender; (b) that the conduct constituting the offence occurred outside the United Kingdom; and (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.'

The question is whether the references to conduct 'which, if it occurred in the United Kingdom, would constitute an offence' in sub-ss 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition (the request date) or the date of the actual conduct (the conduct date). In the Divisional Court, Lord Bingham CJ held that the words required the acts to be criminal only at the request date. He said:

> 'I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in s 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise s 2(1)(a) would have referred to conduct which would at the relevant time "have constituted" an offence, and s 2(3)(c) would have said "would have constituted". I therefore reject this argument.'

Lord Lloyd (who was the only member of the committee to express a view on this point at the first hearing) took the same view. He said ([1998] 4 All ER 897 at 921, [1998] 3 WLR 1456 at 1481):

> 'But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of s 2 of the 1989 Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.' (Lord Lloyd's emphasis.)

My Lords, if the words of s 2 are construed in isolation there is room for two possible views. I agree with Lord Bingham CJ and Lord Lloyd that, if read in isolation, the words 'if it occurred … would constitute' read more easily as a reference to a hypothetical event happening now, ie at the request date, than to a past hypothetical event, ie at the conduct date. But in my judgment the right construction is not clear. The word 'it' in the phrase 'if it occurred' is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be 'would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom'. The answer to that question would depend upon the United Kingdom law at that date.

But of course it is not correct to construe these words in isolation and your Lordships had the advantage of submissions which strongly indicate that the relevant date is the conduct date. The starting point is that the 1989 Act regulates at least three types of extradition.

First, extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the European Convention on Extradition 1957 (the Extradition Convention) (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762). In this class of case (which is not the present one) the procedure under Pt III of the 1989 Act requires the extradition request to be accompanied by evidence sufficient to justify arrest under the 1989 Act: s 7(2)(b). The Secretary of State then issues his authority to proceed which has to specify the offences under UK law which 'would be constituted by equivalent conduct in the United Kingdom': s 7(5). Under s 8 the magistrate is given power to issue a warrant of arrest if he is supplied with such evidence 'as would in his opinion justify the issue of a warrant for the arrest of a person accused': s 8(3). The committal court then has to consider, amongst other things, whether 'the evidence would be sufficient to warrant his trial if the extradition crime *had* taken place within jurisdiction of the court': s 9(8). In my judgment these provisions clearly indicate that the conduct must be criminal under the law of the United Kingdom at the conduct date and not only at the request date. The whole process of arrest and committal leads to a position where under s 9(8) the magistrate has to be satisfied that, under the law of the United Kingdom, if the conduct '*had* occurred' the evidence was sufficient to warrant his trial. This is a clear reference to the position at the date when the conduct in fact occurred. Moreover, it is in my judgment compelling that the evidence which the magistrate has to consider has to be sufficient 'to warrant his trial'. Here what is under consideration is not an abstract concept whether a hypothetical case is criminal but of a hard practical matter—would this case in relation to this defendant be properly committed for trial if the conduct in question had happened in the United Kingdom? The answer to that question must be No unless at that date the conduct was criminal under the law of the United Kingdom.

The second class of case dealt with by the 1989 Act is where extradition is sought by a foreign state which, like Spain, is a party to the Extradition Convention. The requirements applicable in such a case are the same as those I have dealt with above in relation to the first class of case save that the requesting state does not have to present evidence to provide the basis on which the magistrate can make his order to commit. The requesting state merely supplies the information. But this provides no ground for distinguishing convention cases from the first class of case. The double criminality requirement must be the same in both classes of case.

Finally, the third class of case consists of those cases where there is an Order in Council in force under the Extradition Act 1870. In such cases, the procedure is not regulated by Pt III of the 1989 Act but by Sch 1 to the 1989 Act: see s 1(3). Schedule 1 contains, in effect, the relevant provisions of the 1870 Act, which subject to substantial amendments had been in force down to the passing of the 1989 Act. The scheme of the 1870 Act was to define 'extradition crime' as meaning—'a crime which, if committed in England … would be one of the crimes described in the first schedule to this Act': s 26. Schedule 1 to the 1870 Act contains a list of crimes and is headed: 'The following list of crimes is to be construed according to the law existing in England … *at the date of the alleged crime*, whether by common law or by statute made before or after the passing of this Act …' It is therefore quite clear from the words I have emphasised that under

the 1870 Act the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date. Paragraph 20 of Sch 1 to the 1989 Act provides—

> '… "extradition crime", in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order …'

Therefore in this class of case regulated by Sch 1 to the 1989 Act the same position applies as it formerly did under the 1870 Act, ie the conduct has to be a crime under English law at the conduct date. It would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another. But the case is stronger than that. We were taken through a trawl of the travaux préparatoires relating to the Extradition Convention and the departmental papers leading to the 1989 Act. They were singularly silent as to the relevant date. But they did disclose that there was no discussion as to changing the date on which the criminality under English law was to be demonstrated. It seems to me impossible that the legislature can have intended to change that date from the one which had applied for over a hundred years under the 1870 Act (ie the conduct date) by a side wind and without investigation.

The charges which allege extradition crimes

The consequences of requiring torture to be a crime under UK law at the date the torture was committed are considered in Lord Hope's speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which s 134 came into effect) are not extraditable, ie only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and the single act of torture alleged in charge 30 are extradition crimes relating to torture.

Lord Hope also considers, and I agree, that the only charge relating to hostage-taking (charge 3) does not disclose any offence under the Taking of Hostages Act 1982. The statutory offence consists of taking and detaining a person (the hostage), so as to compel someone who is not the hostage to do or abstain from doing some act: s 1. But the only conduct relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offence. The hostage charges therefore are bad and do not constitute extradition crimes.

Finally, Lord Hope's analysis shows that the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4 are extradition crimes.

I must therefore consider whether, in relation to these two surviving categories of charge, Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth.

The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 war, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27(1946); Cmd 6903), in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (see UN GA Resolution 95(I) (1946)). That affirmation affirmed the principles of international law recognised by the Nuremberg Charter and the judgment of the tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Nuremberg Charter. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see *Oppenheim's International Law* (9th edn, 1992) vol 1, p 996; note 6 to art 18 of the ILC Draft Code of Crimes against the Peace and Security of Mankind; *Prosecutor v Anto Furundzija* (10 December 1998, unreported). Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, UN General Assembly Resolutions 3059 (1973), 3452 and 3453 (1975); Statutes of the International Criminal Tribunals for the Former Yugoslavia (art 5) (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) and Rwanda (art 3) (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, ie one of those rules of international law which have a particular status. In *Furundzija*'s case at para 153, the tribunal said:

> 'Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force … Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this

prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.' (See also the cases cited in note 170 to the *Furundzija* case.)

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468, 776 F 2d 571.

It was suggested by Miss Montgomery QC, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Demjanjuk*'s case and *A-G of Israel v Eichmann* (1961) 36 ILR 5. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal—the torturer—could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the Torture Convention and the draftsmen of its first draft) say in their *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 131 that it was 'an essential purpose [of the convention] to ensure that a torturer does not escape the consequences of his acts by going to another country'.

The Torture Convention

Article 1 of the convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes: '…when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and art 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of

superior orders. Under art 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction, (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under art 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in art 5(1) and to indicate whether it intends to exercise jurisdiction. Under art 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in art 5(1), submit him to its authorities for the purpose of prosecution. Under art 8(1) torture is to be treated as an extraditable offence and under art 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in art 5(1).

Who is an 'official' for the purposes of the Torture Convention?

The first question on the convention is to decide whether acts done by a head of state are done by 'a public official or a person acting in an official capacity' within the meaning of art 1. The same question arises under s 134 of the 1988 Act. The answer to both questions must be the same. In his judgment at the first hearing Lord Slynn ([1998] 4 All ER 897 at 916–917, [1998] 3 WLR 1456 at 1476–1477) held that a head of state was neither a public official nor a person acting in an official capacity within the meaning of art 1: he pointed out that there are a number of international conventions (for example the Statute of the Tribunal for the Former Yugoslavia and the Statute of the Tribunal for Rwanda) which refer specifically to heads of state when they intend to render them liable. Lord Lloyd apparently did not agree with Lord Slynn on this point since he thought that a head of state who was a torturer could be prosecuted in his own country, a view which could not be correct unless such head of state had conducted himself as a public official or in an official capacity.

It became clear during the argument that both the Republic of Chile and Senator Pinochet accepted that the acts alleged against Senator Pinochet, if proved, were acts done by a public official or person acting in an official capacity within the meaning of art 1. In my judgment these concessions were correctly made. Unless a head of state authorising or promoting torture is an official or acting in an official capacity within art 1, then he would not be guilty of the international crime of torture even within his own state. That plainly cannot have been the intention. In my judgment it would run completely contrary to the intention of the convention if there was anybody who could be exempt from guilt. The crucial question is not whether Senator Pinochet falls within the definition in art 1: he plainly does. The question is whether, even so, he is procedurally immune from process. To my mind the fact that a head of state can be guilty of the crime casts little, if any, light on the question whether he is immune from prosecution for that crime in a foreign state.

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in art 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the art 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the convention was to introduce the principle aut dedere aut punire—either you extradite or you punish: Burgers and Danelius p 131.

Throughout the negotiation of the convention certain countries wished to make the exercise of jurisdiction under art 5(2) dependent upon the state assuming jurisdiction having refused extradition to an art 5(1) state. However, at a session in 1984 all objections to the principle of aut dedere aut punire were withdrawn: 'The inclusion of universal jurisdiction in the draft convention was no longer opposed by any delegation': Working Group on the Draft Convention UN Doc E/CN 4/1984/72, para 26. If there is no prosecution by, or extradition to, an art 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under art 6) must exercise the jurisdiction under art 5(2) by prosecuting him under art 7(1).

I gather the following important points from the Torture Convention: (1) torture within the meaning of the convention can only be committed by 'a public official or other person acting in an official capacity,' but these words include a head of state. A single act of official torture is 'torture' within the convention; (2) superior orders provide no defence; (3) if the states with the most obvious jurisdiction (the art 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i e there is universal jurisdiction; (4) there is no express provision dealing with state immunity of heads of state, ambassadors or other officials. (5) Since Chile, Spain and the United Kingdom are all parties to the convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988 it will be the first time, so far as counsel have discovered, when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore 'contractually' bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they

relate to matters done for the benefit of the state. Such immunity is said to be granted ratione personae.

What then when the ambassador leaves his post or the head of state is deposed? The position of the ambassador is covered by the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). After providing for immunity from arrest (art 29) and from criminal and civil jurisdiction (art 31), art 39(1) provides that the ambassador's privileges shall be enjoyed from the moment he takes up post; and sub-s 2(2) provides:

> 'When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission immunity shall continue to subsist.'

The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed ratione personae while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his *official* acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under art 39(2) the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, ratione materiae, is to be contrasted with the former immunity ratione personae which gave complete immunity to all activities whether public or private.

In my judgment at common law a former head of state enjoys similar immunities, ratione materiae, once he ceases to be head of state. He too loses immunity ratione personae on ceasing to be head of state: see Sir Arthur Watts QC 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 88 and the cases there cited. He can be sued on his private obligations: *Ex King Farouk of Egypt v Christian Dior, SARL* (1957) 24 ILR 228 and *Jimenez v Aristeguieta* (1962) 311 F 2d 547. As ex-head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch v Baez* (1876) 7 Hun 596. Thus, at common law, the position of the former ambassador and the former head of state appears to be much the same: both enjoy immunity for acts done in performance of their respective functions whilst in office.

I have belaboured this point because there is a strange feature of the United Kingdom law which I must mention shortly. The State Immunity Act 1978 modifies the traditional complete immunity normally afforded by the common law in claims for damages against foreign states. Such modifications are contained in Pt I of the 1978 Act. Section 16(1) provides that nothing in Pt I of the 1978 Act is to apply to criminal proceedings. Therefore Pt I has no direct application to the present case. However, Pt III of the 1978 Act contains s 20(1), which provides: 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State … as it applies to a head of a diplomatic mission …'

The correct way in which to apply art 39(2) of the Vienna Convention to a former head of state is baffling. To what 'functions' is one to have regard? When do they cease since the former head of state almost certainly never arrives in this country let alone leaves it? Is a former head of state's immunity limited to the exercise of the functions of a member of the mission, or is that again something which is subject to 'necessary modification'? It is hard to resist the suspicion that something has gone wrong. A search was done on the parliamentary history of the section. From this it emerged that the original s 20(1)(a) read: '… a sovereign or other head of State *who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom*.' On that basis the section would have been intelligible. However it was changed by a government amendment the mover of which said that the clause as introduced 'leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom'; he said that the amendment was to ensure that heads of state would be treated like heads of diplomatic missions 'irrespective of presence in the United Kingdom'. The parliamentary history, therefore, discloses no clear indication of what was intended. However, in my judgment it does not matter unduly since Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law. Accordingly, 'the necessary modifications' which need to be made will produce the result that a former head of state has immunity in relation to acts done as part of his official functions when head of state. Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity ratione materiae in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is 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. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function. This is the view taken by Sir Arthur Watts, who said:

> 'While generally international law … does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community. States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law. Problems in this area—such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this

> purpose—have not affected the general acceptance of the principle of individual responsibility for international criminal conduct.' (Sir Arthur Watt's emphasis.) (See (1994) 247 Recueil des Cours p 82.)

Later, he said (p 84):

> 'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.'

It can be objected that Sir Arthur was looking at those cases where the international community has established an international tribunal in relation to which the regulating document *expressly* makes the head of state subject to the tribunal's jurisdiction: see, for example, the Nuremberg Charter art 7; the Statute of the Tribunal for the Former Yugoslavia; the Statute of the Tribunal for Rwanda and the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court). It is true that in these cases it is expressly said that the head of state or former head of state is subject to the court's jurisdiction. But those are cases in which a new court with no existing jurisdiction is being established. The jurisdiction being established by the Torture Convention and the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893) is one where existing domestic courts of all the countries are being authorised and required to take jurisdiction internationally. The question is whether, in this new type of jurisdiction, the only possible view is that those made subject to the jurisdiction of each of the state courts of the world in relation to torture are not entitled to claim immunity.

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: art 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed 'by or with the acquiesence of a public official or other person acting in an official capacity.' As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for

example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988 he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the convention) even if such torture were committed in Chile.

As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

In issuing to the magistrate an authority to proceed under s 7 of the 1989 Act, the Secretary of State proceeded on the basis that the whole range of torture charges and murder charges against Senator Pinochet would be the subject matter of the extradition proceedings. Your Lordships' decision excluding from consideration a very large number of those charges constitutes a substantial change in the circumstances. This will obviously require the Secretary of State to reconsider his decision under s 7 in the light of the changed circumstances.

LORD GOFF OF CHIEVELEY. My Lords,

I. INTRODUCTION

The background to the present appeal is set out, with economy and lucidity, in the opinion of my noble and learned friend Lord Browne-Wilkinson, which I have had the opportunity of reading in draft. I gratefully adopt his account and, to keep my own opinion as short as reasonably possible, I do not propose to repeat it. The central question in the appeal is whether Senator Pinochet is entitled as former head of state to the benefit of state immunity ratione materiae in respect of the charges advanced against him, as set out in the schedule of charges prepared by Mr Alun Jones QC on behalf of the government of Spain.

II. THE PRINCIPAL ISSUE ARGUED ON THE APPEAL

Before the Divisional Court, and again before the first Appellate Committee, it was argued on behalf of the government of Spain that Senator Pinochet was not entitled to the benefit of state immunity basically on two grounds, viz first, that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the international law principle of state immunity; and second, that the crimes with which he is charged are crimes against international law, in respect of which state immunity is not available. Both arguments were rejected by the Divisional Court, but a majority of the first Appellate Committee accepted the second argument. The leading opinion was delivered by Lord Nicholls of Birkenhead, whose reasoning was of great simplicity. He said:

> 'In my view, art 39(2) of the Vienna Convention, as modified and applied to former heads of state by s 20 of the 1978 Act, is apt to confer immunity in respect of … functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution. This formulation, and this test for determining what are the functions of a head of state for this purpose, are sound in principle and were not the subject of controversy before your Lordships. International law does not require the grant of any wider immunity. And 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. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.' (See [1998] 4 All ER 897 at 939–940, [1998] 3 WLR 1456 at 1500.)

Lord Hoffmann agreed, and Lord Steyn delivered a concurring opinion to the same effect.

Lord Slynn of Hadley and Lord Lloyd of Berwick, however, delivered substantial dissenting opinions. In particular, Lord Slynn considered in detail 'the developments in international law relating to what are called international crimes' (see [1998] 4 All ER 897 at 911–915, [1998] 3 WLR 1456 at 1471–1475). On the basis of the material so reviewed by him, he concluded:

> 'It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any jus cogens in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden.' (See [1998] 4 All ER 897 at 913, [1998] 3 WLR 1456 at 1473.)

He went on to consider whether international law now recognises that some crimes, and in particular crimes against humanity, are outwith the protection of

head of state immunity. He referred to the relevant material, and observed ([1998] 4 All ER 897 at 914, [1998] 3 WLR 1456 at 1474):

> '… except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question as to whether otherwise existing immunities were taken away. Nor did they always specifically recognise the jurisdiction of, or confer jurisdiction on, national courts to try such crimes.'

He then proceeded to examine the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593), the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421) and the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893), and concluded that none of them had removed the long established immunity of former heads of state.

I have no doubt that, in order to consider the validity of the argument advanced on behalf of the government of Spain on this point, it was necessary to carry out the exercise so performed by Lord Slynn; and I am therefore unable, with all respect, to accept the simple approach of the majority of the first Appellate Committee. Furthermore, I wish to record my respectful agreement with the analysis, and conclusions, of Lord Slynn set out in the passages from his opinion to which I have referred. I intend no disrespect to the detailed arguments advanced before your Lordships on behalf of the appellants in this matter, when I say that in my opinion they did not succeed in shaking the reasoning, or conclusions, of Lord Slynn which I have set out above. However, having regard to (1) the extraordinary impact on this case of the double criminality rule, to which I will refer in a moment, and (2) the fact that a majority of your Lordships have formed the view that, in respect of the very few charges (of torture or conspiracy to torture) which survive the impact of the double criminality rule, the effect of the Torture Convention is that in any event Senator Pinochet is not entitled to the benefit of state immunity, the present issue has ceased to have any direct bearing on the outcome of the case. In these circumstances, I do not consider it necessary or appropriate to burden this opinion with a detailed consideration of the arguments addressed to the Appellate Committee on this issue. However, I shall return to the point when I come to consider the topic of state immunity later in this opinion.

III. THE DOUBLE CRIMINALITY RULE

During the course of the hearing before your Lordships, two new issues emerged or acquired an importance which they had not previously enjoyed. The first of these is the issue of double criminality, to which I now turn.

At the hearing before your Lordships Mr Alun Jones, for the appellants, sought to extend backwards the period during which the crimes charged were alleged to have been committed, with the effect that some of those crimes could be said to have taken place before the coup following which Senator Pinochet came into power. The purpose was obviously to enable the appellants to assert that, in respect of these crimes, no immunity as former head of state was available to him. As a result Miss Clare Montgomery QC, for Senator Pinochet, revived the submission that certain of the charges related to crimes which were not extradition crimes because they were not, at the time they were alleged to have been committed, criminal under the law of this country, thus offending against

the double criminality rule. Mr Alun Jones replied to this argument but, for the reasons given by my noble and learned friend Lord Browne-Wilkinson, with which I am respectfully in complete agreement, I too am satisfied that Miss Montgomery's submission was well founded.

The appellants did not, however, analyse the consequences of this argument, if successful, in order to identify the charges against Senator Pinochet which would survive the application of the double criminality rule. That substantial task has, however, been undertaken by my noble and learned friend, Lord Hope of Craighead, to whom your Lordships owe a debt of gratitude. His analysis I respectfully accept. As he truly says, the impact upon the present case is profound. The great mass of the offences with which Senator Pinochet is charged must be excluded, as must also be the charge of hostage-taking which does not disclose an offence under the Taking of Hostages Act 1982. The principal charges which survive are those which relate to acts of torture alleged to have been committed, or conspiracies to torture which are alleged to have been active, after 29 September 1988 the date on which s 134 of the Criminal Justice Act 1988 (which gave effect to the Torture Convention in this country) came into effect. These are: charge 30, which relates to a single act of torture alleged to have been committed on 24 June 1989; and charges 2 and 4, which allege conspiracies to torture between 1 August 1973 and 1 January 1972 respectively, and 1 January 1990 in so far as they relate to the relatively brief period between 29 September 1988 and 1 January 1990. In addition, however, the charge of conspiracy to commit murder in Spain (charge 9), and such conspiracies to commit murder in Spain as can be shown to form part of the allegations in charge 4, also survive.

IV. STATE IMMUNITY

Like my noble and learned friend Lord Browne-Wilkinson, I regard the principles of state immunity applicable in the case of heads of state and former heads of state as being relatively non-controversial, though the legislation on which they are now based, the State Immunity Act 1978, is in a strange form which can only be explained by the legislative history of the Act.

There can be no doubt, in my opinion, that the Act is intended to provide the sole source of English law on this topic. This is because the long title to the Act provides (inter alia) that the Act is 'to make *new* provision with respect to the immunities and privileges of heads of State'. Since in the present case we are concerned with immunity from criminal process, we can ignore Pt I (which does not apply to criminal proceedings) and turn straight to Pt III, and in particular to s 20. Section 20(1) provides as follows: 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State … as it applies to the head of a diplomatic mission …' The function of the Diplomatic Privileges Act 1964 is to give effect to the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) in this country, the relevant articles of which are scheduled to the Act. The problem is, of course, how to identify the 'necessary modifications' when applying the Vienna Convention to heads of state. The nature of the problem is apparent when we turn to art 39 of the convention, which provides:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his

appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

At first this seems very strange, when applied to a head of state. However, the scales fall from our eyes when we discover from the legislative history of the Act that it was originally intended to apply only to a sovereign or other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country—hence the form of the long title, which was amended to apply simply to heads of state. We have, therefore, to be robust in applying the Vienna Convention to heads of state 'with the necessary modifications'. In the case of a head of state, there can be no question of tying art 39(1) or (2) to the territory of the receiving state, as was suggested on behalf of the appellants. Once that is realised, there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set: see *Alcom Ltd v Republic of Colombia* (*Barclays Bank plc, garnishees*) [1984] 2 All ER 6 at 8, [1984] AC 580 at 597 per Lord Diplock. The effect is that a head of state will, under the statute as at international law, enjoy state immunity ratione personae so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity ratione materiae 'in respect of acts performed [by him] in the exercise of his functions [as head of state]', the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority' (see Sir Arthur Watts QC 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 56). In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not.

There can be no doubt that the immunity of a head of state, whether ratione personae or ratione materiae, applies to both civil and criminal proceedings. This is because the immunity applies to any form of legal process. The principle of state immunity is expressed in the Latin maxim par in parem non habet imperium, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state. That the principle applies in criminal proceedings is reflected in the 1978 Act, in that there is no equivalent provision in Pt III of the 1978 Act to s 16(4) which provides that Pt I does not apply to criminal proceedings.

However, a question arises whether any limit is placed on the immunity in respect of criminal offences. Obviously the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character. It follows, in my opinion, that the mere fact that the crime in question is torture does not exclude state immunity. It has however been stated by Sir Arthur Watts (at pp 81–84) that a head of state may be personally

responsible: '… for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community.' He then referred to a number of instruments, including the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27(1946); Cmd 6903), the Charter of the Tokyo Tribunal (1948), the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (provisionally adopted in 1988), and the Statute of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)), all of which expressly provide for the responsibility of heads of state, apart from the Charter of the Tokyo Tribunal which contains a similar provision regarding the official position of the accused. He concluded (p 84) that: 'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.'

So far as torture is concerned, however, there are two points to be made. The first is that it is evident from this passage that Sir Arthur is referring not just to a specific crime as such, but to a crime which offends against the public order of the international community, for which a head of state may be *internationally* (his emphasis) accountable. The instruments cited by him show that he is concerned here with crimes against peace, war crimes and crimes against humanity. Originally these were limited to crimes committed in the context of armed conflict, as in the case of the Nuremberg and Tokyo Charters, and still in the case of the Statute of the Tribunal for the Former Yugoslavia, though there it is provided that the conflict can be international or internal in character. Subsequently, the context has been widened to include (inter alia) torture 'when committed as part of a widespread or systematic attack against a civilian population' on specified grounds. A provision to this effect appeared in the International Law Commission's Draft Code of Crimes of 1996 (which was, I understand, provisionally adopted in 1988), and also appeared in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)), and in the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court); and see also the view expressed obiter by the US Court of Appeals in *Siderman de Blake v Argentina* (1992) 965 F 2d 699 at 716. I should add that these developments were foreshadowed in the International Law Commission's Draft Code of Crimes of 1954; but this was not adopted, and there followed a long gap of about 35 years before the developments in the 1990s to which I have referred. It follows that these provisions are not capable of evidencing any settled practice in respect of torture outside the context of armed conflict until well after 1989 which is the latest date with which we are concerned in the present case. The second point is that these instruments are all concerned

with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts. This supports the conclusion of Lord Slynn ([1998] 4 All ER 897 at 914, [1998] 3 WLR 1456 at 1474) that: '… except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question whether otherwise existing immunities were taken away …', with which I have already expressed my respectful agreement.

It follows that, if state immunity in respect of crimes of torture has been excluded at all in the present case, this can only have been done by the Torture Convention itself.

V. TORTURE CONVENTION

I turn now to the Torture Convention, which lies at the heart of the present case. This is concerned with the jurisdiction of national courts, but its 'essential purpose' is to ensure that a torturer does not escape the consequences of his act by going to another country: see Burgers (the chairman-rapporteur of the convention) and Danelius *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 131. The articles of the convention proceed in a logical order. Article 1 contains a very broad definition of torture. For present purposes, it is important that torture has to be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Article 2 imposes an obligation on each state party to take effective measures to prevent acts of torture in any territory under its jurisdiction. Article 3 precludes refoulement of persons to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Article 4 provides for the criminalisation of torture by each state party. Article 5 is concerned with jurisdiction. Each state party is required to establish its jurisdiction over the offences referred to in art 4 in the following cases: '(a) when the offences are committed in any territory under its jurisdiction … (b) when the alleged offender is a national of that state; (c) when the victim is a national of that state if that state considers it appropriate' and also 'over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him'.

Article 7 is concerned with the exercise of jurisdiction. Article 7(1) provides:

> 'The State Party in 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.'

This provision reflects the principle aut dedere aut punire, designed to ensure that torturers do not escape by going to another country.

I wish at this stage to consider briefly the question whether a head of state, if not a public official, is at least a 'person acting in a public capacity' within art 1(1) of the Torture Convention. It was my first reaction that he is not, on the ground that no one would ordinarily describe a head of state such as a monarch or the president of a republic as a 'public official', and the subsidiary words 'other person acting in a public capacity' appeared to be intended to catch a person who, while not a public official, has fulfilled the role of a public official, for example, on a temporary or ad hoc basis. Miss Montgomery, for Senator Pinochet, submitted that the words were not apt to include a head of state relying in particular on the fact that in a number of earlier conventions heads of state are expressly

mentioned in this context in addition to responsible government officials. However, Dr Collins QC for the Republic of Chile conceded that, in the Torture Convention, heads of state must be regarded as falling within the category of 'other person acting in a public capacity'; and in these circumstances I am content to proceed on that basis. The effect of Dr Collins' concession is that a head of state could be held responsible for torture committed during his term of office, although (as Dr Collins submitted) the state of which he was head would be able to invoke the principle of state immunity, ratione personae or materiae, in proceedings brought against him in another national jurisdiction if it thought right to do so. Accordingly, on the argument now under consideration, the crucial question relates to the availability of state immunity.

It is to be observed that no mention is made of state immunity in the convention. Had it been intended to exclude state immunity, it is reasonable to assume that this would have been the subject either of a separate article, or of a separate paragraph in art 7, introduced to provide for that particular matter. This would have been consistent with the logical framework of the convention, under which separate provision is made for each topic, introduced in logical order.

VI. THE ISSUE WHETHER IMMUNITY RATIONE MATERIAE HAS BEEN EXCLUDED UNDER THE TORTURE CONVENTION

(a) *The argument*

I now come to the second of the two issues which were raised during the hearing of the appeal, viz whether the Torture Convention has the effect that state parties to the convention have agreed to exclude reliance on state immunity ratione materiae in relation to proceedings brought against their public officials, or other persons acting in an official capacity, in respect of torture contrary to the convention. In broad terms I understand the argument to be that, since torture contrary to the convention can only be committed by a public official or other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity ratione materiae, it would be inconsistent with the obligations of state parties under the convention for them to be able to invoke state immunity ratione materiae in cases of torture contrary to the convention. In the case of heads of state this objective could be achieved on the basis that torture contrary to the convention would not be regarded as falling within the functions of a head of state while in office, so that although he would be protected by immunity ratione personae while in office as head of state, no immunity ratione materiae would protect him in respect of allegations of such torture after he ceased to hold office. There can, however, be no doubt that, before the Torture Convention, torture by public officials could be the subject of state immunity. Since therefore exclusion of immunity is said to result from the Torture Convention and there is no express term of the convention to this effect, the argument has, in my opinion, to be formulated as dependent upon an implied term in the convention. It is a matter of comment that, for reasons which will appear in a moment, the proposed implied term has not been precisely formulated; it has not therefore been exposed to that valuable discipline which is always required in the case of terms alleged to be implied in ordinary contracts. In any event, this is a different argument from that which was advanced to your Lordships by the appellants and those supporting them, which was that both torture contrary to the Torture Convention, and hostage-taking contrary to the Taking of Hostages Convention, constituted crimes under international law, and that such crimes cannot be part of the functions of a head of state as a matter of international law.

The argument now under consideration was not advanced before the Divisional Court; nor can it have been advanced before the first Appellate Committee, or it would have been considered by both Lord Slynn and Lord Lloyd in their dissenting opinions. It was not advanced before your Lordships by the appellants and those supporting them, either in their written cases, or in their opening submissions. In fact, it was introduced into the present case as a result of interventions by members of the Appellate Committee in the course of the argument. This they were, of course, fully entitled to do; and subsequently the point was very fairly put both to Miss Montgomery for Senator Pinochet and to Dr Collins for the government of Chile. It was subsequently adopted by Mr Lloyd Jones, the amicus curiae, in his oral submissions to the committee. The appellants, in their written submissions in reply, restricted themselves to submitting that the 'conduct alleged in the present case is not conduct which amounts to official acts performed by the respondent in the exercise of his functions as head of state …': see para 11 of their written submissions. They did not at that stage go so far as to submit that any torture contrary to the Torture Convention would not amount to such an official act. However, when he came to make his final oral submissions on behalf of the appellants, Professor Greenwood, following the lead of Mr Lloyd Jones, and perhaps prompted by observations from the committee to the effect that this was the main point in the case, went beyond his clients' written submissions in reply and submitted that, when an offence of torture is committed by an official within the meaning of s 134 of the 1988 Act and art 1 of the Torture Convention, no immunity ratione materiae can attach in respect of that act.

It is surprising that an important argument of this character, if valid, should previously have been overlooked by the fourteen counsel (including three distinguished Professors of International Law) acting for the appellants, and for Amnesty International and Human Rights Watch which are supporting the appellants in this litigation. The concern thereby induced as to the validity of the argument is reinforced by the fact that it receives no support from the literature on the subject and, on the material before your Lordships, appears never to have been advanced before. At all events, having given the matter the most careful consideration, I am satisfied that it must be rejected as contrary to principle and authority, and indeed contrary to common sense.

(b) *Waiver of immunity by treaty must be express*

On behalf of the government of Chile Dr Collins' first submission was that a state's waiver of its immunity by treaty must always be express. With that submission, I agree.

I turn first to *Oppenheim's International Law* (9th edn, 1992). The question of waiver of state immunity is considered at pp 351–355, from which I quote the following passage:

> 'A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement … A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case.'

It is significant that, in this passage, the only examples given of implied waiver of immunity relate to actual submission by a state to the jurisdiction of a court or

tribunal by instituting or intervening in proceedings, or by taking a step in proceedings.

A similar approach is to be found in the Report of the International Law Commission on the Jurisdictional Immunities of States and their Property reported in Yearbook of the International Law Commission (1991), vol II, Pt 2, in which a fuller exposition of the subject is to be found. Article 7 of the Commission's Draft Articles on this subject is entitled 'Express consent to exercise of jurisdiction'. Article 7(1) provides as follows:

> 'A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case … (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding.'

I turn to the commentary on art 7(1), from which I quote para (8) in full:

> 'In the circumstances under consideration, that is, in the context of the State against which legal proceedings have been brought, there appear to be several recognisable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognisable manner, including by the means provided in article 8 [which is concerned with the effect of participation in a proceeding before a court]. It remains to be seen how consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.'

The two examples then provided of how such consent would be given or expressed are (i) consent given in a written contract, or by a declaration or a written communication in a specific proceeding, and (ii) consent given in advance by international agreement. In respect of the latter, reference is made (in para 10) to such consent being *expressed* in a provision of a treaty concluded by states; there is no reference to such consent being implied.

The general effect of these passages is that, in a treaty concluded between states, consent by a state party to the exercise of jurisdiction against it must, as Dr Collins submitted, be express. In general, moreover, implied consent to the exercise of such jurisdiction is to be regarded only as an added explanation or justification for an otherwise valid and recognised exception, of which the only example given is actual submission to the jurisdiction of the courts of another state.

The decision of the Supreme Court of the United States in *Argentina v Amerada Hess Shipping Corp* (1989) 109 S Ct 683 is consistent with the foregoing approach. In an action brought by a shipowner against the Argentine Republic for the loss of a ship through an attack by aircraft of the Argentine Air Force, the defendant relied upon state immunity. Among other arguments the plaintiff suggested that the defendant had waived its immunity under certain international agreements to which the United States was party. For this purpose, the plaintiff invoked para 1605(a)(1) of the Foreign Sovereign Immunities Act 1976 (28 USSC-1602)

(FSIA), which specifies, as one of a number of exceptions to immunity of foreign states, a case in which the foreign state has waived its immunity either explicitly or by implication. It was the plaintiff's contention that there was an implicit waiver in the relevant international agreements. This submission was tersely rejected by Rehnquist CJ, who delivered the judgment of the court, in the following words (at 693): 'Nor do we see how a foreign state can waive its immunity under para. 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts …' Once again, the emphasis is on the need for an express waiver of immunity in an international agreement. This cannot be explained away as due to the provisions of the United States Act. On the contrary, the Act contemplates the possibility of waiver by implication; but in the context of a treaty the Supreme Court was only prepared to contemplate express waiver.

I turn next to the 1978 Act, the provisions of which are also consistent with the principles which I have already described. In Pt I of the Act (which does not apply to criminal proceedings—see s 16(4)), it is provided by s 1(1) that 'A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' For the present purposes, the two relevant provisions are s 2, concerned with submission to the jurisdiction, and s 9, concerned with submissions to arbitration by an agreement in writing. Section 2(2) recognises that a state may submit to the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the 1978 Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity; but my reading of the Act leads me to understand that such a submission to the jurisdiction is here regarded as an express rather than an implied waiver of immunity or agreement to submit to the jurisdiction. This is consistent with Pt III of the 1978 Act, which by s 20 provides that, subject to the provisions of that section and to any necessary modifications, the 1964 Act shall apply to a sovereign or other head of state. Among the articles of the Vienna Convention so rendered applicable by s 2 of the 1964 Act is art 32 concerned with waiver of immunity, para 2 of which provides that such waiver must always be express, which I read as including an actual submission to the jurisdiction, as well as an express agreement in advance to submit. Once again, there is no provision for an implied agreement.

In the light of the foregoing it appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must, as Dr Collins submitted, always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.

(c) *The functions of public officials and others acting in an official capacity*

However it is, as I understand it, suggested that this well-established principle can be circumvented in the present case on the basis that it is not proposed that state parties to the Torture Convention have agreed to waive their state immunity in proceedings brought in the states of other parties in respect of allegations of torture within the convention. It is rather that, for the purposes of the convention, such torture does not form part of the functions of public officials or others acting in an official capacity including, in particular, a head of state. Moreover since state immunity ratione materiae can only be claimed in respect

of acts done by an official in the exercise of his functions as such, it would follow, for example, that the effect is that a former head of state does not enjoy the benefit of immunity ratione materiae in respect of such torture after he has ceased to hold office.

In my opinion, the principle which I have described cannot be circumvented in this way. I observe first that the meaning of the word 'functions' as used in this context is well established. The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is as true of a serious crime, such as murder or torture, as it is of a lesser crime. As Lord Bingham of Cornhill CJ said in the Divisional Court:

> '… a former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity. If the former sovereign is immune from process in respect of some crimes, where does one draw the line?'

It was in answer to that question that the appellants advanced the theory that one draws the line at crimes which may be called 'international crimes'. If, however, a limit is to be placed on governmental functions so as to exclude from them acts of torture within the Torture Convention, this can only be done by means of an implication arising from the convention itself. Moreover, as I understand it, the only purpose of the proposed implied limitation upon the functions of public officials is to deprive them, or as in the present case a former head of state, of the benefit of state immunity; and in my opinion the policy which requires that such a result can only be achieved in a treaty by express agreement, with the effect that it cannot be so achieved by implication, renders it equally unacceptable that it should be achieved indirectly by means of an implication such as that now proposed.

(d) *An implication must in any event be rejected*

In any event, however, even if it were possible for such a result to be achieved by means of an implied term, there are, in my opinion, strong reasons why any such implication should be rejected.

I recognise that a term may be implied into a treaty, if the circumstances are such that 'the parties must have intended to contract on the basis of the inclusion in the treaty of a provision whose effect can be stated with reasonable precision': see *Oppenheim's International Law*, p 1271, note 4. It would, however, be wrong to assume that a term may be implied into a treaty on the same basis as a term may be implied into an ordinary commercial contract, for example to give the contract business efficacy (as to which see Treitel *The Law of Contract* (9th edn, 1995) pp 185ff). This is because treaties are different in origin, and serve a different purpose. Treaties are the fruit of long negotiation, the purpose being to produce a draft which is acceptable to a number, often a substantial number, of state parties. The negotiation of a treaty may well take a long time, running into years. Draft after draft is produced of individual articles, which are considered in depth by national representatives, and are the subject of detailed comment and consideration. The agreed terms may well be the fruit of 'horse-trading' in order to achieve general agreement, and proposed articles may be amended, or even omitted in whole or in part, to accommodate the wishes or anxieties of some of the negotiating parties. In circumstances such as these, it is the text of the treaty itself which provides the only safe guide to its terms, though reference may be

made, where appropriate, to the travaux préparatoires. But implied terms cannot, except in the most obvious cases, be relied on as binding the state parties who ultimately sign the treaty, who will in all probability include those who were not involved in the preliminary negotiations.

In this connection, however, I wish first to observe that the assumption underlying the present argument, viz that the continued availability of state immunity is inconsistent with the obligations of state parties to the convention, is in my opinion not justified. I have already summarised the principal articles of the convention; and at this stage I need only refer to art 7 which requires that a state party under whose jurisdiction a person alleged to have committed torture is found shall, in the cases contemplated in art 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. I wish to make certain observations on these provisions. First of all, in the majority of cases which may arise under the convention, no question of state immunity will arise at all, because the public official concerned is likely to be present in his own country. Even when such a question does arise, there is no reason to assume that state immunity will be asserted by the state of which the alleged torturer is a public official; on the contrary, it is only in unusual cases, such as the present, that this is likely to be done. In any event, however, not only is there no mention of state immunity in the convention, but in my opinion it is not inconsistent with its express provisions that, if steps are taken to extradite him or to submit his case to the authorities for the purpose of prosecution, the appropriate state should be entitled to assert state immunity. In this connection, I comment that it is not suggested that it is inconsistent with the convention that immunity ratione personae should be asserted; if so, I find it difficult to see why it should be inconsistent to assert immunity ratione materiae.

The danger of introducing the proposed implied term in the present case is underlined by the fact that there is, as Dr Collins stressed to your Lordships, nothing in the negotiating history of the Torture Convention which throws any light on the proposed implied term. Certainly the travaux préparatoires shown to your Lordships reveal no trace of any consideration being given to waiver of state immunity. They do however show that work on the draft convention was on foot as long ago as 1979, five years before the date of the convention itself. It is surely most unlikely that during the years in which the draft was under consideration no thought was given to the possibility of the state parties to the convention waiving state immunity. Furthermore, if agreement had been reached that there should be such a waiver, express provision would inevitably have been made in the convention to that effect. Plainly, however, no such agreement was reached. There may have been recognition at an early stage that so many states would not be prepared to waive their immunity that the matter was not worth pursuing; if so, this could explain why the topic does not surface in the travaux préparatoires. In this connection it must not be overlooked that there are many reasons why states, although recognising that in certain circumstances jurisdiction should be vested in another national court in respect of acts of torture committed by public officials within their own jurisdiction, may nevertheless have considered it imperative that they should be able, if necessary, to assert state immunity. The Torture Convention applies not only to a series of acts of systematic torture, but to the commission of, even acquiescence in, a single act of physical or mental torture. Extradition can nowadays be sought, in some parts of the world, on the basis of a simple allegation unsupported by prima facie evidence. In certain circumstances torture may, for compelling political

reasons, be the subject of an amnesty, or some other form of settlement, in the state where it has been, or is alleged to have been, committed. *a*

Furthermore, if immunity ratione materiae was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of a different political persuasion. In this connection, it is a mistake to assume that state parties to the convention would only wish to preserve state *b* immunity in cases of torture in order to shield public officials guilty of torture from prosecution elsewhere in the world. Such an assumption is based on a misunderstanding of the nature and function of state immunity, which is a rule of international law restraining one sovereign state from sitting in judgment on the sovereign behaviour of another. As Lord Wilberforce said in *I Congreso del* *c* *Partido* [1981] 2 All ER 1064 at 1078, [1983] 1 AC 244 at 272: 'The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another.' State immunity ratione materiae operates therefore to protect former heads of state, and (where immunity is asserted) public officials, even minor public officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, *d* including accusation and arrest in respect of alleged crimes. It can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious—a matter which can be of great significance where, for example, a former head of state is concerned and political passions are aroused. Preservation of state immunity is therefore a *e* matter of particular importance to powerful countries whose heads of state perform an executive role, and who may therefore be regarded as possible targets by governments of states which, for deeply felt political reasons, deplore their actions while in office. But, to bring the matter nearer home, we must not overlook the fact that it is not only in the United States of America that a substantial body of opinion supports the campaign of the IRA to overthrow the *f* democratic government of Northern Ireland. It is not beyond the bounds of possibility that a state whose government is imbued with this opinion might seek to extradite from a third country, where he or she happens to be, a responsible Minister of the Crown, or even a more humble public official such as a police inspector, on the ground that he or she has acquiesced in a single act of physical or mental torture in Northern Ireland. The well-known case of *Republic of Ireland* *g* *v UK* (1978) 2 EHRR 25 provides an indication of circumstances in which this might come about.

Reasons such as these may well have persuaded possible state parties to the Torture Convention that it would be unwise to give up the valuable protection *h* afforded by state immunity. Indeed, it would be strange if state parties had given up the immunity ratione materiae of a head of state which is regarded as an essential support for his immunity ratione personae. In the result, the subject of waiver of state immunity could well not have been pursued, on the basis that to press for its adoption would only imperil the very substantial advantages which could be achieved by the convention even if no waiver of state immunity was *j* included in it. As I have already explained, in cases arising under the convention, state immunity can only be relevant in a limited number of cases. This is because the offence is normally committed in the state to which the official belongs. There he is unprotected by immunity, and under the convention the state has simply to submit the case to the competent authorities. In practice state immunity is relevant in only two cases—where the offender is present in a third state, or where the offender is present in a state one of whose nationals was the

victim, that state being different from the state where the offence was committed. A case such as the present must be regarded as most unusual. Having regard to considerations such as these, not to press for exclusion of state immunity as a provision of the convention must have appeared to be a relatively small price to pay for the major achievement of widespread agreement among states (your Lordships were informed that 116 states had signed the convention) in respect of all the other benefits which the convention conferred. After all, even where it was possible for a state to assert state immunity, in many cases it would not wish to expose itself to the opprobrium which such a course would provoke; and in such cases considerable diplomatic or moral pressure could be exerted upon it to desist.

I wish to stress the implications of the fact that there is no trace in the travaux préparatoires of any intention in the convention to exclude state immunity. It must follow, if the present argument is correct, first that it was so obvious that it was the intention that immunity should be excluded that a term could be implied in the convention to that effect, and second that, despite that fact, during the negotiating process none of the states involved thought it right to raise the matter for discussion. This is remarkable. Moreover, it would have been the duty of the responsible senior civil servants in the various states concerned to draw the attention of their governments to the consequences of this obvious implication, so that they could decide whether to sign a convention in this form. Yet nothing appears to have happened. There is no evidence of any question being raised, still less of any protest being made, by a single state party. The conclusion follows either that every state party was content without question that state immunity should be excluded sub silentio, or that the responsible civil servants in all these states, including the United Kingdom, failed in their duty to draw this very important matter to the attention of their governments. It is difficult to imagine that either of these propositions can be correct. In particular it cannot, I suspect, have crossed the minds of the responsible civil servants that state immunity was excluded sub silentio in the convention.

The cumulative effect of all these considerations is, in my opinion, to demonstrate the grave difficulty of recognising an implied term, whatever its form, on the basis that it must have been agreed by all the state parties to the convention that state immunity should be excluded. In this connection it is particularly striking that, in the *Handbook on the Torture Convention* by Burgers and Danelius, it is recognised that the obligation of a state party, under art 5(1) of the convention, to establish jurisdiction over offences of torture committed within its territory, is subject to an exception in the case of those benefiting from special immunities, including foreign diplomats. It is true that this statement could in theory be read as limited to immunity ratione personae; but in the absence of explanation it should surely be read in the ordinary way as applicable both to immunity ratione personae and its concomitant immunity ratione materiae, and in any event the total silence in this passage on the subject of waiver makes it highly improbable that there was any intention that immunity ratione materiae should be regarded as having been implicitly excluded by the convention. Had there been such an intention, the authors would have been bound to refer to it. They do not do so.

The background against which the Torture Convention is set adds to the improbability of the proposition that the state parties to the convention must have intended, directly or indirectly, to exclude state immunity ratione materiae. Earlier conventions made provision for an international tribunal. In the case of such conventions, no question of par in parem non habet imperium arose; but

heads of state were expressly mentioned, so ensuring that they are subject to the jurisdiction of the international tribunal. In the case of the Taking of Hostages Convention and the Torture Convention, jurisdiction was vested in the national courts of state parties to the convention. Here, therefore, for the first time the question of waiver of state immunity arose in an acute form. Curiously, the suggestion appears to be that state immunity was waived only in the case of the Torture Convention. Apart from that curiosity, however, for state parties to exclude state immunity in a convention of this kind would be a remarkable surrender of the basic protection afforded by international law to all sovereign states, which underlines the necessity for immunity to be waived in a treaty, if at all, by express provision; and, having regard in particular to the express reference to heads of state in earlier conventions, state parties would have expected to find an express provision in the Torture Convention if it had been agreed that state immunity was excluded. That it should be done by implication in the Torture Convention seems, in these circumstances, to be most improbable.

I add that the fact that 116 states have become party to the Torture Convention reinforces the strong impression that none of them appreciated that, by signing the convention, each of them would silently agree to the exclusion of state immunity ratione materiae. Had it been appreciated that this was so, I strongly suspect that the number of signatories would have been far smaller. It should not be forgotten that national representatives involved in the preliminary discussions would have had to report back to their governments about the negotiation of an important international convention of this kind. Had such a representative, or indeed a senior civil servant in a country whose government was considering whether the country should become a party to the convention, been asked by his Secretary of State the question whether state immunity would be preserved, it is unlikely that a point would have occurred to him which had been overlooked by all the fourteen counsel (including, as I have said, three distinguished professors of international law) appearing for the appellants and their supporters in the present case. It is far more probable that he would have had in mind the clear and simple words of Rehnquist CJ in *Argentina v Amerada Hess Shipping Corp* (1989) 109 S Ct 683 and have answered that, since there was no mention of state immunity in the convention, it could not have been affected. This demonstrates 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. Common sense therefore supports the conclusion reached by principle and authority that this cannot be done.

(e) *Conclusion*

For these reasons I am of the opinion that the proposed implication must be rejected not only as contrary to principle and authority, but also as contrary to common sense.

VII. THE CONCLUSION OF LORD HOPE

My noble and learned friend Lord Hope, having concluded that, so far as torture is concerned, only charges 2 and 4 (in so far as they apply to the period after 29 September 1988) and charge 30 survive the application of the double criminality point, has nevertheless concluded that the benefit of state immunity is not available to Senator Pinochet in respect of these three charges. He has reached this conclusion on the basis that (1) the two conspiracy charges, having regard to para 9(3) of the extradition request, reveal charges that Senator Pinochet was party to a conspiracy to carry out a systematic, if not a widespread, attack on a section of the civil population, ie to torture those who opposed or

might oppose his government, which would constitute a crime against humanity (see eg art 7(1) of the Rome Statute); and (2) the single act of torture alleged in charge 30 shows that an alleged earlier conspiracy to carry out such torture, constituting a crime against humanity, was still alive when that act was perpetrated after 29 September 1988. Furthermore, although he is (as I understand the position) in general agreement with Lord Slynn's analysis, he considers that such a crime against humanity, or a conspiracy to commit such a crime, cannot be the subject of a claim to state immunity in a national court, even where it is alleged to have taken place before 1 January 1990.

I must first point out that, apart from the single act of torture alleged in charge 30, the only other cases of torture alleged to have occurred since 29 September 1988 are two cases, referred to in the extradition request but not made the subject of charges, which are alleged to have taken place in October 1988. Before that, there is one case alleged in 1984, before which it is necessary to go as far back as 1977. In these circumstances I find it very difficult to see how, after 29 September 1988, it could be said that there was any systematic or widespread campaign of torture, constituting an attack on the civilian population, so as to amount to a crime against humanity. Furthermore, in so far as it is suggested that the single act of torture alleged in charge 30 represents the last remnant of a campaign which existed in the 1970s, there is, quite apart from the factual difficulty of relating the single act to a campaign which is alleged to have been in existence so long ago, the question whether it would be permissible, in the context of extradition, to have regard to the earlier charges of torture, excluded under the double criminality rule, in order to establish that the single act of torture was part of a campaign of systematic torture which was still continuing in June 1989. This raises a question under s 6(4)(b) and (5) of the 1989 Act, provisions which are by no means clear in themselves or easy to apply in the unusual circumstances of the present case.

In truth, however, the real problem is that, since the appellants did not consider the position which would arise if they lost the argument on the double criminality point, they did not address questions of this kind. If they had done so, the matter would have been argued out before the Appellate Committee, and Miss Montgomery and Dr Collins would have had an opportunity to reply and would no doubt have had a good deal to say on the subject. This is after all a criminal matter, and it is no part of the function of the court to help the prosecution to improve their case. In these circumstances it would not, in my opinion, be right to assist the prosecution by now taking such a point as this, when they have failed to do so at the hearing, in order to decide whether or not this is a case in which it would be lawful for extradition to take place.

I wish to add that, in any event, for the reasons given by Lord Slynn to which I have already referred, I am of the opinion that in 1989 there was no settled practice that state immunity ratione materiae was not available in criminal proceedings before a national court concerned with an alleged crime against humanity, or indeed as to what constituted a crime against humanity (see [1998] 4 All ER 897 at 913 and 914–915, [1998] 3 WLR 1456 at 1473 and 1474–1475). This is a matter which I have already considered in Pt IV of this opinion.

For all these reasons I am, with great respect, unable to accompany the reasoning of my noble and learned friend on these particular points.

VIII. CONCLUSION

For the above reasons, I am of the opinion that by far the greater part of the charges against Senator Pinochet must be excluded as offending against the

double criminality rule; and that, in respect of the surviving charges—charge 9, charge 30 and charges 2 and 4 (in so far as they can be said to survive the double criminality rule)—Senator Pinochet is entitled to the benefit of state immunity ratione materiae as a former head of state. I would therefore dismiss the appeal of the government of Spain from the decision of the Divisional Court.

LORD HOPE OF CRAIGHEAD. My Lords, this is an appeal against the decision of the Divisional Court to quash the provisional warrants of 16 and 22 October 1998 which were issued by the metropolitan stipendiary magistrate under s 8(1)(b) of the Extradition Act 1989. The application to quash had been made on two grounds. The first was that Senator Pinochet as a former head of state of the Republic of Chile was entitled to immunity from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state. The second was that the charges which had been made against him specified conduct which would not have been punishable in England when the acts were done, with the result that these were not extradition crimes for which it would be lawful for him to be extradited.

The Divisional Court quashed the first warrant, in which it was alleged that Senator Pinochet had murdered Spanish citizens in Chile, on the ground that it did not disclose any offence for which he could be extradited to Spain. Its decision on that point has not been challenged in this appeal. It also quashed the second warrant, in which it was alleged that Senator Pinochet was guilty of torture, hostage-taking, conspiracy to take hostages and conspiracy to commit murder. It did so on the ground that Senator Pinochet was entitled to immunity as a former head of state from the process of the English courts. The court held that the question whether these were offences for which, if he had no immunity, it would be lawful for him to be extradited was not a matter to be considered in that court at that stage. But Lord Bingham of Cornhill CJ said that it was not necessary for this purpose that the conduct alleged constituted a crime which would have been punishable in this country at the time when it was alleged to have been committed abroad.

When this appeal was first heard in your Lordships' House the argument was directed almost entirely to the question whether Senator Pinochet was entitled as a former head of state to claim sovereign immunity in respect of the charges alleged against him in the second provisional warrant. It was also argued that the offences of torture and hostage-taking were not offences for which he could be extradited until these became offences for which a person could be prosecuted extra-territorially in the United Kingdom. But the second argument appears to have been regarded as no more than a side issue at that stage. This is not surprising in view of the terms of the second provisional warrant. The offences which it specified extended over periods lasting well beyond the date when the conduct became extra-territorial offences in this country. Only Lord Lloyd of Berwick dealt with this argument in his speech, and he confined himself to one brief comment. He said that it involved a misunderstanding of s 2 of the 1989 Act, as in his view s 2(1)(a) referred to conduct which would constitute an offence in the United Kingdom now, not to conduct which would have constituted an offence then (see [1998] 4 All ER 897 at 921, [1998] 3 WLR 1456 at 1481).

The offences alleged against Senator Pinochet

Four offences were set out in the second provisional warrant of 22 October 1998. These were: (1) torture between 1 January 1988 and December 1992; (2) conspiracy to torture between 1 January 1988 and 31 December 1992; (3) (a) hostage-taking and (b) conspiracy to take hostages between 1 January 1982

and 31 January 1992; and (4) conspiracy to commit murder between January 1976 and December 1992. These dates must be compared with the date of the coup which brought Senator Pinochet to power in Chile, which was 11 September 1973 and the date when he ceased to be head of state, which was 11 March 1990. Taking the dates in the second provisional warrant at their face value, it appears (a) that he was not being charged with any acts of torture prior to 1 January 1988, (b) that he was not being charged with any acts of hostage-taking or conspiracy to take hostages prior to 1 January 1982 and (c) that he was not being charged with any conspiracy to commit murder prior to January 1976. On the other hand he was being charged with having committed these offences up to December 1992, well after the date when he ceased to be head of state in Chile.

The second appellant has taken the opportunity of the interval between the end of the first hearing of this appeal and the second hearing to obtain further details from the Spanish judicial authorities. He has explained that the provisional warrant was issued under circumstances of urgency and that the facts are more developed and complex than first appeared. And a number of things have happened since the date of the first hearing which, it is submitted, mean that the provisional warrant no longer has any life or effect. On 9 December 1998 the Secretary of State issued an authority to proceed under s 7(4) of the 1989 Act. On 10 December 1998 the Spanish indictment was preferred in Madrid, and on 24 December 1998 further particulars were drafted in accordance with art 13 of the European Convention on Extradition 1957 (the Extradition Convention) (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762) for furnishing with the extradition request.

Mr Alun Jones QC for the appellants said that it would be inappropriate for your Lordships in these circumstances to confine an examination of the facts to those set out in the provisional warrant and that it would be unfair to deprive him of the ability to rely on material which has been served within the usual time limits imposed in the extradition process. He invited your Lordships to examine all the material which was before the Secretary of State in December, including the formal request which was signed at Madrid on 3 November 1998 and the further material which has now been submitted by the Spanish government. Draft charges have been prepared, of the kind which are submitted in extradition proceedings as a case is presented to the magistrate at the beginning of the main hearing under s 9(8) of the 1989 Act. This has been done to demonstrate how the charges which are being brought by the Spanish judicial authorities may be expressed in terms of English criminal law, to show the offences which he would have committed by his conduct against the law of this country.

The crimes which are alleged in the Spanish request are murder on such a scale as to amount to genocide and terrorism, including torture and hostage-taking. The Secretary of State has already stated in his authority to proceed that Senator Pinochet is not to be extradited to Spain for genocide. So that part of the request must now be left out of account. But my impression is that the omission of the allegation of genocide is of little consequence in view of the scope which is given in Spanish law to the allegations of murder and terrorism.

It is not our function to investigate the allegations which have been made against Senator Pinochet, and it is right to place on record the fact that his counsel, Miss Montgomery QC, told your Lordships that they are all strenuously denied by him. It is necessary to set out the nature and some of the content of these allegations, on the assumption that they are supported by the information which the Spanish judicial authorities have made available. This is because they

form an essential part of the background to the issues of law which have been raised in this appeal. But the following summary must not be taken as a statement that the allegations have been shown to be true by the evidence, because your Lordships have not considered the evidence.

The material which has been gathered together in the extradition request by the Spanish judicial authorities alleges that Senator Pinochet was party to a conspiracy to commit the crimes of murder, torture and hostage-taking, and that this conspiracy was formed before the coup. He is said to have agreed with other military figures that they would take over the functions of government and subdue all opposition to their control of it by capturing and torturing those who opposed them, who might oppose them or who might be thought by others to be likely to oppose them. The purpose of this campaign of torture was not just to inflict pain. Some of those who were to be tortured were to be released, to spread words of the steps that would be taken against those who opposed the conspirators. Many of those who were to be tortured were be subjected to various other forms of atrocity, and some of them were be killed. The plan was to be executed in Chile and in several other countries outside Chile.

When the plan was put into effect victims are said to have been abducted, tortured and murdered pursuant to the conspiracy. This was done first in Chile, and then in other countries in South America, in the United States and in Europe. Many of the acts evidencing the conspiracy are said to have been committed in Chile before 11 September 1973. Some people were tortured at a naval base in August 1973. Large numbers of persons were abducted, tortured and murdered on 11 September 1973 in the course of the coup before the junta took control and Senator Pinochet was appointed its President. These acts continued during the days and weeks after the coup. A period of repression ensued, which is said to have been at its most intense in 1973 and 1974. The conspiracy is said to have continued for several years thereafter, but to have declined in intensity during the decade before Senator Pinochet retired as head of state on 11 March 1990. It is said that the acts committed in other countries outside Chile are evidence of the primary conspiracies and of a variety of sub-conspiracies within those states.

The draft charges which have been prepared in order to translate these broad accusations into terms of English law may be summarised as follows: (1) conspiracy to torture between 1 January 1972 and 10 September 1973 and between 1 August 1973 and 1 January 1990—charges 1, 2 and 5; (2) conspiracy to take hostages between 1 August 1973 and 1 January 1990—charge 3; (3) conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal between 1 January 1972 and 1 January 1990—charge 4; (4) torture between 1 August 1973 and 8 August 1973 and on 11 September 1973—charges 6 and 8 [there is no charge 7]; (5) conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975—charges 9 and 12; (6) attempted murder in Italy on 6 October 1975—charges 10 and 11; (7) torture on various occasions between 11 September 1973 and May 1977—charges 13 to 29 and 31 to 32; and (8) torture on 24 June 1989—charge 30.

This summary shows that some of the alleged conduct relates to the period before the coup when Senator Pinochet was not yet head of state. Charges 1 and 5 (conspiracy to torture) and charge 6 (torture) relate exclusively to that period. Charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) relate to conduct over many years including the period before the coup. None of the conduct now alleged extends beyond the period when Senator Pinochet ceased to be head of state.

Only one charge (charge 30—torture on 24 June 1989) relates exclusively to the period after 29 September 1988 when s 134 of the Criminal Justice Act 1988, to which I refer later, was brought into effect. But charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) which relate to conduct over many years extend over this period also. Two acts of torture which are said to have occurred between 21 and 28 October 1988 are mentioned in the extradition request. They have not been included as separate counts in the list of draft charges, but it is important not to lose sight of the fact that the case which is being made against Senator Pinochet by the Spanish judicial authorities is that each act of torture has to be seen in the context of a continuing conspiracy to commit torture. As a whole, the picture which is presented is of a conspiracy to commit widespread and systematic torture and murder in order to obtain control of the government and, having done so, to maintain control of government by those means for as long as might be necessary.

Against that background it is necessary first to consider whether the relevant offences for the purposes of this appeal are those which were set out in the second provisional warrant or those which are set out in the draft charges which have been prepared in the light of the further information which has been obtained from the Spanish judicial authorities.

On one view it might be said that, as the appeal is against the decision of the Divisional Court to quash the second provisional warrant, your Lordships should be concerned only with the charges which were set out in that document. If that warrant was bad on the ground that the charges which it sets out are charges in respect of which Senator Pinochet has immunity, everything else that has taken place in reliance upon that warrant must be bad also. If he was entitled to immunity, no order should have been made against him in the committal proceedings and the Secretary of State should not have issued an authority to proceed. But art 13 of the Extradition Convention which, following the enactment of the 1989 Act, the United Kingdom has now ratified (see the European Convention on Extradition Order 1990, SI 1990/1507), provides that if the information communicated by the requesting party is found to be insufficient to allow the requested party to make a decision in pursuance of the convention the requested party may ask for the necessary supplementary information to be provided to it by the requesting party.

It is clear that the first provisional warrant was prepared in circumstances of some urgency, as it was believed that Senator Pinochet was about to leave the United Kingdom in order to return to Chile. Once begun, the procedure was then subject to various time limits. There was also the problem of translating the Spanish accusations, which cover so many acts over so long a period, into the terms of English criminal law. I do not think that it is surprising that the full extent of the allegations which were being made was not at first appreciated. In my opinion the Spanish judicial authorities were entitled to supplement the information which was originally provided in order to define more clearly the charges which were the subject of the request. On this view it would be right to regard the material which is now available as explanatory of the charges which the second provisional warrant was intended to comprise. Mr Clive Nicholls QC for Senator Pinochet said that he was content with this approach in the interests of finality.

Are the alleged offences 'extradition crimes'?

If your Lordships are willing, as I suggest we should be, to examine this material it is necessary to subject it to further analysis. The starting point is s 1(1) of the 1989 Act, which provides that a person who is accused in a foreign state of

the commission of an extradition crime may be arrested and returned to that state in accordance with the extradition procedures in Pt III of the 1989 Act. The expression 'extradition crime' is defined in s 2 of the 1989 Act under two headings. The first, which is set out in s 2(1)(a), 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 …'

The second, which is set out in s 2(1)(b) read with s 2(2), refers to an extra-territorial offence against the law of a foreign state which is punishable under that law with imprisonment for a term of 12 months or any greater punishment, and which in corresponding circumstances would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment.

For reasons which have been explained by my noble and learned friend Lord Browne-Wilkinson, the critical issue on the question of sovereign immunity relates to the effect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593) and the offences which allege torture. As to those alleged offences which do not fall within the scope of the Torture Convention and which could not be prosecuted here under s 134 of the 1988 Act, any loss of immunity would have to be decided on other grounds. But there is no need to examine this question in the case of those alleged offences for which Senator Pinochet could not in any event be extradited. The purpose of the following analysis is to remove from the list of draft charges those charges which fall into that category either because they are not extradition crimes as defined by s 2 of the 1989 Act or because for any other reason other than on grounds of immunity they are charges on which Senator Pinochet could not be extradited.

This analysis proceeds on the basis that the definition of the expression 'extradition crime' in s 2 of the 1989 Act requires the conduct which is referred to in s 2(1)(a) to have been an offence which was punishable in the United Kingdom when that conduct took place. It also proceeds on the basis that it requires the extra-territorial offence which is referred to in s 2(1)(b) to have been an extra-territorial offence in the United Kingdom on the date when the offence took place. The principle of double criminality would suggest that this was the right approach, in the absence of an express provision to the contrary. The tenses used in s 2 seem to me to be equivocal on this point. They leave it open to examination in the light of the provisions of the 1989 Act as a whole. The argument in favour of the date when the conduct took place has particular force in the case of those offences listed in s 22(4) of the 1989 Act. These have been made extra-territorial offences in order to give effect to international conventions, but neither the conventions nor the provisions which gave effect to them were intended to operate retrospectively.

I respectfully agree with the reasons which my noble and learned friend Lord Browne-Wilkinson has given for construing the definition as requiring that the conduct must have been punishable in the United Kingdom when it took place, and that it is not sufficient for the appellants to show that it would be punishable here were it to take place now.

Hostage-taking

An offence under the Taking of Hostages Act 1982 is one of those offences, wherever the act takes place, which is deemed by s 22(6) of the 1989 Act to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893). Under s 1 of the 1982 Act hostage-taking is an extra-territorial offence against the law of the United Kingdom. Section 1(1) of that Act defines the offence in these terms:

> 'A person, whatever his nationality, who, in the United Kingdom or elsewhere,—(a) detains any other person ("the hostage"), and (b) in order to compel a State, international governmental organisation or person to do or to abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence.'

Mr Jones accepted that he did not have particulars of any case of hostage-taking. He said that his case was that Senator Pinochet was involved in a conspiracy to take hostages for the purposes which were made unlawful by s 1 of the 1982 Act. Charge 3 of the draft charges, which is the only charge which alleges conspiracy to take hostages, states that the course of conduct which was to be pursued was to include the abduction and torture of persons as part of a campaign to terrify and subdue those who were disposed to criticise or oppose Senator Pinochet or his fellow conspirators. Those who were not detained were to be intimidated, through the accounts of survivors and by rumour, by fear that they might suffer the same fate. Those who had been detained were to be compelled to divulge information to the conspirators by the threatened injury and detention of others known to the abducted persons by the conspirators.

But there is no allegation that the conspiracy was to threaten to kill, injure or detain those who were being detained in order to compel others to do or to abstain from doing any act. The narrative shows that the alleged conspiracy was to subject persons already detained to threats that others would be taken and that they also would be tortured. This does not seem to me to amount to a conspiracy to take hostages within the meaning of s 1 of the 1982 Act. The purpose of the proposed conduct, as regards the detained persons, was to subject them to what can best be described as a form of mental torture.

One of the achievements of the Torture Convention was to provide an internationally agreed definition of torture which includes both physical and mental torture in the terms set out in art 1:

> 'For the purposes of this Convention … "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind …'

The offence of torture under English law is constituted by s 134(1) of the 1988 Act, which provides:

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

elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.' *a*

Section 134(3) provides that it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission. So, in conformity with the convention, the offence includes mental as well as physical torture. It seems to me that the conspiracy which charge 3 alleges against Senator Pinochet was a conspiracy to inflict mental torture, and not a conspiracy *b* to take hostages.

I would hold therefore that it is not necessary for your Lordships to examine the Taking of Hostages Convention in order to see whether its terms were such as to deprive a former head of state of any immunity from a charge that he was guilty of hostage-taking. In my opinion Senator Pinochet is not charged with the *c* offence of hostage-taking within the meaning of s 1(1) of the 1982 Act.

Conspiracy to murder and attempted murder

The charges of conspiracy to torture include allegations that it was part of the conspiracy that some of those who were abducted and tortured would thereafter be murdered. Charge 4 alleges that in furtherance of that agreement about four *d* thousand persons of many nationalities were murdered in Chile and in various other countries outside Chile. Two other charges, charges 9 and 12, allege conspiracy to murder—in one case of a man in Spain and in the other of two people in Italy. Charge 9 states that Senator Pinochet agreed in Spain with others who were in Spain, Chile and France that the proposed victim would be murdered in Spain. Charge 12 does not say that anything was done in Spain in *e* furtherance of the alleged conspiracy to murder in Italy. There is no suggestion in either of these charges that the proposed victims were to be tortured. Two further charges, charges 10 and 11, allege the attempted murder of the two people in Italy who were the subject of the conspiracy to commit murder there. Here again there is no suggestion that they were to be tortured before they were *f* murdered.

Murder is a common law crime which, before it became an extra-territorial offence if committed in a convention country under s 4 of the Suppression of Terrorism Act 1978, could not be prosecuted in the United Kingdom if it was committed abroad except in the case of a murder committed abroad by a British citizen: Offences against the Person Act 1861, s 9. A murder or attempted murder *g* committed by a person in Spain, whatever his nationality, is an extradition crime for the purposes of his extradition to Spain from the United Kingdom under s 2(1)(a) of the 1989 Act as it is conduct which would be punishable here if it occurred in this country. But the allegation relating to murders in Spain and elsewhere which is made against Senator Pinochet is not that he himself *h* murdered or attempted to murder anybody. It is that the murders were carried out, or were to be carried out, in Spain and elsewhere as part of a conspiracy and that he was one of the conspirators.

Section 1 of the Criminal Law Act 1977 created a new statutory offence of conspiracy to commit an offence triable in England and Wales. The offence of *j* conspiracy which was previously available at common law was abolished by s 5. Although the principal offence was defined in the statute more narrowly, in other respects it codified the pre-existing law. It came into force on 1 December 1977: see Criminal Law Act 1977 (Commencement No 3) Order 1980, SI 1977/1682. Subsection (4) of that section provides:

'In this Part of this Act "offence" means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in

> question would not be so triable if committed in accordance with the intentions of the parties to the agreement.'

The effect of that subsection is that a person, whatever his nationality, who agrees in England to a course of conduct which will involve the offence of murder abroad may be prosecuted here for the offence of conspiracy to murder even although the murder itself would not have been triable in this country. It re-enacted a provision to the same effect in s 4 of the 1861 Act, which it in part repealed: see Sch 13 to the 1977 Act. Section 4 of the 1861 Act was in these terms:

> 'All Persons who shall conspire, confederate, and agree to murder any Person, whether he be a Subject of Her Majesty or not, and whether he be within the Queen's Dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any Person, to murder any other Person, whether he be a Subject of Her Majesty or not, and whether he be within the Queen's Dominions or not, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not more than Ten and not less than Three Years,—or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.'

So the conduct which is alleged against Senator Pinochet in charge 9—that between 1 January 1975 and 31 December 1976 he was a party to a conspiracy in Spain to murder someone in Spain—*is* an offence for which he could, unless protected by immunity, be extradited to Spain under reference to s 4 of the 1861 Act, as it remained in force until the relevant part of it was repealed by the 1977 Act. This is because his participation in the conspiracy in Spain was conduct by him in Spain for the purposes of s 2(1)(a) of the 1989 Act.

The conduct which is alleged against him in charge 4 is that he was a party to a conspiracy to murder, in furtherance of which about 4,000 people were murdered in Chile and in various countries outside Chile including Spain. It is implied that this conspiracy was in Chile, so I would hold that this is *not* conduct by him in Spain for the purposes of s 2(1)(a) of 1989 Act. The question then is whether it is an extra-territorial offence within the meaning of s 2(1)(b) of that Act.

A conspiracy to commit a criminal offence in England is punishable here under the common law rules as to extra-territorial conspiracies even if the conspiracy was formed outside England and nothing was actually done in this country in furtherance of the conspiracy: *Liangsiriprasert v US Government* [1990] 2 All ER 866, [1991] 1 AC 225. In that case it was held by the Judicial Committee, applying the English common law, that a conspiracy to traffic in a dangerous drug in Hong Kong entered into in Thailand could be tried in Hong Kong although no act pursuant to that conspiracy was done in Hong Kong. Lord Griffiths, delivering the judgment of the Board, said:

> 'Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.' (See [1990] 2 All ER 866 at 878, [1991] 1 AC 225 at 251.)

In *R v Sansom* [1991] 2 All ER 145, [1991] 2 QB 130 the appellants had been charged with conspiracy contrary to s 1 of the 1977 Act, which does not in terms deal with extra-territorial conspiracies. The Court of Appeal rejected the

argument that the principle laid down in *Liangsiriprasert v US Government* referred only to the common law and that it could not be applied to conspiracies charged under the 1977 Act. Taylor LJ said that it should now be regarded as the law of England on this point.

As Lord Griffiths ([1990] 2 All ER 866 at 872, [1991] 1 AC 225 at 244) observed in *Liangsiriprasert v US Government*, it is still true, as a broad general statement, that English criminal law is local in its effect and that the criminal law does not concern itself with crimes committed abroad. But I consider that the common law of England would, applying the rule laid down in *Liangsiriprasert v US Government*, also regard as justiciable in England a conspiracy to commit an offence anywhere which was triable here as an extra-territorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. I do not think that this would be an unreasonable extension of the rule. It seems to me that on grounds of comity it would make good sense for the rule to be extended in this way in order to promote the aims of the convention.

Prior to the coming into force of the Suppression of Terrorism Act 1978, a conspiracy which was formed outside this country to commit murder in some country other than England in pursuance of which nothing was done in England to further that conspiracy would not be punishable in England, as it was not the intention that acts done in pursuance of the conspiracy would result in the commission of a criminal offence in this country. The presumption against the extra-territorial application of the criminal law would have precluded such conduct from being prosecuted here. Section 4(1) of the Suppression of Terrorism Act 1978 gives the courts of the United Kingdom jurisdiction over a person who does any act in a convention country which, if he had done that act in a part of the United Kingdom, would have made him guilty in that part of the United Kingdom of an offence mentioned in some, but not all, of the paragraphs of Sch 1 to that Act. Murder is one of the offences to which that provision applies. But that Act, which was passed to give effect to the European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977; TS 93 (1978) Cmnd 7390), did not come into force until 21 August 1978: see The Suppression of Terrorism Act 1978, SI 1978/1063. And Chile is not a convention country for the purposes of that Act, nor is it one of the non-convention countries to which its provisions have been applied by s 5 of the 1978 Act. Only two non-convention countries have been so designated. These are the United States (The Suppression of Terrorism Act 1978 (Application of provision) (United States of America) Order 1986, SI 1986/2146) and India (The Suppression of Terrorism Act 1978 (Application of provision) (India) Order 1993, SI 1993/2533).

Applying these principles, the only conduct alleged against Senator Pinochet as conspiracy to murder in charge 4 for which he could be extradited to Spain is that part of it which alleges that he was a party to a conspiracy in Spain to commit murder in Spain prior to 21 August 1978. As for the allegation that he was a party to a conspiracy in Spain or elsewhere to commit murder in a country which had been designated as a convention country after that date, the extradition request states that acts in furtherance of the conspiracy took place in France in 1975, in Spain in 1975 and 1976 and in the United States and Portugal in 1976. These countries have now been designated as countries to which the Suppression of Terrorism Act 1978 applies. But the acts which are alleged to have taken place there all pre-date the coming into force of that Act. So the extra-territorial jurisdiction cannot be applied to them.

The alleged offences of attempted murder in Italy are not, as such, offences for which Senator Pinochet could be extradited to Spain under reference to s 2(1)(a) of the 1989Act because the alleged conduct did not take place in Spain and because he is not of Spanish nationality. But for their date they would have been offences for which he could have been extradited from the United Kingdom to Spain under reference to s 2(1)(b), on the grounds, first, that murder is now an extra-territorial offence under s 4(1)(a) of the Suppression of Terrorism Act 1978 as it is an offence mentioned in para 1 of Sch 1 to that Act, Italy has been designated as a convention country (see The Suppression of Terrorism Act 1978 (Designation of countries) (No 2) Order 1986, SI 1986/1137) and, second, that an offence of attempting to commit that offence is an extra-territorial offence under s 4(1)(b) of the 1978 Act. But the attempted murders in Italy which are alleged against Senator Pinochet are said to have been committed on 6 October 1975. As the 1978 Act was not in force on that date, these offences are not capable of being brought within the procedures laid down by that Act.

Finally, to complete the provisions which need to be reviewed under this heading, mention should be made of an amendment which was made to Sch 1 to the Suppression of Terrorism Act 1978 by s 22 of the 1988 Act, which includes within the list of offences set out in that schedule the offence of conspiracy. That section appears in Pt I of the 1988 Act, most of which was repealed before having been brought into force following the enactment of the 1989 Act. But s 22 was not repealed. It was brought into force on 5 June 1990: see Criminal Justice Act 1988 (Commencement No 11) Order 1990, SI 1990/1145. It provides that there shall be added at the end of the schedule a new paragraph in these terms: '21. An offence of conspiring to commit any offence mentioned in a preceding paragraph of this Schedule.' At first sight it might seem that the effect of this amendment was to introduce a statutory extra-territorial jurisdiction in regard to the offence of conspiracy, wherever the agreement was made to participate in the conspiracy. But this offence does not appear in the list of offences in that Schedule in respect of which s 4(1) of the Suppression of Terrorism Act 1978 gives jurisdiction, if committed in a convention country, as extra-territorial offences. In any event s 22 was not brought into force until 5 June 1990: SI 1990/1145. This was after the last date when Senator Pinochet is alleged to have committed the offence of conspiracy.

Torture and conspiracy to torture

Torture is another of those offences, wherever the act takes place, which is deemed by s 22(6) of the 1989 Act to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the Torture Convention. But s 134 of the 1988 Act also gave effect to the Torture Convention. It made it a crime under English law for a public official or a person acting in an official capacity to commit acts of both physical and mental torture: see sub-s (3). And it made such acts of torture an extra-territorial offence wherever they were committed and whatever the nationality of the perpetrator: see sub-s (1). Read with the broad definition which the expression 'torture' has been given by art 1 of the convention and in accordance with ordinary principles, the offence which s 134 lays down must be taken to include the ancillary offences of counselling, procuring, commanding and aiding or abetting acts of torture and of being an accessory before or after the fact to such acts. All of these offences became extra-territorial offences against the law of the United Kingdom within the meaning of s 2(2) of the 1989 Act as soon as s 134 was brought into force on 29 September 1988.

Section 134 does not mention the offence of conspiracy to commit torture, nor does art 1 of the convention, nor does s 22(6) of the 1989 Act. So, while the courts of the United Kingdom have extra-territorial jurisdiction under s 134 over offences of official torture wherever in the world they were committed, that section does not give them extra-territorial jurisdiction over a conspiracy to commit torture in any other country where the agreement was made outside the United Kingdom and no acts in furtherance of the conspiracy took place here. Nor is it conduct which can be deemed to take place in the territory of the requesting country under s 22(6) of the 1989 Act.

However, the general statutory offence of conspiracy under s 1 of the 1977 Act extends to a conspiracy to commit any offence which is triable in England and Wales. Among those offences are all the offences over which the courts in England and Wales have extra-territorial jurisdiction, including the offence under s 134 of the 1988 Act. And, for reasons already mentioned, I consider that the common law rule as to extra-territorial conspiracies laid down in *Liangsiriprasert v US Government* [1990] 2 All ER 866, [1991] 1 AC 225 applies if a conspiracy which was entered into abroad was intended to result in the commission of an offence, wherever it was intended to be committed, which is an extra-territorial offence in this country. Accordingly the courts of this country could try Senator Pinochet for acts of torture in Chile and elsewhere after 29 September 1988 because they are extra-territorial offences under s 134 of the 1988 Act. They could also try him here for conspiring in Chile or elsewhere after that date to commit torture, wherever the torture was to be committed, because torture after that date is an extra-territorial offence and the courts in England have jurisdiction over such a conspiracy at common law.

Torture prior to 29 September 1989

Section 134 of the 1988 Act did not come into force until 29 September 1988. But acts of physical torture were already criminal under English law. Among the various offences against the person which would have been committed by torturing would have been the common law offence of assault occasioning actual bodily harm or causing injury and the statutory offence under s 18 of the 1861 Act of wounding with intent to cause grievous bodily harm. A conspiracy which was entered into in England to commit these offences in England was an offence at common law until the common law offence was replaced on 1 December 1977 by the statutory offence of conspiracy in s 1 of the 1977 Act, which remains in force and available. As I have said, I consider that a conspiracy which was entered into abroad to commit these offences in England would be triable in this country under the common law rule as to extra-territorial conspiracies which was laid down in *Liangsiriprasert v US Government* if they were extra-territorial offences at the time of the alleged conspiracy.

However none of these offences, if committed prior to the coming into force of s 134 of the 1988 Act, could be said to be extra-territorial offences against the law of the United Kingdom within the meaning of s 2(2) of the 1989 Act as there is no basis upon which they could have been tried extra-territorially in this country. The offences listed in Sch 1 to the Suppression of Terrorism Act 1978 include the common law offence of assault and the statutory offences under the 1861 Act. But none of these offences are included in the list of offences which are made extra-territorial offences if committed in a convention country by s 4(1) of the 1989 Act. So the rule laid down in *Liangsiriprasert v US Government* cannot be applied to any conspiracy to commit these offences in any country outside England, as it would not be an extra-territorial conspiracy according to English law. Senator Pinochet could only be extradited to Spain for such offences under

reference to s 2(1)(a) of the 1989 Act if he was accused of conduct in Spain which, if it occurred in the United Kingdom, would constitute an offence which would be punishable in this country. Section 22(6) of the 1989 Act is of no assistance, because torture contrary to the Torture Convention had not yet become an offence in this country.

None of the charges of conspiracy to torture and none of the various torture charges allege that Senator Pinochet did anything in Spain which might qualify under s 2(1)(a) of the 1989 Act as conduct in that country. All one can say at this stage is that, if the information presented to the magistrate under s 9(8) of the 1989 Act in regard to charge 4 were to demonstrate (1) that he did something *in Spain* prior to 29 September 1988 to commit acts of torture there, or (2) that he was party to a conspiracy *in Spain* to commit acts of torture *in Spain*, that *would* be conduct in Spain which would meet the requirements of s 2(1)(a) of that Act.

Torture after 29 September 1989

The effect of s 134 of the 1988 Act was to make acts of official torture, wherever they were committed and whatever the nationality of the offender, an extra-territorial offence in the United Kingdom. The section came into force two months after the passing of the Act on 29 September 1988 and it was not retrospective. As from that date official torture was an extradition crime within the meaning of s 2(1) of the 1989 Act because it was an extra-territorial offence against the law of the United Kingdom.

The general offence of conspiracy which was introduced by s 1 of the 1977 Act applies to any offence triable in England and Wales: s 1(4). So a conspiracy which took place here after 29 September 1988 to commit offences of official torture, wherever the torture was to be carried out and whatever the nationality of the alleged torturer, is an offence for which Senator Pinochet could be tried in this country if he has no immunity. This means that a conspiracy to torture which he entered into in Spain after that date is an offence for which he could be extradited to Spain, as it would be an extradition offence under s 2(1)(a) of the 1989 Act. But, as I have said, I consider that the common law of England would, applying the rule laid down in *Liangsiriprasert v US Government*, also regard as justiciable in England a conspiracy to commit an offence which was triable here as an extra-territorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. This means that he could be extradited to Spain under reference to s 2(1)(b) of the 1989 Act on charges of conspiracy to torture entered into anywhere which related to periods after that date. But, as s 134 of the 1988 Act does not have retrospective effect, he could not be extradited to Spain for any conduct in Spain or elsewhere amounting to a conspiracy to commit torture, wherever the torture was to be carried out, which occurred before 29 September 1988.

The conduct which is alleged against Senator Pinochet under the heading of conspiracy in charge 4 is not confined to the allegation that he was a party to an agreement that people were to be tortured. Included in that charge is the allegation that many people in various countries were murdered after being tortured in furtherance of the conspiracy that they would be tortured and then killed. So this charge includes charges of torture as well as conspiracy to torture. And it is broad enough to include the ancillary offences of counselling, procuring, commanding, aiding or abetting, or of being accessory before or after the fact to, these acts of torture. Ill-defined as this charge is, I would regard it as including allegations of torture and of conspiracy to torture after 29 September 1988 for which, if he has no immunity, Senator Pinochet could be extradited to Spain on the ground that, as they were extra-territorial offences against the law of the

United Kingdom, they were extradition crimes within the meaning of s 2(1) of the 1989 Act.

What is the effect of the qualification which I have just mentioned, as to the date on which these allegations of torture and conspiracy to torture first became offences for which, at the request of Spain, Senator Pinochet could be extradited? In the circumstances of this case its effect is a profound one. It is to remove from the proceedings the entire course of such conduct in which Senator Pinochet is said to have engaged from the moment he embarked on the alleged conspiracy to torture in January 1972 until 29 September 1988. The only offences of torture and conspiracy to torture which are punishable in this country as extra-territorial offences against the law of the United Kingdom within the meaning of s 2(2) of the 1989 Act are those offences of torture and conspiracy to torture which he is alleged to have committed on or after 29 September 1988. But almost all the offences of torture and murder, of which there are alleged to have been about 4,000 victims, were committed during the period of repression which was at its most intense in 1973 and 1974. The extradition request alleges that during the period from 1977 to 1990 only about 130 such offences were committed. Of that number only three have been identified in the extradition request as having taken place after 29 September 1988.

Of the various offences which are listed in the draft charges only charge 30, which refers to one act of official torture in Chile on 24 June 1989 relates exclusively to the period after 29 September 1988. Two of the charges of conspiracy to commit torture extend in part over the period after that date. Charge 2 alleges that Senator Pinochet committed this offence during the period from 1 August 1973 to 1 January 1990, but it does not allege that any acts of torture took place in furtherance of that conspiracy. Charge 4 alleges that he was party to a conspiracy to commit torture in furtherance of which acts of murder following torture were committed in various countries including Spain during the period from 1 January 1972 to 1 January 1990. The only conduct alleged in charges 2 and 4 for which Senator Pinochet could be extradited to Spain is that part of the alleged conduct which relates to the period after 29 September 1988.

Although the allegations of conspiracy to torture in charge 2 and of torture and conspiracy to torture in charge 4 must now be restricted to the period from 29 September 1988 to 1 January 1990 the fact that these allegations remain available for the remainder of the period is important because of the light which they cast on the single act of torture alleged in charge 30. For reasons which I shall explain later, I would find it very difficult to say that a former head of state of a country which is a party to the Torture Convention has no immunity against an allegation of torture committed in the course of governmental acts which related only to one isolated instance of alleged torture. But that is not the case which the Spanish judicial authorities are alleging against Senator Pinochet. Even when reduced to the period from 29 September 1988 until he left office as head of state, which the provisions for speciality protection in s 6(4) of the 1989 Act would ensure was the only period in respect of which the Spanish judicial authorities would be entitled to bring charges against him if he were to be extradited, the allegation is that he was a party to the use of torture as a systematic attack on all those who opposed or who might oppose his government.

The extradition request states that between August 1977 when the National Intelligence Directorate (DINA) was dissolved and replaced by the National Intelligence Bureau (CNI), the Directorate of Communications of the Militarised Police (DICOMCAR) and the Avenging Martyrs Commando (COVERMA), while engaged in a policy of repression acting on orders emanating from Augusto

Pinochet, systematically performed torture on detainees. Among the methods which are said to have been used was the application of electricity to sensitive parts of the body, and it is alleged that the torture sometimes led to the victim's death. Charge 30 alleges that the victim died after having been tortured by inflicting electric shock. The two victims of an incident in October 1988 which is mentioned in the extradition request but is not the subject of a separate count in the list of draft charges, are said to have shown signs of the application of electricity after autopsy. It appears that the evidence has revealed only these three instances after 29 September 1988 when acts of official torture were perpetrated in pursuance of this policy. Even so, this does not affect the true nature and quality of those acts. The significance of charges 2 and 4 may be said to lie in the fact that they show that a policy of systematic torture was being pursued when those acts were perpetrated.

I must emphasise that it is not our function to consider whether or not the evidence justifies this inference, and I am not to be taken as saying that it does. But it is plain that the information which is before us is capable of supporting the inference that the acts of torture which are alleged during the relevant period were of that character. I do not think that it would be right to approach the question of immunity on a basis which ignores the fact that this point is at least open to argument. So I consider that the argument that Senator Pinochet has no immunity for this reduced period is one which can properly be examined in the light of developments in customary international law regarding the use of widespread or systematic torture as an instrument of state policy.

Charges which are relevant to the question of immunity

The result of this analysis is that the only charges which allege extradition crimes for which Senator Pinochet could be extradited to Spain if he has no immunity are: (1) those charges of conspiracy to torture in charge 2, of torture and conspiracy to torture in charge 4 and of torture in charge 30 which, irrespective of where the conduct occurred, became extra-territorial offences as from *29 September 1988* under s 134 of the 1988 Act and under the common law as to extra-territorial conspiracies; (2) the conspiracy *in Spain* to murder *in Spain* which is alleged in charge 9; (3) such conspiracies *in Spain* to commit murder *in Spain* and such conspiracies *in Spain* prior to 29 September 1988 to commit acts of torture *in Spain*, as can be shown to form part of the allegations in charge 4. So far as the law of the United Kingdom is concerned, the only country where Senator Pinochet could be put on trial for the full range of the offences which have been alleged against him by the Spanish judicial authorities is Chile.

State immunity

Section 20(1)(a) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 applies, subject to 'any necessary modifications', to a head of state as it applies to the head of a diplomatic mission. The generality of this provision is qualified by s 20(5), which restricts the immunity of the head of state in regard to civil proceedings in the same way as Pt I of the State Immunity Act 1978 does for diplomats. This reflects the fact that s 14 already provides that heads of state are subject to the restrictions in Pt I. But there is nothing in s 20 to indicate that the immunity from criminal proceedings which art 31.1 of the Vienna Convention as applied by the 1964 Act gives to diplomats is restricted in any way for heads of state. Section 23(3), which provides that the provisions of Pts I and II of the State Immunity Act 1978 do not operate retrospectively, makes no mention of Pt III. I infer from this that it was not thought that Pt III would give rise to the suggestion that it might operate in this way.

It seems to me to be clear therefore that what s 20(1) did was to give statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts. *Marcos v Federal Dept of Police* (1990) 102 ILR 198 at 203 supports this view, as it was held in that case that the art 39.2 immunity was available under customary international law to the former head of state of the Republic of the Philippines.

The question then is to what extent does the immunity which art 39.2 gives to former diplomats have to be modified in its application to former heads of state? The last sentence of art 39.2 deals with the position after the functions of the diplomat have come to an end. It provides that: '… with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.' It is clear that this provision is dealing with the residual immunity of the former diplomat ratione materiae, and not with the immunity ratione personae which he enjoys when still serving as a diplomat. In its application to a former head of state this provision raises two further questions: (1) does it include functions which the head of state performed outside the receiving state from whose jurisdiction he claims immunity, and (2) does it include acts of the kind alleged in this case—which Mr Alun Jones accepts were not private acts but were acts done in the exercise of the state's authority?

As to the first of these two further questions, it is plain that the functions of the head of state will vary from state to state according to the acts which he is expected or required to perform under the constitution of that state. In some countries which adhere to the traditions of constitutional monarchy these will be confined largely to ceremonial or symbolic acts which do not involve any executive responsibility. In others the head of state is head of the executive, with all the resources of the state at his command to do with as he thinks fit within the sphere of action which the constitution has given to him. I have not found anything in customary international law which would require us to confine the expression 'his functions' to the lowest common denominator. In my opinion the functions of the head of state are those which his own state enables or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state. These may include instructing or authorising acts to be done by those under his command at home or abroad in the interests of state security. It would not be right therefore to confine the immunity under art 39.2 to acts done in the receiving state. I would not regard this as a 'necessary modification' which has to be made to it under s 20(1) of the 1978 Act.

As to the second of those questions, I consider that the answer to it is well settled in customary international law. The test is whether they were private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other. It is whether the act was done to promote the state's interests—whether it was done for his own benefit or gratification or was done for the state: *US v Noriega* (1990) 746 F Supp 1506 at 1519–1521. Sir Arthur Watts QC in his Hague Lectures 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 56, said: '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.' The sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate: *I Congreso del Partido* [1981] 2 All ER 1064 at 1070, [1983] 1 AC 244 at 262 per Lord Wilberforce. The fact that acts

done for the state have involved conduct which is criminal does not remove the immunity. Indeed the whole purpose of the residual immunity ratione materiae is to protect the former head of state against allegations of such conduct after he has left office. A head of state needs to be free to promote his own state's interests during the entire period when he is in office without being subjected to the prospect of detention, arrest or embarrassment in the foreign legal system of the receiving state: see *US v Noriega* (1990) 746 F Supp 1506 at 1519 and *Lafontant v Aristide* (1994) 844 F Supp 128 at 132. The conduct does not have to be lawful to attract the immunity.

It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The examples which Lord Steyn gave ([1998] 4 All ER 897 at 945, [1998] 3 WLR 1456 at 1506) of the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of jus cogens. This compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct. As Sir Arthur Watts QC said, in respect of conduct constituting an international crime, such as war crimes, special considerations apply (see (1994) 247 Recueil des Cours p 89, note 198).

But even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts. There is plenty of source material to show that war crimes and crimes against humanity have been separated out from the generality of conduct which customary international law has come to regard as criminal. These developments were described by Lord Slynn of Hadley ([1998] 4 All ER 897 at 914, [1998] 3 WLR 1456 at 1474) and I respectfully agree with his analysis. As he said, except in regard to crimes in particular situations where international tribunals have been set up to deal with them and it is part of the arrangement that heads of state should not have any immunity, there is no general recognition that there has been a loss of immunity from the jurisdiction of foreign national courts. This led him to sum the matter up in this way:

> 'So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged

against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.' (See [1998] 4 All ER 897 at 915, [1998] 3 WLR 1456 at 1475.)

That is the background against which I now turn to the Torture Convention. As all the requirements which Lord Slynn laid out ([1998] 4 All ER 897 at 915, [1998] 3 WLR 1456 at 1475) save one are met by it, when read with the provisions of ss 134 and 135 of the 1988 Act which gave the force of law to the convention in this country, I need deal only with the one issue which remains. Did it make it clear that a former head of state has no immunity in the courts of a state which has jurisdiction to try the crime?

The Torture Convention and loss of immunity

The Torture Convention is an international instrument. As such, it must be construed in accordance with customary international law and against the background of the subsisting residual former head of state immunity. Article 32.2 of the Vienna Convention, which forms part of the provisions in the 1964 Act which are extended to heads of state by s 20(1) of the Sovereign Immunity Act 1978, subject to 'any necessary modifications', states that waiver of the immunity accorded to diplomats 'must always be express'. No modification of that provision is needed to enable it to apply to heads of state in the event of it being decided that there should be a waiver of their immunity. The Torture Convention does not contain any provision which deals expressly with the question whether heads of state or former heads of state are or are not to have immunity from allegations that they have committed torture.

But there remains the question whether the effect of the Torture Convention was to remove the immunity by necessary implication. Although art 32.2 says that any waiver must be express, we are required nevertheless to consider whether the effect of the convention was necessarily to remove the immunity. This is an exacting test. Section 1605(a)(1) of the United States Foreign Sovereign Immunities Act 1976 (28 USSC-1602) (FSIA) provides for an implied waiver, but this section has been narrowly construed: *Siderman de Blake v Argentina* (1992) 965 F 2d 699 at 720, *Princz v Federal Republic of Germany* (1994) 26 F 3d 1166 at 1174 and *Argentina v Amerada Hess Shipping Corp* (1989) 109 S Ct 683 at 693. In international law the need for clarity in this matter is obvious. The general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states.

The preamble to the Torture Convention explains its purpose. After referring to art 5 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) which provides that no one shall be subjected to torture or other cruel, inhuman or degrading treatment and to the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December 1975 regarding torture and other cruel, inhuman or degrading treatment or punishment, it states that it was desired 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. There then follows in art 1 a definition of the term 'torture' for the purposes of the convention. It is expressed in the widest

possible terms. It means 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted' for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. It is confined however to official torture by its concluding words, which require such pain or suffering to have been 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

This definition is so broadly framed as to suggest on the one hand that heads of state must have been contemplated by its concluding words, but to raise the question on the other hand whether it was also contemplated that they would by necessary implication be deprived of their immunity. The words 'public official' might be thought to refer to someone of lower rank than the head of state. Other international instruments suggest that where the intention is to include persons such as the head of state or diplomats they are mentioned expressly in the instrument: see art 27 of the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court). But a head of state who resorted to conduct of the kind described in the exercise of his function would clearly be 'acting in an official capacity'. It would also be a strange result if the provisions of the convention could not be applied to heads of state who, because they themselves inflicted torture or had instigated the carrying out of acts of torture by their officials, were the persons primarily responsible for the perpetration of these acts.

Yet the idea that the framing of the definition in these terms in itself was sufficient to remove the immunity from prosecution for all acts of torture is also not without difficulty. The jus cogens character of the immunity enjoyed by serving heads of state ratione personae suggests that, on any view, that immunity was not intended to be affected by the convention. But once one immunity is conceded it becomes harder, in the absence of an express provision, to justify the removal of the other immunities. It may also be noted that Burgers and Danelius *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 131 make this comment on art 5.1 of the convention, which sets out the measures which each state party is required to take to establish its jurisdiction over the offences of torture which it is required by art 4 to make punishable under its own criminal law:

> 'This means, first of all, that the State shall have jurisdiction over the offence when it has been committed in its territory. Under international or national law, there may be certain limited exceptions to this rule, e.g. in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted insofar as they apply to criminal acts in general and are not unduly extensive.'

These observations, although of undoubted weight as Jan Herman Burgers of the Netherlands was a chairman/rapporteur to the convention, may be thought to be so cryptic as to defy close analysis. But two points are worth making about them. The first is that they recognise that the provisions of the convention are not inconsistent with at least some of the immunities in customary international law. The second is that they make no mention of any exception which would deprive heads of state or former heads of state of their customary international law immunities. The absence of any reference to this matter suggests that the framers of the convention did not consider it. The Reports of the Working Group

on the Draft Convention to the Economic and Social Council of the Commission on Human Rights show that many meetings were held to complete its work. These extended over several years, and many issues were raised and discussed before the various delegations were content with its terms. If the issue of head of state and former head of state immunity was discussed at any of these meetings, it would without doubt have been mentioned in the reports. The issue would have been recognised as an important one on which the delegations would have to take instructions from their respective governments. But there is no sign of this in any of the reports which have been shown to us.

The absence of any discussion of the issue is not surprising, once it is appreciated that the purpose of the convention was to put in place as widely as possible the machinery which was needed to make the struggle against torture more effective throughout the world. There was clearly much to be done, as the several years of discussion amply demonstrate. According to Burgers and Danelius *Handbook on the Convention* p 1, the principal aim was to strengthen the existing position by a number of supportive measures. A basis had to be laid down for legislation to be enacted by the contracting states. An agreed definition of torture, including mental torture, had to be arrived at for the adoption by states into their own criminal law. Provisions had to be agreed for the taking of extra-territorial jurisdiction to deal with these offences and for the extradition of offenders to states which were seeking to prosecute them. As many states do not extradite their own citizens and the convention does not oblige states to extradite, they had to undertake to take such measures as might be necessary to establish jurisdiction over these offences in cases where the alleged offender was present within their territory but was not to be extradited. For many, if not all, states these arrangements were innovations upon their domestic law. Waiver of immunities was not mentioned. But, as Yoram Dinstein 'Diplomatic Immunity from Jurisdiction Ratione Materiae' (1966) 15 ICLQ 76 at 80 had already pointed out, it would be entirely meaningless to waive the immunity unless local courts were able, as a consequence, to try the offender.

These considerations suggest strongly that it would be wrong to regard the Torture Convention as having by necessary implication removed the immunity ratione materiae from former heads of state in regard to every act of torture of any kind which might be alleged against him falling within the scope of art 1. In *Siderman de Blake v Argentina* (1992) 965 F 2d 699 at 714–717 it was held that the alleged acts of official torture, which were committed in 1976 before the making of the Torture Convention, violated international law under which the prohibition of official torture had acquired the status of jus cogens. Cruel acts had been perpetrated over a period of seven days by men acting under the direction of the military governor. Argentina was being ruled by an anti-semitic military junta, and epithets were used by those who tortured him which indicated that Jose Siderman was being tortured because of his Jewish faith. But the definition in art 1 is so wide that any act of official torture, so long as it involved 'severe' pain or suffering, would be covered by it.

As Burgers and Danelius *Handbook on the Convention* p 122 point out, although the definition of torture in art 1 may give the impression of being a very precise and detailed one, the concept of 'severe pain and suffering' is in fact rather a vague concept, on the application of which to a specific case there may be very different views. There is no requirement that it should have been perpetrated on such a scale as to constitute an international crime in the sense described by Sir Arthur Watts, that is to say a crime which offends against the public order of the international community (see (1994) 247 Recueil des Cours p 82). A single act

of torture by an official against a national of his state within that state's borders will do. The risks to which former heads of state would be exposed on leaving office of being detained in foreign states upon an allegation that they had acquiesced in an act of official torture would have been so obvious to governments that it is hard to believe that they would ever have agreed to this. Moreover, even if your Lordships were to hold that this was its effect, there are good reasons for doubting whether the courts of other states would take the same view. An express provision would have removed this uncertainty.

Nevertheless there remains the question whether the immunity can survive Chile's agreement to the Torture Convention if the torture which is alleged was of such a kind or on such a scale as to amount to an international crime. Sir Arthur Watts states (at p 82) that the idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. The international agreements to which states have been striving in order to deal with this problem in international criminal courts have been careful to set a threshold for such crimes below which the jurisdiction of those courts will not be available. The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (UN Security Council Resolution 827 (1993)) includes torture in art 5 as one of the crimes against humanity. In para 48 of his Report to the United Nations the Secretary-General explained that crimes against humanity refer to inhuman acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population. Similar observations appear in paras 131 to 135 of the Secretary-General's Report of 9 December 1994 on the Rwanda conflict. Article 3 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (UN SC Resolution 955 (1994)) included torture as one of the crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population' on national, political, ethnic or other grounds. Article 7 of the Rome Statute contains a similar limitation to acts of widespread or systematic torture.

The allegations which the Spanish judicial authorities have made against Senator Pinochet fall into that category. As I sought to make clear in my analysis of the draft charges, we are not dealing in this case—even upon the restricted basis of those charges on which Senator Pinochet could lawfully be extradited if he has no immunity—with isolated acts of official torture. We are dealing with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an *international* crime. This is because he is said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic torture within Chile and elsewhere as an instrument of government. On the other hand it is said that, for him to lose his immunity, it would have to be established that there was a settled practice for crime of this nature to be so regarded by customary international law at the time when they were committed. I would find it hard to say that it has been shown that any such settled practice had been established by 29 September 1988. But we must be careful not to attach too much importance to this point, as the opportunity for prosecuting such crimes seldom presents itself.

Despite the difficulties which I have mentioned, I think that there are sufficient signs that the necessary developments in international law were in place by that date. The careful discussion of the jus cogens and erga omnes rules in regard to allegations of official torture in *Siderman de Blake v Argentina* (1992) 965 F 2d 699 at 714–718, which I regard as persuasive on this point, shows that there was already widespread agreement that the prohibition against official torture had achieved the status of a jus cogens norm. Articles which were published in 1988 and 1989 are referred to (at 717) in support of this view. So I think that we can take it that that was the position by 29 September 1988. Then there is the Torture Convention of 10 December 1984. Having secured a sufficient number of signatories, it entered into force on 26 June 1987. In my opinion, once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the convention to invoke the immunity ratione materiae in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity.

As Sir Arthur Watts has explained at the general principle in such cases is that of individual responsibility for international criminal conduct (see (1994) 247 Recueil des Cours p 82). After a review of various general international instruments relating mainly but not exclusively to war crimes, of which the most recent was the International Law Commission's draft Code of Crimes against the Peace and Security of Mankind of 1988, he concludes at (p 84) that it can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes. A head of state is still protected while in office by the immunity ratione personae, but the immunity ratione materiae on which he would have to rely on leaving office must be denied to him.

I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity ratione materiae with respect to all acts of official torture as defined in art 1. It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available.

I consider that the date as from which the immunity ratione materiae was lost was 30 October 1988, which was the date when Chile's ratification of the Torture Convention on 30 September 1988 took effect. Spain had already ratified the convention. It did so on 21 October 1987. The convention was ratified by the United Kingdom on 8 December 1988 following the coming into force of s 134 of the 1988 Act. On the approach which I would take to this question the immunity ratione materiae was lost when Chile, having ratified the convention to which s 134 gave effect and which Spain had already ratified, was deprived of the right to object to the extra-territorial jurisdiction which the United Kingdom was able to assert over these offences when the section came into force. But I am content to accept the view of my noble and learned friend Lord Saville of Newdigate that Senator Pinochet continued to have immunity until 8 December 1988 when the United Kingdom ratified the convention.

Conclusion

It follows that I would hold that, while Senator Pinochet has immunity ratione materiae from prosecution for the conspiracy in Spain to murder in Spain which is alleged in charge 9 and for such conspiracies in Spain to murder in Spain and such conspiracies in Spain prior to 8 December 1988 to commit acts of torture in Spain as could be shown to be part of the allegations in charge 4, he has no immunity from prosecution for the charges of torture and of conspiracy to torture which relate to the period after that date. None of the other charges which are made against him are extradition crimes for which, even if he had no immunity, he could be extradited. On this basis only I too would allow the appeal, to the extent necessary to permit the extradition to proceed on the charges of torture and conspiracy to torture relating to the period after 8 December 1988.

The profound change in the scope of the case which can now be made for the extradition to Spain of Senator Pinochet will require the Secretary of State to reconsider his decision to give authority to proceed with the extradition process under s 7(4) of the 1989 Act and, if he decides to renew that authority, with respect to which of the alleged crimes the extradition should be authorised. It will also make it necessary for the magistrate, if renewed authority to proceed is given, to pay very careful attention to the question whether the information which is laid before him under s 9(8) of the 1989 Act supports the allegation that torture in pursuance of a conspiracy to commit systematic torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

LORD HUTTON My Lords, the rehearing of this appeal has raised a number of separate issues which have been fully considered in the speech of my noble and learned friend Lord Browne-Wilkinson which I have had the benefit of reading in draft. I am in agreement with his reasoning and conclusion that the definition of an 'extradition crime' in the Extradition Act 1989 requires the conduct to be criminal under United Kingdom law at the date of commission. I am also in agreement with the analysis and conclusions of my noble and learned friend Lord Hope of Craighead as to the alleged crimes in respect of which Senator Pinochet could be extradited apart from any issue of immunity. I further agree with the view of Lord Browne-Wilkinson that Senator Pinochet is entitled to immunity in respect of charges of murder and conspiracy to murder, but I wish to make some observations on the issue of immunity claimed by Senator Pinochet in respect of charges of torture and conspiracy to torture.

Senator Pinochet ceased to be head of state of Chile on 11 March 1990, and he claims immunity as a former head of state. The distinction between the immunity of a serving head of state and the immunity of a former head of state is discussed by Sir Arthur Watts QC in his monograph in the *Hague Lectures* 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours at 53, 88, 89:

> 'It is well established that, put broadly, a Head of State enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other States. This immunity—to the extent that it exists—becomes effective upon his assumption of office, even in respect of events occurring earlier. A Head of State's immunity is enjoyed in recognition of his very special status as a holder of his State's highest office … A former Head of State is entitled under international law to none of the facilities, immunities and privileges which international law accords to heads of States in office … After his loss of office

> he may be sued in relation to his private activities, both those taking place while he was still Head of State, as well as those occurring before becoming Head of State or since ceasing to be Head of State … A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts, and he cannot be sued for them even after he has ceased to be head of state. The position is similar to that of acts performed by an ambassador in the exercise of his functions for which immunity continues to subsist even after the ambassador's appointment has come to an end.'

.Section 20 in Pt III of the State Immunity Act 1978 provides that, subject to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state, and s 2 of the 1964 Act provides that the articles of the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565), set out in Sch 1 to the 1964 Act, shall have the force of law in the United Kingdom. The articles set out in Sch 1 include arts 29, 31 and 39. Article 29 provides: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.' Article 31(1) provides: 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State …' Article 39 provides:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

One of the issues raised before your Lordships is whether s 20 of the 1978 Act relates only to the functions carried out by a foreign head of state when he is present within the United Kingdom, or whether it also applies to his actions in his own state or in another country. Section 20 is a difficult section to construe, but I am of opinion that, with the necessary modifications, the section applies the provisions of the 1964 Act, and therefore the articles of the Vienna Convention, to the actions of a head of state in his own country or elsewhere, so that, adopting the formulation of Lord Nicholls of Birkenhead in the earlier hearing ([1998] 4 All ER 897 at 939, [1998] 3 WLR 1456 at 1499), with the addition of seven words, the effect of s 20 of the 1978 Act, s 2 of the 1964 Act and of the articles of the Vienna Convention is that—

> 'A former head of state shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him in the exercise of his functions as a head of state.'

I consider, however, that s 20 did not change the law in relation to the immunity from criminal jurisdiction to which a former head of state was entitled

in the United Kingdom but gave statutory form to the relevant principle of international law which was part of the common law.

Therefore the crucial question for decision is whether, if committed, the acts of torture (in which term I include acts of torture and conspiracy to commit torture) alleged against Senator Pinochet were carried out by him in the performance of his functions as head of state. I say 'if committed' because it is not the function of your Lordships in this appeal to decide whether there is evidence to substantiate the allegations and Senator Pinochet denies them. Your Lordships had the advantage of very learned and detailed submissions from counsel for the parties and the interveners and from the amicus curiae (to which submissions I would wish to pay tribute) and numerous authorities from many jurisdictions were cited.

It is clear that the acts of torture which Senator Pinochet is alleged to have committed were not acts carried out in his private capacity for his personal gratification. If that had been the case they would have been private acts and it is not disputed that Senator Pinochet, once he had ceased to be head of state, would not be entitled to claim immunity in respect of them. It was submitted on his behalf that the acts of torture were carried out for the purposes of protecting the state and advancing its interests, as Senator Pinochet saw them, and were therefore governmental functions and were accordingly performed as functions of the head of state. It was further submitted that the immunity which Senator Pinochet claimed was the immunity of the State of Chile itself. In the present proceedings Chile intervened on behalf of Senator Pinochet and, in para 10 of its written case, Chile submitted:

> '… the immunity of a head of state (or former head of state) is an aspect of state immunity … Immunity of a head of state in his public capacity is equated with state immunity in international law … Actions against representatives of a foreign government in respect of their governmental or official acts are in substance proceedings against the state which they represent, and the immunity is for the benefit of the state.'

Moreover, it was submitted that a number of authorities established that the immunity which a state is entitled to claim in respect of the acts of its former head of state or other public officials applies to acts which are unlawful and criminal.

My Lords, in considering the authorities it is necessary to have regard to a number of matters. First, it is a principle of international law that a state may not be sued in the courts of another state without its consent (although this principle is now subject to exceptions—the exceptions in the law of the United Kingdom being set out in the 1978 Act). Volume 18 of *Halsbury's Laws* (4th edn, 1977 issue) para 1548 stated:

> 'An independent sovereign state may not be sued in the English courts against its will and without its consent. This immunity from the jurisdiction is derived from the rules of international law, which in this respect have become part of the law of England. It is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity.'

Secondly, many of the authorities cited by counsel were cases where an action in tort for damages was brought against a state. Thirdly, a state is responsible for the actions of its officials carried out in the ostensible performance of their official

functions notwithstanding that the acts are performed in excess of their proper functions. *Oppenheim's International Law* (9th edn, 1992) p 545 states:

> 'In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are *prima facie* attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior.'

Fourthly, in respect of the jurisdiction of the courts of the United Kingdom, foreign states are now expressly given immunity in civil proceedings (subject to certain express exceptions) by statute. Part I of the 1978 Act, relating to civil proceedings, provides in s 1(1): 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' But Pt I of the Act has no application to criminal jurisdiction and s 16(4) in Pt I provides: 'This Part of this Act does not apply to criminal proceedings.' In the United States, the Foreign Sovereignty Immunities Act 1976 (28 USSC-1602) (FSIA) provides:

> 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter.'

Counsel for Senator Pinochet and for Chile relied on the decision of the Court of Appeal in *Al Adsani v Kuwait* (1996) 107 ILR 536 where the plaintiff brought an action for damages in tort against the government of Kuwait claiming that he had been tortured in Kuwait by officials of that government. The Court of Appeal upheld a claim by the government of Kuwait that it was entitled to immunity. Counsel for the plaintiff submitted that the rule of international law prohibiting torture is so fundamental that it is jus cogens which overrides all other principles of international law, including the principle of sovereign immunity. This submission was rejected by the Court of Appeal on the ground that immunity was given by s 1 of the FSIA 1976 and that the immunity was not subject to an overriding qualification in respect of torture or other acts contrary to international law which did not fall within one of the express exceptions contained in the succeeding sections of the Act. Ward LJ stated (at 549):

> 'Unfortunately, the Act is as plain as plain can be. A foreign State enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to

escape that state immunity *is* afforded in respect of acts of torture committed outside this jurisdiction.' (Ward LJ's emphasis.)

A similar decision was given by the United States Court of Appeals, 9th Circuit, in *Siderman de Blake v Argentina* (1992) 965 F 2d 699 where an Argentine family brought an action for damages in tort against Argentina and one of its provinces for acts of torture by military officials. Argentina claimed that it was entitled to immunity under the FSIA 1976 and the Court of Appeals, with reluctance, upheld this claim. The argument advanced on behalf of the plaintiffs was similar to that advanced in *Al-Adsani*'s case, but the court ruled that it was obliged to reject it because of the express provisions of the FSIA 1976, stating (at 718):

'The Sidermans argue that since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, they argue that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. As a matter of international law, the Sidermans' argument carries much force … Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. We must interpret the FSIA through the prism of *Amerada Hess* [*Argentina v Amerada Hess Shipping Corp* (1989) 109 S Ct 683]. Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity. Argentina contends that the Supreme Court's statement in *Amerada Hess* that the FSIA grants immunity "in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," (109 S Ct 683 at 688), precludes the Sidermans' reliance on *jus cogens* in this case. Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*. In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement "that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," *Amerada Hess* (109 S Ct 683 at 688), and so specific in its formulation and method of approach (at 690) ("Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here"), we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.'

It has also been decided that where an action for damages in tort is brought against officials of a foreign state for actions carried out by them in ostensible exercise of their governmental functions, they can claim state immunity, notwithstanding that their actions were illegal. The state itself, if sued directly for damages in respect of their actions would be entitled to immunity and this immunity would be impaired if damages were awarded against the officials and then the state was obliged to indemnify them. In *Jaffe v Miller (No 2)* (1993) 95 ILR 446 government officials were sued in tort for laying false criminal charges and for conspiracy for kidnap, and it was held that they were entitled to claim

immunity. Finlayson JA, delivering the judgment of the Ontario Court of Appeal, stated (at 458–459):

> 'I also agree with the reasoning on this issue put forward by counsel for the respondents. Counsel submitted that to confer immunity on a government department of a foreign state but to deny immunity to the functionaries, who in the course of their duties performed the acts, would render the *State Immunity Act* ineffective. To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. Counsel submitted that when functionaries are acting within the scope of their official duties, as in the present case, they come within the definition of "foreign state".'

In my opinion these authorities and similar authorities relating to claims for damages in tort against states and government officials do not support the claim of Senator Pinochet to immunity from criminal proceedings in the United Kingdom because the immunity given by Pt I of the 1978 Act does not apply to criminal proceedings.

Counsel for Senator Pinochet and for Chile further submitted that, under the rules of international law, courts recognise the immunity of a former head of state in respect of criminal acts committed by him in the purported exercise of governmental authority. In *Marcos v Federal Dept of Police* (1990) 102 ILR 198 the United States instituted criminal proceedings against Ferdinard Marcos, the former President of the Philippines, and his wife, who had been a minister in the Philippine government. They were accused of having abused their positions to acquire for themselves public funds and works of art. The United States authorities sought legal assistance from the Swiss authorities to obtain banking and other documents in order to clarify the nature of certain transactions which were the subject of investigation. Mr Marcos and his wife claimed immunity as the former leaders of a foreign state. In its judgment, the Swiss federal tribunal stated (at 203):

> 'The immunity in relation to their functions which the appellants enjoyed therefore subsisted for those criminal acts which were allegedly committed while they were still exercising their powers in the Republic of the Philippines. The proceedings brought against them before the United States courts could therefore only be pursued pursuant to an express waiver by the State of the Philippines of the immunity which public international law grants them not as a personal advantage but for the benefit of the state over which they ruled.'

The tribunal then held that the immunity could not be claimed by Mr and Mrs Marcos in Switzerland because there had been an express waiver by the State of the Philippines. However, I would observe that in that case Mr and Mrs Marcos were not accused of violating a rule of international law which had achieved the status of jus cogens.

Counsel also relied on the decision of the Federal Constitutional Court of the Federal Republic of Germany in *Re Former Syrian Ambassador to the German Democratic Republic* (unreported, 10 June 1997). In that case the former Syrian ambassador to the German Democratic Republic was alleged to have failed to prevent a terrorist group from removing a bag of explosives from the Syrian

Embassy, and a few hours later the explosives were used in an attack which left one person dead and more than 20 persons seriously injured. Following German unification and the demise of the German Democratic Republic in 1990, a district court in Berlin issued an arrest warrant against the former ambassador for complicity in murder and the causing of an explosion. The provincial court quashed the warrant but the Court of Appeal overruled the decision of the provincial court and restored the validity of the warrant, holding: 'The complainant was held to have contributed to the attack by omission. He had done nothing to prevent the explosives stored at the embassy building from being removed.' The former ambassador then lodged a constitutional complaint claiming that he was entitled to diplomatic immunity.

The constitutional court rejected the complaint and held that the obligation limited to the former German Democratic Republic to recognise the continuing immunity of the complainant, according to art 39(2) of the Vienna Convention, was not transferred to the Federal Republic of Germany by the international law of state succession.

Counsel for Senator Pinochet and for Chile relied on the following passage in the judgment of the constitutional court:

> 'For the categorization as an official act, it is irrelevant whether the conduct is legal according to the legal order of the Federal Republic of Germany … and whether it fulfilled diplomatic functions in the sense of Article 3 of the [Vienna Convention] (see also the position taken by the [Swiss] Federal Political Department on 12 May [82] 1961, *Schweizerisches Jahrbuch für internationles Recht* (SJIR) 21 (1964) p 171; however, a different position was taken by the Federal Political Department on 31 January 1979, reproduced in SJIR 36 (1980), p 210 at 211). The commission of criminal acts does not simply concern the functions of the mission. If a criminal act was never considered as official, there would be no substance to continuing immunity. In addition, there is no relevant customary international law exception from diplomatic immunity here (see Preamble to the [Vienna Convention], 5th paragraph) … Diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law. The diplomat can in such situations only be declared persona non grata.'

However, two further parts of the judgment are to be noted. First, it appears that the explosives were left in the embassy when the ambassador was absent, and his involvement began after the explosives had been left in the embassy. The report states:

> 'The investigation conducted by the Public Prosecutor's Office concluded that the bombing attack was planned and carried out by a terrorist group. The complainant's sending state had, in a telegram, instructed its embassy in East Berlin to provide every possible assistance to the group. In the middle of August 1983 a member of the terrorist group appeared in the embassy while the complainant was absent and requested permission from the then third secretary to deposit a bag in the embassy. In view of the telegram, which was known to him, the third secretary granted that permission. Later, the member of the terrorist group returned to the embassy and asked the third secretary to transport the bag to West Berlin for him in an embassy car. At the same time, he revealed that there were explosives in the bag. The third secretary informed the complainant of the request. The complainant first ordered the third secretary to bring him the telegram, in order to read

through the text carefully once again, and then decided that the third secretary could refuse to provide the transportation. After the third secretary had returned and informed the terrorist of this, the terrorist took the bag, left the embassy and conveyed the explosive in an unknown manner towards West Berlin.'

It appears that these facts were taken into account by the constitutional court when it stated:

'The complainant acted in the exercise of his official functions as a member of the mission, within the meaning of Article 39(2)(2) of the [Vienna Convention], because he is charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending state. The complainant was charged with having done nothing to prevent the return of the explosive. The Court of Appeal derived the relevant obligation of conduct out of the official responsibility of the complainant, as leader of the mission, for objects left in the embassy. After the explosive was left in the embassy and therefore in the complainant's sphere of control and responsibility, he was obligated, within the framework of his official duties, to decide how the explosive would then be dealt with. The complainant made such a decision, apparently on the basis of the telegraphed instruction from his sending state, so that private interests are not discernible (on the classification of activities on the basis of instructions see the Bingham Case in McNair *International Law Opinions* vol 1 (1956) p 196 at 197; Denza *Diplomatic Law* (1976) p 249; Salmon *Manuel de Droit Diplomatique* (1994) p 458). Instead, the complainant responded to the third secretary directly, in his position as the superior official, and, according to the view of the Court of Appeal, sought the best solution for the embassy.'

In addition the constitutional court stated that the rules of diplomatic law constitute a self-contained regime and drew a distinction between the immunity of a diplomat and the immunity of a head of state or governmental official and stated:

'Article 7 of the Charter of the International Military Tribunal of Nuremberg (UNTS. Vol. 82, p. 279) [7] and following it Article 7(2) of the Statute of the International Criminal Tribunal for Yugoslavia (ILM 32 (1993), p. 1192), as well as Article 6(2) of the Statute for the International Criminal Tribunal for Rwanda (ILM 33 (1994), p. 1602) state that the official position of an accused, whether as a leader of a state or as a responsible official in a Government department, does not serve to free him from responsibility or mitigate punishment. Exemptions from immunity for cases of war criminals, violations of international law and offences against jus cogens under international law have been discussed as developments of this rule … However, as the wording of Article 7 of the Charter of the International Military Tribunal of Nuremberg makes clear, these exceptions are relevant only to the applicable law of state organs that flows directly from it, in particular for members of the Government, and not to diplomatic immunity. State immunity and diplomatic immunity represent two different institutions of international law, each with their own rules, so that no inference can be drawn from any restrictions in one sphere as to possible effects in the other.'

Therefore I consider that the passage in the judgment relied on by counsel does not give support to the argument that acts of torture, although criminal, can be regarded as functions of a head of state.

In 1946 the General Assembly of the United Nations affirmed 'The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' and gave the following directive to its International Law Commission (the Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)):

> 'This Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.'

Pursuant to this directive, the 1950 Report of the International Law Commission to the General Assembly set out the following principle followed by the commentary contained in para 103:

> *'The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible Government official does not relieve him from responsibility under international law.* 103. This principle is based on article 7 of the Charter of the Nürnberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as head of state or responsible government official did not relieve him from international responsibility. "The principle of international law which, under certain circumstances, protects the representatives of a state", said the Tribunal, "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment …". The same idea was also expressed in the following passage of the findings: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."'

The International Law Commission's Draft Code of Offences against the Peace and Security of Mankind 1954 provided in art 3:

> 'The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) provided in art 7(2):

> 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) provided in art 6(2):

> 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official shall not relieve such person of criminal responsibility nor mitigate punishment.'

The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996 provided in art 7:

> 'The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State of Government, does not relieve him of criminal responsibility or mitigate punishment.'

In July 1998 in Rome the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998). The preamble to the statute states (inter alia):

> '*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
>
> *Recognizing* that such grave crimes threaten the peace, security and well-being of the world,
>
> *Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes …
>
> *Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.
>
> *Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> *Resolved* to guarantee lasting respect for the enforcement of international justice,
>
> *Have agreed as follows* …'

Article 5 of the statute provides that jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole which include crimes against humanity. Article 7 states that 'crime against humanity' means a number of acts including murder and torture when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 27 provides:

> '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected

> representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

Therefore since the end of the 1939–45 war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. Torture has been recognised as such a crime. The preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN GA Resolution 39/46, Doc A/39/51; Cmnd 9593), which has been signed by the United Kingdom, Spain and Chile and by over 100 other nations, states:

> 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that those rights derive from the inherent dignity of the human person, Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Having regard also to the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, Have agreed as follows …'

Article 1 defines 'torture' as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes specified in the article, such as punishment, or intimidation, or obtaining information, or a confession, and such pain and suffering is inflicted 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

The convention then contains a number of articles designed to make the measures against public officials who commit acts of torture more effective. In their handbook on the convention, Burgers and Danelius *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* p 1 stated:

> 'It is expedient to redress at the outset a widespread misunderstanding as to the objective of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the General Assembly of the United Nations in 1984. Many people assume that the *Convention's* principal aim is to *outlaw* torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the *Convention* only and that this prohibition will be binding as a rule of

> international law only for those States which have become parties to the *Convention*. On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.'

As your Lordships hold that there is no jurisdiction to extradite Senator Pinochet for acts of torture prior to 29 September 1988, which was the date on which s 134 of the Criminal Justice Act 1988 came into operation, it is unnecessary to decide when torture became a crime against international law prior to that date, but I am of opinion that acts of torture were clearly crimes against international law and that the prohibition of torture had required the status of ius cogens by that date.

The appellants accepted that in English courts a serving head of state is entitled (ratione personae) to immunity in respect of acts of torture which he has committed. Burgers and Danelius, referring to the obligation of a state party to the convention to establish its jurisdiction over offences of torture, recognise that some special immunities may exist in respect of acts of torture and state (p 131):

> 'Under international or national law, there may be certain limited exceptions to this rule, e.g. in relation to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted insofar as they apply to criminal acts in general and are not unduly extensive.'

It is also relevant to note that art 98(1) of the Rome Statute of the International Criminal Court 1998 provides:

> 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the court can first obtain the cooperation of that third State for the waiver of the immunity.'

But the issue in the present case is whether Senator Pinochet, as a former head of state, can claim immunity (ratione materiae) on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state. In my opinion he is not entitled to claim such immunity. The Torture Convention 1984 makes it clear that no state is to tolerate torture by its public officials or by persons acting in an official capacity and art 2 requires that:

> '1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

Article 4 provides:

> '1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

Article 7(1) provides:

> '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.'

I do not accept the argument advanced by counsel on behalf of Senator Pinochet that the provisions of the convention were designed to give one state jurisdiction to prosecute a public official of another state in the event of that state deciding to waive state immunity. I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present in another state.

Therefore, having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime. It is relevant to observe that in 1996 the military government of Chile informed a United Nations working group on human rights violations in Chile that torture was unconditionally prohibited in Chile, that the constitutional prohibition against torture was fully enforced and that:

> 'It is therefore apparent that the practice of inflicting unlawful ill-treatment has not been instituted in our country as is implied by the resolution [a UN resolution critical of Chile] and that such ill-treatment is not tolerated; on the contrary, a serious, comprehensive and coherent body of provisions exist to prevent the occurrence of such ill-treatment and to punish those responsible for any type of abuse.'

It is also relevant to note that, in his opening oral submissions on behalf of Chile, Dr Collins QC stated:

> '… the Government of Chile, several of whose present members were in prison or exile during those years, deplores the fact that the governmental authorities of the period of the dictatorship committed major violations of human rights in Chile. It reaffirms its commitment to human rights, including the prohibition of torture.'

In its written submissions (which were repeated by Dr Collins in his oral submissions) Chile stated:

> 'The Republic intervenes to assert its own interest and right to have these matters dealt with in Chile. The purpose of the intervention is not to defend the actions of Senator Pinochet whilst he was head of state. Nor is the purpose to prevent him from being investigated and tried for any crime he is alleged to have committed whilst in office, provided that any investigation and trial takes place in the only appropriate courts, namely those of Chile. The democratically elected Government of the Republic of Chile upholds the commitment of the Republic under international conventions to the maintenance and promotion of human rights. The position of the Chilean

> Government on state immunity is not intended as a personal shield for Senator Pinochet, but is intended to defend Chilean national sovereignty, in accordance with generally accepted principles of international law. Its plea, therefore, does not absolve Senator Pinochet from responsibility in Chile if the acts alleged against him are proved.'

My Lords, the position taken by the democratically elected government of Chile that it desires to defend Chilean national sovereignty and considers that any investigation and trial of Senator Pinochet should take place in Chile is understandable. But in my opinion that is not the issue which is before your Lordships; the issue is whether the commission of acts of torture taking place after 29 September 1988 was a function of the head of state of Chile under international law. For the reasons which I have given I consider that it was not.

Article 32(2) of the Vienna Convention 1961 set out in Sch 1 to the Diplomatic Privileges Act 1964 provides that 'waiver must always be express'. I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not, under international law, a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore, in this case, the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture.

A number of international instruments define a crime against humanity as one which is committed on a large scale. Article 18 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996 provides:

> 'A crime against humanity means any of the following acts, when committed in a systematic manner on a large scale or instigated or directed by a Government or by any organization or a group: (a) murder; (b) extermination; (c) torture …'

Article 7(1) of the Rome Statute of the International Criminal Court 1988 provides:

> 'For the purposes of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination … (f) Torture …'

However, art 4 of the Torture Convention 1984 provides: 'Each State Party shall ensure that *all* acts of torture are offences under its criminal law.' (My emphasis.)

Therefore I consider that a single act of torture carried out, or instigated by, a public official, or other person acting in a official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale. Accordingly, I am of the opinion that Senator Pinochet cannot claim that a single act of torture, or a small number of acts of torture carried out by him did not constitute international crimes and did not constitute acts committed outside the ambit of his functions as head of state.

For the reasons given by *Oppenheim's International Law* (9th edn, 1992) p 545, which I have cited in an earlier part of this judgment, I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages under the principle stated in *Jaffe v Miller (No 2)* (1993) 95 ILR 446. But I am of the opinion that there is no inconsistency between Chile and Senator Pinochet's entitlement to claim immunity if sued in civil proceedings for damages and Senator Pinochet's lack of entitlement to claim immunity in criminal proceedings for torture brought against him personally. This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in art 4 and the commentary thereon in the International Law Commission's 1996 Draft Code:

> *'Article 4—Responsibility of States* The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.
>
> *Commentary* (1) Although, as made clear by article 2, the present Code addresses matters relating to the responsibility of individuals for the crimes set out in Part II, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a de facto relationship with the State, without being vested with any legal power. (2) The "without prejudice" clause contained in article 4 indicates that the present Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft articles on State responsibility, the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs". The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.'

Therefore, for the reasons which I have given, I am of opinion that Senator Pinochet is not entitled to claim immunity in the extradition proceedings in respect of conspiracy to torture and acts of torture alleged to have been committed by him after 29 September 1988 and, to that extent, I would allow the appeal. However I am in agreement with the view of Lord Browne-Wilkinson that the Secretary of State should reconsider his decision under s 7 of the Extradition Act 1989 in the light of the changed circumstances arising from your Lordships' decision.

LORD SAVILLE OF NEWDIGATE. My Lords, in this case the government of Spain seeks the extradition of Senator Pinochet (the former head of state of Chile) to stand trial in Spain for a number of alleged crimes. On this appeal two questions of law arise.

Senator Pinochet can only be extradited for what, in the Extradition Act 1989, is called an extradition crime. Thus the first question of law is whether any of the crimes of which he stands accused in Spain is an extradition crime within the meaning of the 1989 Act.

As to this, I am in agreement with the reasoning and conclusions in the speech of my noble and learned friend Lord Browne-Wilkinson. I am also in agreement with the reasons given by my noble and learned friend Lord Hope of Craighead in his speech for concluding that only those few allegations that he identifies amount to extradition crimes.

These extradition crimes all relate to what Senator Pinochet is said to have done while he was head of state of Chile. The second question of law is whether, in respect of these extradition crimes, Senator Pinochet can resist the extradition proceedings brought against him on the grounds that he enjoys immunity from these proceedings.

In general, under customary international law, serving heads of state enjoy immunity from criminal proceedings in other countries by virtue of holding that office. This form of immunity is known as immunity ratione personae. It covers all conduct of the head of state while the person concerned holds that office and thus draws no distinction between what the head of state does in his official capacity (ie what he does as head of state for state purposes) and what he does in his private capacity.

Former heads of state do not enjoy this form of immunity. However, in general under customary international law, a former head of state does enjoy immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state. This form of immunity is known as immunity ratione materiae.

These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question.

In my judgment the effect of s 20(1)(a) of the State Immunity Act 1978 is to give statutory force to these international law immunities.

The relevant allegations against Senator Pinochet concern not his private activities but what he is said to have done in his official capacity when he was head of state of Chile. It is accepted that the extradition proceedings against him are criminal proceedings. It follows that unless there exists, by agreement or otherwise, any relevant qualification or exception to the general rule of immunity ratione materiae, Senator Pinochet is immune from this extradition process.

The only possible relevant qualification or exception in the circumstances of this case relates to torture.

I am not persuaded that before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593) there was any such qualification or exception. Although the systematic or widespread use of torture became universally condemned as an international crime, it does not follow that a former head of state, who as head of state used torture for state purposes, could under international law be prosecuted for torture in other countries where previously under that law he would have enjoyed immunity ratione materiae.

The Torture Convention set up a scheme under which each state becoming a party was in effect obliged either to extradite alleged torturers found within its

jurisdiction or to refer the case to its appropriate authorities for the purpose of prosecution. Thus, as between the states who are parties to the convention, there is now an agreement that each state party will establish and have this jurisdiction over alleged torturers from other state parties.

This country has established this jurisdiction through a combination of s 134 of the Administration of Justice Act 1988 and the 1989 Act. It ratified the Torture Convention on 8 December 1988. Chile's ratification of the convention took effect on 30 October 1988 and that of Spain just over a year earlier.

It is important to bear in mind that the convention applies (and *only* applies) to any act of torture '*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*'. It thus covers what can be described as official torture and must therefore include torture carried out for state purposes. The words used are wide enough to cover not only the public officials or persons acting in an official capacity who themselves inflict torture, but also (where torture results) those who order others to torture or who conspire with others to torture.

To my mind, it must follow in turn that a head of state, who for state purposes resorts to torture, would be a person acting in an official capacity within the meaning of this convention. He would indeed, to my mind, be a prime example of an official torturer.

It does not follow from this that the immunity enjoyed by a serving head of state, which is entirely unrelated to whether or not he was acting in an official capacity, is thereby removed in cases of torture. In my view it is not, since immunity ratione personae attaches to the office and not to any particular conduct of the office holder.

On the other hand, the immunity of a former head of state does attach to his conduct whilst in office and is wholly related to what he did in his official capacity.

So far as the states that are parties to the 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.

Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity ratione materiae of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity ratione materiae.

I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms. A former head of state who it is alleged resorted to torture for state purposes falls, in my view, fairly and squarely within those terms and, on the face of it, should be dealt with in accordance with them. Indeed it seems to me that it is those who would seek to remove such alleged official torturers from the machinery of the convention who in truth have to assert that by some process of implication or otherwise the clear words of the convention should be treated as inapplicable to a former head of state,

notwithstanding he is properly described as a person who was '*acting in an official capacity*'.

I can see no valid basis for such an assertion. It is said that if it had been intended to remove immunity for alleged official torture from former heads of state there would inevitably have been some discussion of the point in the negotiations leading to the treaty. I am not persuaded that the apparent absence of any such discussions takes the matter any further. If there were states that wished to preserve such immunity in the face of universal condemnation of official torture, it is perhaps not surprising that they kept quiet about it.

It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty.

For the same reasons, it seems to me that the wider arguments based on 'Act of State' or non-justiciability must also fail, since they are equally inconsistent with the terms of the convention agreed by these state parties.

I would accordingly allow this appeal to the extent necessary to permit the extradition proceedings to continue in respect of the crimes of torture and (where it is alleged that torture resulted) of conspiracy to torture, allegedly committed by Senator Pinochet after 8 December 1988. I would add that I agree with what my noble and learned friend Lord Hope of Craighead has said at the end of his speech with regard to the need for the Secretary of State to reconsider his decision and (if renewed authority to proceed is given) the very careful attention the magistrate must pay to the information laid before him.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Browne-Wilkinson. Save in one respect, I agree with his reasoning and conclusions. Since the one respect in which I differ is of profound importance to the outcome of this appeal, I propose to set out my own process of reasoning at rather more length than I might otherwise have done.

State immunity is not a personal right. It is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet. It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute.

The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; par in parem non habet imperium. States were obliged to abstain from interfering in the internal affairs of one another. International law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form. The idea that individuals who commit crimes, recognised as such by international law, may be held internationally accountable for their actions, is now an accepted doctrine of international law. The adoption by most major jurisdictions of the restrictive theory of state immunity, enacted into English law

by Pt I of the State Immunity Act 1978, has made major inroads into the doctrine as a bar to the jurisdiction of national courts to entertain civil proceedings against foreign states. The question before your Lordships is whether a parallel, though in some respects opposite, development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts.

Two overlapping immunities are recognised by international law: immunity ratione personae and immunity ratione materiae. They are quite different and have different rationales.

Immunity ratione personae is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by s 20(1) of the 1978 Act, enacting customary international law and the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565).

The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state, in relation both to his public and private acts.

This immunity is not in issue in the present case. Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.

Immunity ratione materiae is very different. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts, but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993, *Hatch v Baez* (1876) 7 Hun 596 and *Underhill v Hernandez* (1897) 168 US 250. These hold that the courts of one state

cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state, or diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.

Given its scope and rationale, it is closely similar to, and may be indistinguishable from, aspects of the anglo-american 'Act of State' doctrine. As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.

Immunity ratione materiae is given statutory form in English law by the combined effect of s 20(1) of the 1978 Act, the Diplomatic Privileges Act 1964 and art 39(2) of the Vienna Convention. The 1978 Act is not without its difficulties. The former head of state is given the same immunity 'subject to all necessary modifications' as a former diplomat, who continues to enjoy immunity in respect of acts committed by him 'in the exercise of his functions.' The functions of a diplomat are limited to diplomatic activities, ie acts performed in his representative role in the receiving state. He has no broader immunity in respect of official or governmental acts not performed in exercise of his diplomatic functions: see Dinstein 'Diplomatic Immunity from Jurisdiction Ratione Materiae' (1966) 15 ICLQ 76. There is, therefore, a powerful argument for holding that, by a parity of reasoning, the statutory immunity conferred on a former head of state by the 1978 Act is confined to acts performed in his capacity as head of state, ie in his representative role. If so, the statutory immunity would not protect him in respect of official or governmental acts which are not distinctive of a head of state, but which he performed in some other official capacity, whether as head of government, commander in chief or party leader. It is however, not necessary to decide whether this is the case, for any narrow statutory immunity is subsumed in the wider immunity in respect of other official or governmental acts under customary international law.

The charges brought against Senator Pinochet are concerned with his public and official acts, first as commander in chief of the Chilean army and later as head of state. He is accused of having embarked on a widespread and systematic reign of terror in order to obtain power and then to maintain it. If the allegations against him are true, he deliberately employed torture as an instrument of state policy. As international law stood on the eve of the 1939–45 war, his conduct as head of state after he seized power would probably have attracted immunity ratione materiae. If so, I am of opinion that it would have been equally true of his conduct during the period before the coup was successful. He was not then, of course, head of state. But he took advantage of his position as commander in chief of the army and made use of the existing military chain of command to deploy the armed forces of the state against its constitutional government. These were not private acts. They were official and governmental or sovereign acts by any standard.

The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or

unconstitutional under its own domestic law. Even before the end of the 1939–45 war, however, it was questionable whether the doctrine of state immunity accorded protection in respect of conduct which was prohibited by international law. As early as 1841, according to Quincy Wright (see (1947) 41 AJIL 71), many commentators held the view that 'the Government's authority could not confer immunity upon its agents for acts beyond its powers under international law'. Thus state immunity did not provide a defence to a crime against the rules of war: see Sir Hirsch Lauterpacht 'The Subjects of the Law of Nations' (1947) 63 LQR 438. Writing in 1946 before the Nuremberg Tribunal delivered its judgment and commenting on the seminal judgment of Marshall CJ in *Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116, Sheldon Glueck 'The Nuernberg Trial and Aggressive War' (1946) 59 Harv LR 396 at 426–427 observed:

> '… as Marshall implied, even in an age when the doctrine of sovereignty had a strong hold, the non-liability of agents of a State for "acts of State" must rationally be based on the assumption that no member of the Family of Nations will order its agents to commit flagrant violations of international and criminal law … in modern times a State is—*ex hypothesi*—incapable of ordering or ratifying acts which are not only criminal according to generally accepted principles of domestic penal law but also contrary to that international law to which all States are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope; and must, in consequence be held personally liable for their wrongful conduct.'

It seems likely that Glueck was contemplating trial before municipal courts, for more than half a century was to pass before the establishment of a truly international criminal tribunal. This would also be consistent with the tenor of his argument that the concept of sovereignty was of relatively recent origin and had been mistakenly raised to what he described as the 'status of some holy fetish'.

Whether conduct contrary to the peremptory norms of international law attracted state immunity from the jurisdiction of national courts, however, was largely academic in 1946, since the criminal jurisdiction of such courts was generally restricted to offences committed within the territory of the forum state or elsewhere by the nationals of that state. In this connection it is important to appreciate that the International Military Tribunal (the Nuremberg Tribunal) which was established by the four allied powers at the conclusion of the 1939–45 war to try the major war criminals was not, strictly speaking, an international court or tribunal. As Sir Hersch Lauterpacht explained in *Oppenheim's International Law* (7th edn, 1952) vol II, pp 580–581, the tribunal was—

> 'the joint exercise by the four States which established the Tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law.'

In its judgment, the tribunal described the making of the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) as an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered, and of the undoubted right of those countries to legislate for the occupied territories which had been recognised by the whole civilised world.

Article 7 of the Nuremberg Charter provided:

> 'The official position of defendants, *whether as Heads of State or responsible officials in Government Departments* shall not be considered as freeing them from responsibility or mitigating punishment.' (My emphasis.)

In its judgment, the tribunal ruled (see 'Trial of Major War Criminals before the International Military Tribunal, Nuremberg, 1 November 1945—1 October 1946', 42 vols, IMT Secretariat):

> '… the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates *the rules of war cannot obtain immunity while acting in pursuance of the authority of the State* if the State in authorising action moves outside its competence under international law … The principle of international law, which under certain circumstances protects the representatives of a State, *cannot be applied to acts which are condemned as criminal by international law.*' (My emphasis.)

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the 1939–45 war; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

The principles of the Nuremberg Charter and the judgment of the tribunal were unanimously affirmed by the Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)). Thereafter it was no longer possible to deny that individuals could be held criminally responsibility for war crimes and crimes against peace and were not protected by state immunity from the jurisdiction of national courts. Moreover, while it was assumed that the trial would normally take place in the territory where the crimes were committed, it was not suggested that this was the only place where the trial could take place.

The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of, or in connection with, war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the 1939–45 war. As memory of the war receded, it was abandoned.

In 1946 the General Assembly had entrusted the formulation of the principles of international law recognised in the Nuremberg Charter and the Judgment of the Tribunal to the International Law Commission. It reported in 1954. It rejected the principle that international criminal responsibility for crimes against humanity should be limited to crimes committed in connection with war crimes or crimes against peace. It was, however, necessary to distinguish international crimes from ordinary domestic offences. For this purpose, the commission proposed that acts would constitute international crimes only if they were committed at the instigation or the toleration of state authorities. This is the distinction which was later adopted in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46,

Doc A/39/51; Cmnd 9593). In my judgment it is of critical importance in relation to the concept of immunity ratione materiae. The very official or governmental character of the acts, which is necessary to found a claim to immunity ratione materiae and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime. It was, no doubt, for this reason that art 3 of the commission's Draft Code against the Peace and Security of Mankind 1954 (see Yearbook of the International Law Commission 1954, Vol II) provided: 'The fact that a person acted as Head of State or as a responsible government official does not relieve him of responsibility for committing any of the offences defined in the Code.'

The landmark decision of the Supreme Court of Israel in *A-G of Israel v Eichmann* (1961) 36 ILR 5 is also of great significance. Eichmann had been a very senior official of the Third Reich. He was in charge of Department IV D-4 of the Reich main security office, the department charged with the implementation of the 'final solution', and subordinate only to Heydrich and Himmler. He was abducted from Argentina and brought to Israel, where he was tried in the District Court for Tel Aviv. His appeal against conviction was dismissed by the Supreme Court. The means by which he was brought to Israel to face trial has been criticised by academic writers, but Israel's right to assert jurisdiction over the offences has never been questioned.

The court dealt separately with the questions of jurisdiction and act of state. Israel was not a belligerent in the 1939–45 war, which ended three years before the state was founded. Nor were the offences committed within its territory. The district court found support for its jurisdiction in the historic link between the State of Israel and the Jewish people. The Supreme Court preferred to concentrate on the international and universal character of the crimes of which the accused had been convicted, not least because some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and gipsies).

As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities, including the judgment of the Permanent Court of International Justice in *The Lotus Case* PCIJ, Series A, No 10, it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion. The limiting factor that prevents the exercise of extra-territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.

Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted universal jurisdiction: see eg Greenspan *The Modern Law of Land Warfare* (1959) p 420, where he writes:

> 'Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party.'

This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute. The court explained that the limitation often imposed on the exercise of universal jurisdiction, that the state which apprehended the offender must first offer to extradite him to the state in which the offence was committed, was not intended to prevent the violation of the latter's territorial sovereignty. Its basis was purely practical. The great majority of the witnesses and the greater part of the evidence would normally be concentrated in that state, and it was therefore the most convenient forum for the trial.

Having disposed of the objections to its jurisdiction, the court rejected the defence of act of state. As formulated, this did not differ in any material respect from a plea of immunity ratione materiae. It was based on the fact that in committing the offences of which he had been convicted, the accused had acted as an organ of the state, 'whether as head of the state or a responsible official acting on the government's orders'. The court applied art 7 of the Nuremberg Charter (which it will be remembered expressly referred to the head of state) and which it regarded as having become part of the law of nations.

The case is authority for three propositions. (1) There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad. (2) War crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law. (3) The fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court.

The case was followed in the United States in *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; *affd* 776 F 2d 571. In the context of an extradition request by the State of Israel the court accepted Israel's right to try a person charged with murder in the concentration camps of Eastern Europe. It held that the crimes were crimes of universal jurisdiction, observing (at 1472):

> 'International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'

The difficulty is to know precisely what is the ambit of the expression 'certain offences'.

Article 5 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) and art 7 of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A resolution of the General Assembly in 1973 proclaimed the need for international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A further resolution of the General Assembly in 1975 proclaimed the desire to make the struggle against torture more effective throughout the world. The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of Statute of the International Court of Justice (the United Nations Charter) (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) (art 38) was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms.

The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international order. Genocide was made an international crime by the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421). By the time Senator Pinochet seized power, the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that, by 1973, the use of torture by state authorities was prohibited by international law and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists that this does not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and textbooks: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in *Prosecutor v Anto Furundzija* (10 December 1998, unreported), where the court stated:

> 'At the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.'

The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *A-G of Israel v Eichmann* (1961) 36 ILR 5, and the definitions used in the more recent conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.

Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

Burgers and Danelius *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 1 wrote:

> 'Many people assume that the *Convention's* principal aim is to *outlaw* torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the *Convention*

only and that the prohibition will be binding as a rule of international law only for those States which have become parties to the *Convention*. On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.'

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. 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. I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extra-territorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by s 134 of the Criminal Justice Act 1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section.

The 1984 Torture Convention 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. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction. The charges against Senator Pinochet, however, are plainly of the requisite character. The convention thus affirmed and extended an existing international crime and imposed obligations on the parties to the convention to take measures to prevent it and to punish those guilty of it. As Burgers and Danelius explained, its main purpose was to introduce an institutional mechanism to enable this to be achieved. 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. The obligation imposed by the convention resulted in the passing of s 134 of the 1988 Act.

I agree, therefore, that our courts have statutory extra-territorial jurisdiction in respect of the charges of torture and conspiracy to torture committed after the section had come into force and (for the reasons explained by my noble and learned friend, Lord Hope of Craighead) the charges of conspiracty to murder where the conspiracy took place in Spain.

I turn finally to the plea of immunity ratione materiae in relation to the remaining allegations of torture, conspiracy to torture and conspiracy to murder. I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity ratione materiae is not available in respect of an offence committed in the forum state, whether this be England or Spain.

The definition of torture, both in the convention and s 134 of the 1988 Act, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed *only* by or at the instigation of,

or with the consent or acquiescence of, a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.

In my view a serving head of state or diplomat could still claim immunity ratione personae if charged with an offence under s 134. He does not have to rely on the character of the conduct of which he is accused. The nature of the charge is irrelevant; his immunity is personal and absolute. But the former head of state and the former diplomat are in no different position from anyone else claiming to have acted in the exercise of state authority. If the respondent's arguments were accepted, s 134 would be a dead letter. Either the accused was acting in a private capacity, in which case he cannot be charged with an offence under the section; or he was acting in an official capacity, in which case he would enjoy immunity from prosecution. Perceiving this weakness in her argument, counsel for Senator Pinochet submitted that the United Kingdom took jurisdiction so that it would be available if, but only if, the offending state waived its immunity. I reject this explanation out of hand. It is not merely far-fetched; it is entirely inconsistent with the aims and object of the convention. The evidence shows that other states were to be placed under an obligation to take action precisely because the offending state could not be relied upon to do so.

My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.

In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court, while at the same time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action. This was the very object of the Torture Convention. It is important to emphasise that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture. Chile insists on the exclusive right to prosecute him. The Torture Convention, however, gives it only the primary

right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.

My Lords, we have come a long way from what I earlier described as the classical theory of international law—a long way in a relatively short time. But as the Privy Council pointed out in *Re Piracy Jure Gentium* [1934] AC 586 at 597, [1934] All ER Rep 506 at 512–513, international law has not become a crystallised code at any time, but is a living and expanding branch of the law. Sheldon Glueck 'The Nuernberg Trial and Aggressive War' (1946) 59 Harv LR 396 at 398 observed—

> '… unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs … Much of the Law of Nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time.'

The law has developed still further since 1984, and continues to develop in the same direction. Further international crimes have been created. Ad hoc international criminal tribunals have been established. A permanent international criminal court is in the process of being set up. These developments could not have been foreseen by Glueck and the other jurists who proclaimed that individuals could be held individually liable for international crimes. They envisaged prosecution before national courts, and this will necessarily remain the norm even after a permanent international tribunal is established. In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

For my own part, I would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture, wherever and whenever carried out. But the majority of your Lordships think otherwise and consider that Senator Pinochet can be extradited only in respect of a very limited number of charges. This will transform the position from that which the Secretary of State considered last December. I agree with my noble and learned friend Lord Browne-Wilkinson that it will be incumbent on the Secretary of State to reconsider the matter in the light of the very different circumstances which now prevail.

LORD PHILLIPS OF WORTH MATRAVERS. My Lords, the Spanish government seeks extradition of Senator Pinochet to stand trial for crimes committed in a course of conduct spanning a lengthy period. My noble and learned friend Lord Browne-Wilkinson has described how, before your Lordships' House, the Spanish government contended for the first time that the relevant conduct extended back to 1 January 1972, and now covered a significant period before Senator Pinochet became head of state and thus before acts done in that capacity could result in any immunity. This change in the Spanish government's case rendered critical issues that have hitherto barely been touched on. What is the precise nature of the double criminality rule that governs whether conduct amounts to an extradition crime and what parts of Senator Pinochet's alleged conduct satisfy that rule? On the first issue I agree with the conclusion reached by Lord Browne-Wilkinson and on the second I agree with the analysis of my noble and learned friend Lord Hope of Craighead.

These conclusions greatly reduce the conduct that can properly form the subject of a request for extradition under our law. They leave untouched the question of whether the English court can assert any criminal jurisdiction over acts committed by Senator Pinochet in his capacity of head of state. It is on that issue, the issue of immunity, that I would wish to add some comments of my own.

State immunity

There is an issue as to whether the applicable law of immunity is to be found in the State Immunity Act 1978 or in principles of public international law, which form part of our common law. If the statute governs, it must be interpreted, so far as possible, in a manner which accords with public international law. Accordingly I propose to start by considering the position at public international law.

The nature of the claim to immunity

These proceedings have arisen because Senator Pinochet chose to visit the United Kingdom. By so doing, he became subject to the authority that this state enjoys over all within its territory. He has been arrested and is threatened with being removed against his will to Spain to answer criminal charges which are there pending. That has occurred pursuant to our extradition procedures. Both the executive and the court has a role to play in the extradition process. It is for the court to decide whether the legal requirements, which are a precondition to extradition, are satisfied. If they are, it is for the Home Secretary to decide whether to exercise his power to order that Senator Pinochet be extradited to Spain.

If Senator Pinochet were still the head of state of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. A head of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile. While, as a matter of courtesy, a state may accord a visitor of Senator Pinochet's distinction certain privileges, it is under no legal obligation to do so. He accepts, and Chile accepts, that this country no longer owes him any duty under international law by reason of his status ratione personae. Immunity is claimed, ratione materiae, on the ground that the subject matter of the extradition process is the conduct by Senator Pinochet of his official functions when he was head of state. The claim is put thus in his written case:

> 'There is no distinction to be made between a head of state, a former head of state, a state official or a former state official in respect of official acts performed under colour of their office. Immunity will attach to all official acts which are imputable or attributable to the state. It is therefore the nature of the conduct and the capacity of the Respondent at the time of the conduct alleged, not the capacity of the Respondent at the time of any suit, that is relevant.'

We are not, of course, here concerned with a civil suit, but with proceedings that are criminal in nature. Principles of the law of immunity that apply in relation to civil litigation will not necessarily apply to a criminal prosecution. The nature of the process with which this appeal is concerned is not a prosecution but extradition. The critical issue that the court has to address in that process is,

however, whether the conduct of Senator Pinochet which forms the subject of the extradition request constituted a crime or crimes under English law. The argument in relation to extradition has proceeded on the premise that the same principles apply that would apply if Senator Pinochet were being prosecuted in this country for the conduct in question. It seems to me that that is an appropriate premise on which to proceed.

Why is it said to be contrary to international law to prosecute someone who was once head of state, or a state official, in respect of acts committed in his official capacity? It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's. Were these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile. The following general principles are advanced in Chile's written case as supporting the immunity claimed:

> '(a) the sovereign equality of states and the maintenance of international relations require that the courts of one state will not adjudicate on the governmental acts of another state; (b) intervention in the internal affairs of other states is prohibited by international law; (c) conflict in international relations will be caused by such adjudication or intervention.'

These principles are illustrated by the following passage from *Hatch v Baez* (1876) 7 Hun 596 at 599–600, a case in which the former President of the Dominican Republic was sued in New York for injuries allegedly sustained at his hands in San Domingo.

> 'The counsel for the plaintiff relies on the general principle, that all persons, of whatever rank or condition, whether in or out of office, are liable to be sued by them in violation of law. Conceding the truth and universality of that principle, it does not establish the jurisdiction of our tribunals to take cognizance of the official acts of foreign governments. We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgement on the acts of another government done within its own territory. Each State is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country. The only remedy for such wrongs must be sought through the intervention of the government of the person injured … The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.'

This statement was made in the context of civil proceedings. I propose to turn to the sources of international law to see whether they establish that those principles have given rise to a rule of immunity in relation to criminal proceedings.

The sources of immunity

Many rules of public international law are founded upon or reflected in conventions. This is true of those rules of state immunity which relate to civil

suit—see the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081). It is not, however, true of state immunity in relation to criminal proceedings. The primary source of international law is custom, that is 'a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right' (see *Oppenheim's International Law* (9th edn, 1992) p 27). Other sources of international law are judicial decisions, the writing of authors and 'the general principles of law recognised by all civilised nations' (see art 38 of the Statute of the International Court of Justice (the United Nations Charter) (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015)). To what extent can the immunity asserted in this appeal be traced to such sources?

Custom

In what circumstances might a head of state, or other state official commit a criminal offence under the law of a foreign state in the course of the performance of his official duties?

Prior to the developments in international law which have taken place in the last 50 years, the answer is very few. Had the events with which this appeal is concerned occurred in the nineteenth century, there could have been no question of Senator Pinochet being subjected to criminal proceedings in this country in respect of acts, however heinous, committed in Chile. This would not have been because he would have been entitled to immunity from process, but for a more fundamental reason. He would have committed no crime under the law of England and the courts of England would not have purported to exercise a criminal jurisdiction in respect of the conduct in Chile of any national of that state. I have no doubt that the same would have been true of the courts of Spain. Under international practice criminal law was territorial. This accorded with the fundamental principle of international law that one state must not intervene in the internal affairs of another. For one state to have legislated to make criminal acts committed within the territory of another state, by the nationals of the latter, would have infringed this principle. So it would to have exercised jurisdiction in respect of such acts. An official of one state could only commit a crime under the law of another state by going to that state and committing a criminal act there. It is certainly possible to envisage a diplomat committing a crime within the territory to which he was accredited, and even to envisage his doing so in the performance of his official functions—though this is less easy. Well established international law makes provision for the diplomat. The Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) provides for immunity from civil and criminal process while the diplomat is in post and, thereafter, in respect of conduct which he committed in the performance of his official functions while in post. Customary international law provided a head of state with immunity from any form of process while visiting a foreign state. It is possible to envisage a visiting head of state committing a criminal offence in the course of performing his official functions while on a visit and when clothed with status immunity. What seems inherently unlikely is that a foreign head of state should commit a criminal offence in the performance of his official functions while on a visit and subsequently return after ceasing to be head of state. Certainly this cannot have happened with sufficient frequency for any custom to have developed in relation to it. Nor am I aware of any custom which would have protected, from criminal process, a visiting official of a foreign state who was not a member of a special mission, had he had the temerity to commit a criminal offence in the pursuance of some official function. For these reasons I do not believe that custom can

provide any foundation for a rule that a former head of state is entitled to immunity from criminal process in respect of crimes committed in the exercise of his official functions.

Judicial decisions

In the light of the considerations to which I have just referred, it is not surprising that Senator Pinochet and the Republic of Chile have been unable to point to any body of judicial precedent which supports the proposition that a former head of state or other government official can establish immunity from criminal process on the ground that the crime was committed in the course of performing official functions. The best that counsel for Chile has been able to do is to draw attention to the following obiter opinion of the Swiss Federal Tribunal in *Marcos v Federal Dept of Police* (1990) 102 ILR 198 at 202–203.

> 'The privilege of the immunity from criminal jurisdiction of heads of state … has not been fully codified in the Vienna Convention … But it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of state lead or universally represent … Articles 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state.'

Writings of authors

We have been referred to the writings of a number of learned authors in support of the immunity asserted on behalf of Senator Pinochet. In his *International Law* (9th edn, 1992) p 1043, para 456, Oppenheim comments:

> 'All privileges mentioned must be granted to a Head of State only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while Head of State. For his official acts as Head of State he will, like any other agent of a State, enjoy continuing immunity.'

This comment plainly relates to civil proceedings.

Satow's *Guide to Diplomatic Practice* (5th edn, 1978) ch 2 deals with the position of a visiting head of state. The authors deal largely with immunity from civil proceedings but state (see p 10) that under customary international law 'he is entitled to immunity—probably without exception—from criminal and civil jurisdiction'. After a further passage dealing with civil proceedings, the authors state (p 9):

> '(2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state.'

Sir Arthur Watts in his monologue in the *Hague Lectures* 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours, deals with the loss of immunity of a head of state who is deposed on a foreign visit. He then adds (p 89):

> 'A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts and he cannot be sued

a for them even after he has ceased to be Head of State. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador's appointment has come to an end.'

My Lords, I do not find these writings, unsupported as they are by any reference to precedent or practice, a compelling foundation for the immunity in b respect of criminal proceedings that is asserted.

General principles of law recognised by all civilised nations

The claim for immunity raised in this case is asserted in relation to a novel type of extra-territorial criminal jurisdiction. The nature of that jurisdiction I shall consider shortly. If immunity from that jurisdiction is to be established it seems c to me that this can only be on the basis of applying the established general principles of international law relied upon by Chile to which I have already referred, rather than any specific rule of law relating to immunity from criminal process.

These principles underlie some of the rules of immunity that are clearly d established in relation to civil proceedings. It is time to take a closer look at these rules, and at the status immunity that is enjoyed by a head of state ratione personae.

Immunity from civil suit of the state itself

It was originally an absolute rule that the court of one state would not entertain e a civil suit brought against another state. All states are equal and this was said to explain why one state could not sit in judgment on another. This rule was not viable once states began to involve themselves in commerce on a large scale and state practice developed an alternative restrictive rule of state immunity under which immunity subsisted in respect of the public acts of the state but not for its commercial acts. A distinction was drawn between acts done jure imperii and f acts done jure gestionis. This refinement of public international law was described by Lord Denning MR in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529. In that case the majority of the Court of Appeal held that the common law of England, of which international law forms part, had also changed to embrace the restrictive theory of state immunity g from civil process. That change was about to be embodied in statute, the State Immunity Act 1978, which gave effect to the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081).

Part I of the Act starts by providing:

h '**1.** *General immunity from jurisdiction.*—(1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.'

Part I goes on to make provision for a number of exceptions from immunity, the most notable of which is, by s 3, that in relation to a commercial transaction entered into by the state. Part I does not apply to criminal proceedings (s 16(4)).

j *The immunity of a head of state ratione personae*

An acting head of state enjoyed, by reason of his status, absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been

contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, insofar as civil proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity.

When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained (see ss 14(1)(a) and 20(5) of the 1978 Act).

Immunity ratione materiae

This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of the business of the state while in office. While a head of state is serving, his status ensures him immunity. Once he is out of office, he is in the same position as any other state official and any immunity will be based upon the nature of the subject matter of the litigation. We were referred to a number of examples of civil proceedings against a former head of state where the validity of a claim to immunity turned, in whole or in part, on whether the transaction in question was one in which the defendant had acted in a public or a private capacity: *Ex-King Farouk of Egypt v Christian Dior, SARL* (1957) 24 ILR 228, *Société Jean Dessès v Prince Farouk* (1963) 65 ILR 37, *Jimenez v Aristeguieta* (1962) 311 F 2d 547 and *US v Noriega* (1997) 117 F 3d 1206.

There would seem to be two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine. Two citations well illustrate the principle.

(1) *Underhill v Hernandez* (1897) 168 US 250 at 252 per Fuller CJ:

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves … The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.'

(2) *Buck v A-G* [1965] 1 All ER 882 at 887, [1965] Ch 745 at 770 per Diplock LJ:

> 'As a member of the family of nations, the government of the United Kingdom (of which this court forms part of the judicial branch) observes the

rules of comity, viz., the accepted rules of mutual conduct as between state and state, which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent; see [*Duff Development Co Ltd v Kelantan Government* [1924] AC 797, [1924] All ER Rep 1]. As was made clear in [*Rahimtoola v The Nizam of Hyderabad* [1957] 3 All ER 441, [1958] AC 379], the basis of the sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that its validity became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity'

It is contended on behalf of the respondent that the question of whether an official is acting in a public capacity does not depend upon whether he is acting within the law of the state on whose behalf he purports to act, or even within the limits of international law. His conduct in an official capacity will, whether lawful or unlawful, be conduct of the state and the state will be entitled to assert immunity in respect of it. In the field of civil litigation these propositions are supported by authority. There are a number of instances where plaintiffs have impleaded states claiming damages for injuries inflicted by criminal conduct on the part of state officials which allegedly violated international law. In those proceedings it was of the essence of the plaintiffs' case that the allegedly criminal conduct was conduct of the state and this was not generally in issue. What was in issue was whether the criminality of the conduct deprived the state of immunity and on that issue the plaintiffs failed. Counsel for the respondent provided us with an impressive, and depressing, list of such cases: *Saltany v Reagan* (1988) 702 F Supp 319 (claims of assassination and terrorism); *Siderman de Blake v Argentina* (1992) 965 F 2d 699 (claim of torture); *Princz v Federal Republic of Germany* (1994) 26 F 3d 1166 (claim in respect of the holocaust); *Princz v Federal Republic of Germany* (1994) 26 F 3d 1166 (claim of torture); *Sampson v Federal Republic of Germany* (1997) 975 F Supp 1108 (claim in respect of the holocaust); *Smith v Libya* (1995) 886 F Supp 306; *affd* (1996) 101 F 3d 239 (claim in respect of Lockerbie bombing); and *Persinger v Islamic Republic of Iran* (1984) 729 F 2d 835 (claim in relation to hostage taking at the US Embassy).

It is to be observed that all but one of those cases involved decisions of courts exercising the federal jurisdiction of the United States, *Al-Adsani*'s case being a decision of the Court of Appeal of this country. In each case immunity from civil suit was afforded by statute—in America, the Foreign Sovereignty Immunities Act 1976 (28 USSC-1602) (FSIA) and, in England, the State Immunity Act 1978. In each case the court felt itself precluded by the clear words of the statute from acceding to the submission that state immunity would not protect against liability for conduct which infringed international law.

The vital issue

The submission advanced on behalf of the respondent in respect of the effect of public international law can, I believe, be summarised as follows. (1) One

state will not entertain judicial proceedings against a former head of state or other state official of another state in relation to conduct performed in his official capacity. (2) This rule applies even if the conduct amounts to a crime against international law. (3) This rule applies in relation to both civil and criminal proceedings.

For the reasons that I have given and if one proceeds on the premise that Pt I of the 1978 Act correctly reflects current international law, I believe that the first two propositions are made out in relation to civil proceedings. The vital issue is the extent to which they apply to the exercise of criminal jurisdiction in relation to the conduct that forms the basis of the request for extradition. This issue requires consideration of the nature of that jurisdiction.

The development of international criminal law

In the latter part of this century there has been developing a recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur. In *Oppenheim's International Law* (9th edn, 1992) p 998 the authors commented:

> 'While no general rule of positive international law can as yet be asserted which gives to States the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the Sovereign State when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.'

The appellants, and those who have on this appeal been given leave to support them, contend that this passage, which appears verbatim in earlier editions, is out of date. They contend that international law now recognises a category of criminal conduct with the following characteristics. (1) It is so serious as to be of concern to all nations and not just to the state in which it occurs. (2) Individuals guilty of it incur criminal responsibility under international law. (3) There is universal jurisdiction in respect of it. This means that international law recognises the right of any state to prosecute an offender for it, regardless of where the criminal conduct took place. (4) No state immunity attaches in respect of any such prosecution.

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in, or reflected by, a considerable number of international instruments. Since the 1939–45 war states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.

I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes—that is the right, under

international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or to attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.

The principle of state immunity provides no bar to the exercise of criminal jurisdiction by an international tribunal, but the instruments creating such tribunals have tended, nonetheless, to make it plain that no exception from responsibility or immunity from process is to be enjoyed by a head of state or other state official. Thus, the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) provides by art 7:

> 'The official position of defendants, whether as head of state or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

The Tokyo Charter of 1946, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)), the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) and the Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998) all have provisions to like effect.

Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities ratione personae that exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421), which provides in art IV:

> 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the convention was subject to state immunity ratione materiae. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly would not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no

established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.

There can be no doubt that the conduct of which Senator Pinochet stands accused by Spain is criminal under international law. The Republic of Chile has accepted that torture is prohibited by international law and that the prohibition of torture has the character of jus cogens and or obligation erga omnes. It is further accepted that officially sanctioned torture is forbidden by international law. The information provided by Spain accuses Senator Pinochet not merely of having abused his powers as head of state by committing torture, but of subduing political opposition by a campaign of abduction, torture and murder that extended beyond the boundaries of Chile. When considering what is alleged, I do not believe that it is correct to attempt to analyse individual elements of this campaign and to identify some as being criminal under international law and others as not constituting international crimes. If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign.

It is only recently that the criminal courts of this country acquired jurisdiction, pursuant to s 134 of the Criminal Justice Act 1988, to prosecute Senator Pinochet for torture committed outside the territorial jurisdiction, provided that it was committed in the performance, or purported performance, of his official duties. Section 134 was passed to give effect to the rights and obligations of this country under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593), to which the United Kingdom, Spain and Chile are all signatories. That convention outlaws the infliction of torture 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Each state party is required to make such conduct criminal under its law, wherever committed. More pertinently, each state party is required to prosecute any person found within its jurisdiction who has committed such an offence, unless it extradites that person for trial for the offence in another state. The only conduct covered by this convention, is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The convention is thus incompatible with the applicability of immunity ratione materiae. There are only two possibilities. One is that the state parties to the convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that the state parties to the convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture.

The State Immunity Act 1978

I have referred earlier to Pt I of the 1978 Act, which does not apply to criminal proceedings. Part III of the Act, which is of general application, is headed 'Miscellaneous and Supplementary'. Under this part, s 20 provides:

> '(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.'

The Diplomatic Privileges Act 1964 was passed to give effect to the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). The preamble to the convention records that 'peoples of all nations from ancient times have recognised the status of diplomatic agents'. The convention codifies long standing rules of public international law as to the privileges and immunities to be enjoyed by a diplomatic mission. The 1964 Act makes applicable those articles of the convention that are scheduled to the Act. These include art 29, which makes the person of a diplomatic agent immune from any form of detention and arrest, art 31 which confers on a diplomatic agent immunity from the criminal and civil jurisdiction of the receiving state and art 39, which includes the following provisions:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

The question arises of how, after the 'necessary modifications', these provisions should be applied to a head of state. All who have so far in these proceedings given judicial consideration to this problem have concluded that the provisions apply so as to confer the immunities enjoyed by a diplomat upon a head of state in relation to his actions wherever in the world they take place. This leads to the further conclusion that a former head of state continues to enjoy immunity in respect of acts committed 'in the exercise of his functions' as head of state, wherever those acts occurred.

For myself, I would not accord s 20 of the 1978 Act such broad effect. It seems to me that it does no more than to equate the position of a head of state and his entourage visiting this country with that of a diplomatic mission within this country. Thus interpreted, s 20 accords with established principles of international law, is readily applicable and can appropriately be described as supplementary to the other parts of the Act. As Lord Browne-Wilkinson has demonstrated, reference to the parliamentary history of the section discloses that this was precisely the original intention of s 20, for the section expressly provided

that it applied to a head of state who was '*in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom*'. Those words were deleted by amendment. The mover of the amendment explained that the object of the amendment was to ensure that heads of state would be treated like heads of diplomatic missions 'irrespective of presence in the United Kingdom'.

Senator Pinochet and Chile have contended that the effect of s 20, as amended, is to entitle Senator Pinochet to immunity in respect of any acts committed in the performance of his functions as head of state anywhere in the world, and that the conduct which forms the subject matter of the extradition proceedings, insofar as it occurred when Senator Pinochet was head of state, consisted of acts committed by him in performance of his functions as head of state.

If these submissions are correct, the 1978 Act requires the English court to produce a result which is in conflict with international law and with our obligations under the Torture Convention. I do not believe that the submissions are correct, for the following reasons.

As I have explained, I do not consider that s 20 of the 1978 Act has any application to conduct of a head of state outside the United Kingdom. Such conduct remains governed by the rules of public international law. Reference to the parliamentary history of the section, which I do not consider appropriate, serves merely to confuse what appears to me to be relatively clear.

If I am mistaken in this view, and we are bound by the 1978 Act to accord to Senator Pinochet immunity in respect of all acts committed 'in performance of his functions as head of state', I would not hold that the course of conduct alleged by Spain falls within that description. Article 3 of the Vienna Convention, which strangely is not one of those scheduled to the 1964 Act, defines the functions of a diplomatic mission as including 'protecting in the receiving state the interests of the sending state and of its nationals, *within the limits permitted by international law*' (my emphasis).

In so far as Pt III of the 1978 Act entitles a former head of state to immunity in respect of the performance of his official functions, I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way one can reconcile, as one must seek to do, the provisions of the 1978 Act with the requirements of public international law.

For these reasons, I would allow the appeal in respect of so much of the conduct alleged against Senator Pinochet as constitutes extradition crimes. I agree with Lord Hope as to the consequences which will follow as a result of the change in the scope of the case.

Appeal allowed in part.

Celia Fox Barrister.

Diplomatic relations — Immunity — Diplomatic agent — Immunity of diplomatic agent after termination of diplomatic status — Vienna Convention on Diplomatic Relations, 1961, Article 39(2) — Acts performed in the exercise of diplomat's functions as member of the mission — Scope of functions — Police liaison officer — Officer performing police functions — Whether functions as a diplomatic agent separate from functions as a police officer — Waiver — Authority to waive immunity — Undertaking given by diplomatic agent to court — Whether sufficient to constitute waiver

State immunity — Jurisdictional immunity — Entitlement to immunity — Departments of government — Whether police a part of the government for purposes of immunity — Whether State immunity also protects individual official from suit — Relationship between State and diplomatic immunity — The law of England

PROPEND FINANCE PTY LIMITED AND OTHERS *v.* SING AND OTHERS[1]

England, High Court, Queen's Bench Division. 14 *March* 1996

(Laws J)

Court of Appeal. 17 *April* 1997

(Leggatt and Pill LJJ and Mance J)

SUMMARY: *The facts*:—In August 1993, the Attorney-General of Australia made a request to the Government of the United Kingdom, pursuant to the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, 1986 ("the Harare Scheme"), to seek a Court order to search for documents relating to an investigation being conducted by the Australian Federal Police ("the AFP"). The investigation concerned the plaintiff company, Propend Finance Pty Limited ("Propend"). In response to this request, the United Kingdom Home Secretary issued directions to the Metropolitan Police in London. Acting under these directions, officers of the Metropolitan Police applied for search warrants, which were issued by Judge Goddard QC at the Central Criminal Court on 26 October 1993. The first defendant, Superintendent Alan Sing, who was an officer of the AFP and an accredited diplomat with the role of police liaison officer at the Australian High Commission in London, gave evidence at the hearing at which the

[1] The plaintiffs were represented by Mr N. Pleming QC in the High Court and by Mr N. Pleming QC and Mr J. Lewis in the Court of Appeal. The defendants were represented In Mr D. Mayhew in the High Court and by Mr G. Pollock QC and Mr D. Mayhew in the Court of Appeal.

warrants were issued. The following day, the Metropolitan Police seized documents from the premises of a firm of solicitors and a firm of accountants in London. These documents were subsequently handed by the Metropolitan Police to the first defendant who took them to the premises of the Australian High Commission.

The plaintiffs sought judicial review of the decision to issue the search warrants and on 29 October 1993 applied to the High Court for an interlocutory injunction restraining the first defendant from dealing with the documents. At the hearing of the application for an injunction before Potts J, the first defendant gave an undertaking to the Court that neither the documents nor copies thereof would be removed from the jurisdiction of the Court or from the High Commission and that copies of the documents would not be transmitted by fax. The decision to issue the search warrants was subsequently quashed by the Divisional Court in March 1994.[2]

Several months later, the plaintiffs discovered that the first defendant had sent extracts from the seized documents to the headquarters of the AFP in Canberra shortly after giving the undertaking to the Court. The plaintiffs alleged that this communication was in breach of the undertaking and instituted proceedings for contempt of court against the first defendant, who by then had completed his appointment in the United Kingdom and returned to Australia, and the Commissioner of the AFP, who was sued as representing the AFP. The defendants maintained that the Court lacked jurisdiction, because the first defendant was entitled to diplomatic immunity and both defendants were protected by State immunity.

Held (by the High Court):—The first defendant was entitled to diplomatic immunity and the Court therefore lacked jurisdiction over him. The Commissioner was not entitled to State immunity.

(1)(a)It was established by a certificate from the Foreign and Commonwealth Office, which by virtue of the Diplomatic Privileges Act 1964, Section 4, was conclusive, that at the relevant time the first defendant had been a diplomatic agent accredited to the United Kingdom. While present in the United Kingdom he had, therefore, been immune from the jurisdiction of the English courts (p. 616).

(b) The first defendant could not be regarded as having acted in the course of a professional activity, within the meaning of Article 31(1)(c) of the Vienna (Convention on Diplomatic Relations, 1961.[3] The reference in that article to a professional activity referred to an activity carried on by the diplomat on his own account for profit and not to a police liaison officer's conduct of police functions (pp. 635–6).

(c) Although the first defendant had left the United Kingdom, Article 39(2) of the Vienna Convention[4] provided that he retained immunity in respect of acts which he had performed in the exercise of his functions as a member of the mission. In giving the undertaking to the Court, the first defendant had acted in the exercise of his functions as police liaison officer and thus retained his immunity. Although the first defendant had been answerable to the

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[2.] The proceedings are summarized in the judgment of Laws J at pp. 614–53 below.
[3.] For the text of Article 31(1)(c) see p. 629 below.
[4.] For the text of Article 39(2) see p. 630 below.

Commissioner of the AFP and had been acting in furtherance of a police investigation in Australia, the tasks which he performed on behalf of the AFP were a function of his role as police liaison officer and were therefore acts performed in the exercise of his functions as a member of the Australian diplomatic mission (pp. 636–7).

(d) If the first defendant had initiated the proceedings for obtaining the search warrants, he would have been deprived of immunity, by virtue of Article 32(3) of the Vienna Convention,[5] in the subsequent proceedings in which he had given the undertaking. That would have been so, notwithstanding that the two sets of proceedings were separate and had taken place before different courts. The application for the search warrants had, however, been made by the Metropolitan Police, acting on the instructions of the Home Secretary who had, as a matter of English law, been under no obligation to comply with the request from the Attorney-General of Australia, because the Harare Scheme had not been incorporated into English law (pp. 638–41).

(2) The first defendant's diplomatic immunity had not been waived. Diplomatic immunity belonged to the sending State not the individual and Article 32 of the Vienna Convention[6] provided that waiver had to be express and had to be made by the sending State. The undertakings given by the first defendant to Potts J could not be regarded as a waiver because there was no evidence that they had been authorized by the High Commissioner or a competent organ of the Government of Australia (pp. 641–5).

(3) The Commissioner would be entitled to State immunity only if the AFP could be regarded as a part of the Government of Australia for the purposes of Section 14(1) of the State Immunity Act 1978.[7] That was not the case. The AFP, like police forces in the United Kingdom, was separate and distinct from the Executive government and a police constable was an independent officer of the Crown. It was not necessary to consider whether the AFP was a "separate entity" within the meaning of Section 14(2) of the State Immunity Act 1978,[8] but if the Court had been required to consider that provision, it would have held that the AFP had not been acting in the exercise of sovereign authority in the present case, because the AFP did not exercise sovereign authority but rather performed its policing tasks independently of the Executive government (pp. 646–53).

The plaintiffs appealed against the decision of Laws J that the first defendant was entitled to diplomatic immunity. The Commissioner appealed against the decision that he was not entitled to State immunity.

Held (by the Court of Appeal, unanimously):—The plaintiffs' appeal was dismissed and the Commissioner's appeal was allowed.

(1) The first defendant was entitled to diplomatic immunity.

(a) Laws J had been entitled to find that there had been no waiver of immunity when the undertaking was given to Potts J on 29 October 1993 and any subsequent waiver of immunity by the Commonwealth of Australia in the

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5. For the text of Article 32(3) see p. 630 below.
6. For the text of Article 32 see p. 630 below.
7. For the text of Section 14(1) see p. 631 below.
8. For the text of Section 14(2) see p. 632 below.

judicial review proceedings did not operate as a retrospective waiver in relation to that undertaking (pp. 656–8).

(b) The first defendant had not instituted proceedings so as to lose his immunity by virtue of Article 32(3). A request under the Harare Scheme by one government to another did not amount to the initiation of proceedings in the domestic law of the requested State (pp. 658–9).

(c) The first defendant had acted in the exercise of his functions as a member of the mission, so that immunity subsisted under Article 39(2) of the Vienna Convention, notwithstanding that the first defendant had left the United Kingdom. The Government of Australia had an interest in the operation of the Harare Scheme, which provided for criminal assistance, and the first defendant's duties as First Secretary (Police Liaison) at the High Commission had included furthering that interest. Some police functions could be clothed with diplomatic immunity just as some of the military functions of a military attaché might be so clothed (pp. 659–61).

(2) There appeared to be no basis on which the Commissioner could be held vicariously liable for the acts of the first defendant in any event. Nevertheless, even if this obstacle was set aside, the Court had no jurisdiction over the Commissioner. The word "government" in Section 14(1) of the State Immunity Act 1978 had been given too narrow a construction by Laws J and had to be construed in the light of the concept of sovereign authority. The performance of police functions was essentially a part of governmental activity and the AFP were therefore to be regarded as part of the Government of Australia for the purposes of Section 14(1). Consequently, the first defendant was part of the Government of Australia under that provision (pp. 661–9).

(3) The protection afforded by the State Immunity Act 1978 to States would be undermined if employees or officers of the State could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) had therefore to be construed as affording to individual employees or officers of a foreign State protection under the same cloak as protected the State itself. Accordingly, the first defendant was entitled to State, as well as diplomatic immunity. State immunity also applied to the Commissioner (pp. 669–72).

The text of the judgment of the Court of Appeal commences at p. 653. The following is the text of the judgment of the High Court:

By this summons the defendants seek to have set aside certain orders made by Master Trench on 1 June 1995, whereby the learned Master gave leave to the plaintiffs to issue and serve on the defendants out of the jurisdiction in Australia a notice of motion alleging contempt of court by them. In the case of the first defendant, the plaintiffs were given leave in the alternative to effect substituted service at the offices of Messrs Clifford Chance in London. The defendants also seek orders that the notice of motion be set aside and that the action against them be dismissed, a declaration that this court has no jurisdiction over the defendants in respect of the subject-matter of the notice of motion, and orders for costs including wasted costs orders. The basis upon which

this application is mounted is that the defendants respectively enjoy diplomatic immunity and State immunity so as to put them beyond the reach of the contempt motion. The question for my decision is whether, as regards either defendant, that is right; though I will have to examine much of the facts, I am not concerned to try the merits of the contempt allegation, which consists essentially in a breach or breaches of undertakings given to Potts J at a hearing in chambers on 29 October 1993.

The history of the matter stalls in 1993, when there was on foot in Australia a major criminal investigation into suspected tax evasion in which some or all of the plaintiffs were allegedly implicated. In fairness to them I should record that the Australian authorities' claims to tax have now been settled, and payment of all sums due under the settlement has been made. The criminal investigation apparently continues. It has been running for several years. No arrests have been made, and no persons charged.

On 27 August 1993 the Attorney-General of Australia on behalf of the Commonwealth Director of Public Prosecutions and the Australian Federal Police asked the Government of the United Kingdom to assist them by seeking a court order for search warrants in the United Kingdom so as to obtain documents from the premises of Messrs Theodore Goddard (solicitors) and Messrs Stein Richards (accountants) with a view to carrying forward the criminal investigation. The legal authority in Australia for making such a request was the Mutual Assistance in Criminal Matters Act 1987. On the international plane, arrangements for mutual assistance of this kind between Australia and the UK were set in place by what is called the Harare Scheme. Its full title is "Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth". It was adopted in 1986 and amended in 1990. The request to the UK expressly stated that it had "been framed in conformity with that scheme". The request was directed to the "United Kingdom Central Authority", a role fulfilled by the Home Office. Pursuant to the request the Home Office responded first by corresponding with the Australian Attorney-General and the Commonwealth DPP; and then in due course on 30 September 1993 the Secretary of State issued a direction under Section 7(4) of the Criminal Justice (International Cooperation) Act 1990 to the Commissioner of the Metropolitan Police requiring him to apply for a warrant or warrants as requested by the Australian authorities. The direction was later widened by the Secretary of State on 25 October 1993 to include additional details supplied to him by the first defendant, whose position is central to this whole affair, and I should say something about it now.

The request to the UK Central Authority at first stated that it was desired that certain officials from Australia be present at the execution of the search warrants, including Det. Sgt Taciak of the Australian Federal Police. This was later amended so that Mr Taciak was replaced

by the first defendant. This was explained in a letter of 29 September from the Commonwealth DPP to the Home Office which indicated that the first defendant "who is currently attached as the AFP Liaison Officer to New Scotland Yard will be undertaking the overseas investigations on behalf of the AFP". In fact the first defendant was a Detective Superintendent in the Australian Federal Police; he was also (I mean to beg no questions by the adverb) a member of the diplomatic staff of the Australian High Commission in the post of First Secretary (Police Liaison), his appointment having been notified to the Foreign and Commonwealth Office on 5 December 1989. Indeed later, on 4 November 1993, the Foreign and Commonwealth Office issued a certificate to the effect that the first defendant had been so notified and accepted as such; the certificate is conclusive as to the facts stated by virtue of Section 4 of the Diplomatic Privileges Act 1964.

Mr Carver, in his second affidavit sworn for the defendants, offered some description of the first defendant's role. It is clear that he was and remained an officer in the Australian Federal Police before, during, and after his London posting. His role in London as the AFP Liaison Officer is described as involving cooperation with the appropriate police and other authorities in the UK on matters involving the two countries. This is fleshed out by the terms of the Directive issued to the first defendant by the then Commissioner of the AFP, under which his appointment was made; attached to it are 'Guidelines' which describe in some detail the duties of a Police Liaison Officer attached to the High Commission. I shall refer further to these documents in due course. Mr Carver says (para. 13):

> This situation is not unusual within a diplomatic mission, where several members of the mission with diplomatic status are responsible to departments of the sending state other than the foreign ministries. Other examples are Defence Attachés who are invariably military officers seconded from active service and still responsible to their defence ministries. Mr Sing was acting within the parameters of his official functions at all material times.

Mr Carver asserts that the first defendant's status as a diplomat and his position as a police officer were not mutually exclusive. The plaintiffs case is that at the material time (and critically, on 29 October 1993) the first defendant was acting in his capacity as a police officer and not as a diplomat. I will at present postpone the question whether that argument is right. However, aside from anything else, it is plain that at the material time the first defendant was in fact a diplomat; I am bound so to hold by virtue of the Secretary of State's certificate. It is also right in my judgment that the first defendant's actions in October 1993 were, so to speak, all taken in support of the request to the UK Central Authority and the application at the Central Criminal Court for search warrants which followed, and then to preserve the fruits of

the warrants. I have already stated that the Secretary of State's direction was widened by virtue of details supplied by the first defendant. It is worth observing that he notified the materials proposed to be searched for and seized by a letter of 25 October 1993 to the Central Authority, the Home Office, which on the same day passed on the details to DC Fryer of the Metropolitan Police to whom of course the Section 7(4) direction had been given.

Pursuant to the Secretary of State's direction, the Metropolitan Police applied for warrants on 26 October 1993 at the Central Criminal Court. The application was heard by Her Honour Judge Goddard QC. In form it consisted of an Information laid under provisions contained in the Police and Criminal Evidence Act 1984 by DC Fryer, who produced the Letter of Request and referred to the Secretary of State's direction. No counsel or solicitor was present, and the hearing, which was *ex parte*, was almost entirely taken up with evidence given by the first defendant. At the very end the judge asked DC Fryer to confirm that as far as he was aware there was no material being sought which was subject to legal professional privilege; and the officer so confirmed. The judge issued the warrants, which recited that "Detective Superintendent Alan Sing of the Australian Federal Police", along with two others, was authorized to be present at their execution.

There is an issue between the parties, which is material to the second defendant's position, as to the existence or extent of the first defendant's authority to give the evidence he did before Judge Goddard. In para. 14 of Mr Carver's second affidavit for the defendants it is stated that the evidence was given without prior preparation and without prior consultation as required by the 'Guidelines' which I have mentioned. These assertions by Mr Carver were in hot dispute. They go to the question whether the first defendant was authorized by the AFP to act as he did; an issue whose significance I shall explain when I come to the law. Had I had to go deeper into it, I would or might have been obliged to consider an application by the plaintiffs for further discovery, and the possibility of an adjournment. As it is the parties are (very responsibly) content that I should proceed on the footing of an admission made by Mr Mayhew on the defendants' behalf which I recorded in these terms: for the purposes of this application, a letter of 22 October 1993 from the Commonwealth DPP indicated that oral evidence might be required on the application for the warrants, and that such evidence might have to be given either by an officer of the Metropolitan Police or by the first defendant. The letter is silent as regards any question relating to immunity. I shall of course deal with the legal consequences of all this in due course.

On 27 October 1993, the day after their issue, the warrants were executed and the premises of Theodore Goddard and Stein Richards were entered and various documents were seized. But it was probably

on the evening of the 26th, after the warrants had been obtained, that the first defendant and DC Fryer went to see Mr Brian Barker QC in his chambers. There was no solicitor present, and Mr Barker was told that he would be formally instructed by the CPS on behalf of the Metropolitan Police at a later stage. From Mr Barker's affidavit and his evidence before me, it is I think plain that the concerns which took the first defendant to his chambers related primarily to the possibility that issues of legal professional privilege would be raised once the warrants were executed. In his affidavit sworn for the defendants Mr Barker stated that DC Fryer introduced the first defendant to him "as a Detective Superintendent in the Australian Federal Police who was the Police Liaison Officer at the Australian High Commission and a diplomat". In his oral testimony he said he was sure that the word "liaison" had been used when the introduction was made, and that he had been given a visiting card by the first defendant (which he had since lost) which had the word "liaison" on it. I mention these facts as being material to Mr Pleming's argument, with which I must deal in due course, that the first defendant was acting as a police officer and not as a diplomat.

On 29 October 1993 the Secretary of State authorized the Metropolitan Police to transmit the seized documents "direct to Australia". It is interesting to see how this was responded to. A letter from the Police to Theodore Goddard indicates that the documents were in fact handed to the first defendant on the same day, 29 October. The letter described him as "First Secretary Police Liaison of the Australian High Commission", and stated that the papers had been handed to him "on the authority of … Home Office UK Central Authority". The first defendant took them to the High Commission. Mr Harden of Theodore Goddard does not accept that he received this letter before the hearing in chambers, to which I must shortly come, on the afternoon of the same day.

The first defendant had been quite right to anticipate that there might be a challenge to the warrants. In fact there had been correspondence before the warrants had been applied for concerning responsibility for the costs of instructing counsel if warrants were granted and issues of privilege were raised. Theodore Goddard wrote to the Metropolitan Police on 29 October 1993 indicating that they had instructions to apply for an order of *certiorari* to quash the warrants, and seeking an undertaking that meantime the Police would hold the papers in sealed containers and not release them to the AFP. By this time, however, the documents were under the control of the first defendant at the High Commission. Mr Barden of Theodore Goddard was so informed. He spoke to the first defendant and requested that the documents be not removed from the jurisdiction pending an application for judicial review. The first defendant refused to comply, and asserted that the

documents were already in Australia (meaning the High Commission). So no agreement was forthcoming. Meantime the plaintiffs' Australian solicitors had been active in Sydney. On 29 October 1993 they sought an undertaking from the Commonwealth DPP regarding the seized documents indicating that if it was not given they would seek relief that day from the court. That undertaking was not given and the solicitors duly issued process in the Federal Court in Australia.

The plaintiffs' obvious and reasonable concerns were that documents had been seized from their solicitors (and accountants) with no opportunity having been given for their advisers to consider such issues as legal professional privilege. They had got nowhere in seeking agreement that the documents be held, and their contents not be disclosed to the AFP for use in the criminal investigation. In these circumstances they sought emergency injunctive relief from Potts J at this Court late on the Friday afternoon of 29 October 1993, before bringing a claim for judicial review to challenge the issue by Judge Goddard of the search warrants. The application was made *ex parte* although notice of the intention to apply had been given to the first defendant and the High Commissioner. Before the hearing the first defendant telephoned Mr Barker QC and (as the latter's affidavit puts it) asked him to attend on his behalf as a courtesy to the court. The matter was urgent and he agreed to attend, though still without instructions from a solicitor.

The best evidence of what took place before Potts J consists, in my judgment, in a contemporaneous or near contemporaneous note dictated by Mr Holligon of Theodore Goddard. Two versions of it are in the papers. The first contains certain manuscript amendments. The second incorporates those amendments in the typescript and is signed by Robin Mayhew QC and James Lewis, two of the counsel then appearing for the plaintiff. Their signatures are appended on 3 December 1993 but it is clear that the document, certainly in its unamended form, came into existence well before that date. Mr Mayhew for the plaintiffs did not challenge the note so far as it goes but contended, supported by the evidence of Mr Barker, that it was incomplete. In particular, he relies on Mr Barker's testimony to the effect that he told the judge in terms that the first defendant was a diplomat. I accept Mr Barker's evidence that he did so. It is clear to me that Mr Barker did everything he could to assist my task, and was a dispassionate and objective witness. Where there was something he did not remember, he said so frankly.

I will summarize Theodore Goddard's note of the proceedings. Mr Colin Nicholls QC for the plaintiffs introduced Mr Barker as acting "on behalf of the Australian Federal Police and Det Supt Sing". Mr Barker's evidence was that the first defendant *was* the AFP so far as these proceedings were concerned. Mr Nicholls proceeded to outline

the nature of the application, which was for an injunction to prevent the use or dissemination or transport out of the jurisdiction of the documents pending an opportunity being given to Theodore Goddard to establish whether all or any of them were subject to legal privilege. No formal proceedings had been commenced by this time, and Mr Nicholls undertook that proceedings would be issued on the following Monday. The unamended note of the hearing indicates that the undertaking was to issue a writ. The amended document substitutes the words "appropriate proceedings". A writ was in fact issued after the hearing naming Mr Sing as the only defendant. It was later amended to add as a second defendant the Commissioner of the Federal Australian Police. It was not served on either such party.

The note of the proceedings on 29 October 1993 continues thus. Mr Nicholls emphasized his concern as to the question of legal professional privilege. The judge wanted to know against whom any order should be made, and Mr Nicholls responded that it should be the AFP. The judge felt unable to make an order "at large" and Mr Nicholls then indicated that "the order should … be against the person in possession of the documents, in this case probably the diplomat at the High Commission". I think it clear that this was not intended as a reference to the first defendant. The judge then asked Mr Barker "whether he had a problem regarding diplomatic immunity or anything like that which he would wish to raise". Mr Barker, if he will forgive me for saying so, did not answer the question, but made submissions as to the merits of the decision to issue the warrants. From this point on it is plain that the judge took the view that the overall justice of the matter required an effective holding exercise until the rights and wrongs of the warrants could be sorted out. After he had given some indication of that approach, Mr Barker submitted "that it was the Australian Federal Police's opinion that the documents were, in fact, within the jurisdiction of Australia now as they are within the confines of the High Commission". The note continues:

> Mr Justice Potts replied that he would he very upset if a procedure such as this, which depends upon reciprocity, was obstructed in this way by a foreign government. He felt that, therefore, the interests of Theodore Goddard must be conceded to and asked the Australian Federal Police to reflect on this point.

The note immediately continues: "Mr Barker said that he would be prepared to give an undertaking on behalf of his client." There must, as I find, have been a break in the proceedings before Mr Barker gave this indication to the judge.

After further exchanges the judge stated that he was "most concerned about the diplomatic immunity aspect". Mr Nicholls (evidently seeking to assuage the judge's anxiety) expressed the view that the High

Commission was not outside the court's jurisdiction; the judge said that this short hearing was not the time to go into the matter but added "that his main difficulty was that these documents are at the High Commission and therefore the High Commissioner is responsible for the documents and not, in fact, the Superintendent". It seems to me that the judge was canvassing possible problems as to diplomatic immunity in relation to the actual or putative inviolability of the High Commission rather than as pertaining distinctly to the first defendant; and that may be of some significance when I come to deal with the arguments concerning waiver of immunity.

At this point the judge retired and Mr Barker took further instructions from the first defendant. The hearing resumed, and

> Mr Nicholls read out the list of undertakings which [his client] wanted, namely that all the officers of the Australian Federal Police, its agents, servants or otherwise will not under this undertaking until [then a wrong date is given: the date actually agreed to was 5 November 1993]:
>
> (i) remove (or copy documents) from the jurisdiction,
>
> (ii) remove (or copy documents) from the High Commission,
>
> (iii) [will] allow reasonable access to Theodore Goddard to inspect the documents seized.

There exists a manuscript Minute of Order (which was put before the judge) containing such undertakings together with two others which are however deleted. These would have prohibited "communicating the substance of the said documents to any person outside the jurisdiction" and "taking copies of the said documents". Mr Barker's evidence was that he had no instructions to give these latter undertakings as the first defendant would not consent to them. However the note of the hearing records: "Mr Barker agreed that in his undertaking he was also agreeing not to fax copies of the documents and expressly stated that he would not go outside the tenour and spirit of the undertaking." I shall come shortly to the facts which the plaintiffs assert constitute breach of the undertakings given, but should emphasize that issues concerning the breadth or effect of the undertakings are not material to the issues relating to immunity which I have to decide.

The order of the court as it was drawn is in somewhat different terms from those of the manuscript draft. In particular the undertakings are expressed to be given by the defendant—that is, of course, the first defendant before me—and not in terms the AFP. They are also expressed so as to prohibit "the defendant, his agents or otherwise" from removing any documents or copies from the court's jurisdiction or from the High Commission; so they did not purport to bind anyone else. As I have said, the writ which was issued following the hearing named only the first defendant. The AFP Commissioner was added later, on 26 November 1993.

Before leaving the hearing of 29 October 1993 I should deal with one factual issue which is material to the arguments concerning both diplomatic and State immunity. It is whether or not the first defendant obtained authority from the High Commission, or the Commissioner of Police, to give the undertaking. There is no direct evidence about it. Indeed, it is convenient to note at this point that no evidence at all has been sworn in support of this summons by either defendant. I have already held that there were two breaks in the hearing before Potts J (and that, indeed, was Mr Barker's recollection). The first took place just before Mr Barker indicated that he was prepared to give an undertaking on behalf of his client. It is plain that before this point he had no such instructions. He must at this stage have taken them. The question is whether then, or (perhaps less likely) at the second break in the proceedings, the first defendant obtained authority to give the undertakings. Mr Barker's evidence was that he could not remember; but that at one stage the first defendant went off, and he accepted that he probably did so in order to take instructions from somebody.

Mr Pleming QC for the plaintiffs relies on Mr Barker's answers to that effect. He relies also on the following material. In his affidavit Mr Barker says that be told Mr Nicholls that he was acting on behalf of the High Commissioner as well as the first defendant, and Theodore Goddard's letter indicating their intention to apply for an injunction was copied to the High Commissioner. However in my judgement these two facts carry the plaintiffs little distance since (a) there is on the evidence no question of the High Commissioner having authorized the giving of undertakings before this hearing, and (b) if the fact were that knowing that the application was to be made, and later that undertakings had been given, the High Commissioner simply remained silent, that could not constitute an authorization by him of the undertakings capable of having effect as a waiver of diplomatic immunity. I shall set out the relevant provisions of the Diplomatic Immunity Act 1964 in due course. Mr Pleming also relies on the following facts. In a letter written by the first defendant himself to Theodore Goddard on 2 November 1993 there is no suggestion that the undertakings had been given without authority. Nor, at a later stage when he swore an affidavit in the judicial review proceedings which were issued to challenge the warrants, did the first defendant make any such suggestion. Further, a letter from the Commonwealth DPP to the plaintiff's Australian solicitors of 3 November 1993 records the undertakings (describing them as "restraining orders"); its purpose was to decline to give an undertaking sought by the Australian solicitors. It contains no assertion that the first defendant had not been authorized to give the undertakings in London.

There being no direct evidence from the first defendant on the point, I am left to draw inferences from these various materials. I

consider it significant that Mr Barker's evidence, which I accept, was to the effect that immunity was not an issue on 29 October so far as the first defendant was concerned. He said also that he was not then instructed to claim immunity. In my judgment, neither Mr Barker nor the first defendant on 29 October 1993 had their minds focused on the question whether, if the first defendant distinctly enjoyed immunity as a diplomatic agent, that immunity was to be waived, and indeed waived by the head of the mission. Nor do I consider that they had in mind the possibility that by giving undertakings the first defendant might be submitting to the court's jurisdiction on behalf of the Commonwealth of Australia. Other materials in the case (to some of which 1 will refer) demonstrate that the various parties' perception of any problems relating to diplomatic immunity was couched in terms of the question whether it should be *claimed* not whether it might be *waived*.

There is no evidence from the first defendant whether he sought and obtained the authority of the High Commissioner to waive, immunity. There is no evidence from the High Commission whether any such authority was sought or obtained. I do not, of course, for a moment suggest that there was the slightest obligation for such evidence to be given. And the burden of proving that there was waiver of immunity rests on the plaintiffs. Elementarily, I must deal with this issue on the evidence I have which is, to say the least, meagre. In all the circumstances I hold that the probability is that the first defendant made a telephone call to the High Commission during one or other of the adjournments in the proceedings before Potts J; but I am not prepared to hold either that he spoke to the High Commissioner directly, or that the distinct subject matter of any such conversation related to the waiver of immunity, as opposed to what I may call the general merits of giving the undertakings. And I consider it extremely unlikely—not least having regard to the time difference—that the first defendant telephoned Australia to obtain authority from the Commissioner of Police to give the undertakings: a point which would be relevant to the issue whether the AFP, if it were part of the Executive government of Australia, waived State immunity on 29 October 1993. I will deal with the legal consequences of these findings in due course.

It is convenient now briefly to describe the facts which the plaintiffs say constitute a contempt of court by the first defendant. It is said that a 28-page fax was sent from the Australian High Commission in London by him to the Attorney-General of Australia on 1 November 1993 containing extracts from the seized documents. This fax, so it is alleged, was widely disseminated in Australia. Three bundles of documents said to contain it were destroyed in Australia in July 1994. The plaintiffs, as a result of various enquiries under the Freedom of

Information Act in Australia, have been told by the Attorney-General of Australia that there remain further copies of the fax: (a) four in the Headquarters of the second defendant; (b) two in the High Commission (and another copy retrieved from Messrs Clifford Chance); (c) one in the Attorney-General's Office. It may be that these facts are not in dispute. Given that as I have said I am only dealing with the issues relating to immunity, and that the defendants' summons is in the nature of an application to strike out the plaintiffs' motion, it is accepted that I should assume that they are true, or at least that there has been some breach of the undertakings.

I must deal with the sequence of events after 1 November 1993. The writ was issued on 2 November 1993. On 4 November 1993 Messrs Clifford Chance (who represent the defendants before me) wrote to Theodore Goddard on behalf of the Commonwealth of Australia, the High Commission in London, and the first defendant. Theodore Goddard had intimated their intention to apply for judicial review leave on 5 November, and Clifford Chance inquired what was the basis of the allegations they proposed to make. They added:

> The documents are held by Det Supt Sing who has diplomatic immunity. Our clients may wish to claim diplomatic immunity in relation to this matter, although no final decision has been taken on this issue. We should make clear that any appearance in court or any application to court on behalf of our client is made expressly without prejudice to their right to claim diplomatic immunity should they decide to do so.

On 5 November 1993 Clifford Chance sent a number of letters by fax to Theodore Goddard stating that they did not act for the AFP and:

> Our clients have diplomatic immunity and sovereign immunity. Their formal position is that they do not submit to the jurisdiction of the court in these proceedings. Our present instructions are to maintain and assert those rights. However we should inform you that as a matter of fact our clients will not themselves or through their agents or otherwise remove any documents seized on 27th October 1993 or copies thereof from the jurisdiction of the High Court … or … from the Australian High Commission … before 4 pm on Monday 15th November 1993.

On the same day, 5 November, application for judicial review leave was duly made to Brooke J. The Central Criminal Court was named as respondent. The challenge was to the decision to issue the warrants. It is I think unnecessary to enter into the grounds which were put forward; in due course, as we shall see, it was conceded on all hands that the decision was defective. At the hearing on 5 November 1993 the Central Criminal Court was not represented, but Mr Barker was there on behalf of the Commonwealth of Australia, the High Commission,

and the first defendant. As Theodore Goddard's note of the hearing shows, there was some discussion concerning State and diplomatic immunity, but Mr Barker made it clear that he had no submissions to make. Mr Justice Brooke gave leave.

The undertakings to Potts J by their terms expired on the same day but were in effect continued by virtue of an agreement not to "remove or transmit by facsimile, telex or modem (or dictate extracts therefrom by telephone) any documents, copies, extracts or summaries thereof out of or from the Australian High Commission". This agreement, however, was expressed to be without prejudice to the assertion of diplomatic and State immunity by Australia, the High Commission or the first defendant. By this date the plaintiffs knew nothing of the fax of 1 November.

On 8 November 1993 the plaintiffs obtained from the Federal Court of Australia an injunction against the then Police Commissioner, the first defendant and the Commissioner of Taxation, in wider terms, preventing inspection of the seized documents.

On 13 December 1993 the High Court, in the judicial review proceedings, continued the interim relief constituted by the extended agreement by means of a consent order having effect until the substantive hearing. The order was expressed to bind the Commonwealth, and Mr Mayhew for the defendants accepts that the Commonwealth thereby submitted to the jurisdiction. On 20 December 1993 the first defendant swore an affidavit in the judicial review proceedings asserting diplomatic immunity. Para. 5 stated:

> The swearing of this affidavit and any other act or omission by me in relation to this legal action is expressly without prejudice to the existence and continuance of my diplomatic immunity in relation to the proceedings generally and the execution of any order that may be made therein. It should not be taken as any waiver of that immunity.

On 4 March 1994 there was a further hearing which is of considerable importance in relation to one of the major issues before me, namely whether there was a waiver of any diplomatic immunity enjoyed by the first defendant on 29 October 1993. It took place before Balcombe LJ and Schiemann J (as he then was). I should say that by 4 March 1994 concurrent judicial review proceedings had been issued to challenge the Secretary of State's decision to give directions under the Act of 1990 which, of course, had founded Judge Goddard's jurisdiction to issue the warrants. More pertinently, while by this date the plaintiffs had no knowledge of the fax which had been sent by the first defendant on 1 November 1993, it is clear that they were anxious as to any use to which the seized documents had been or might be put; and amongst a number of interlocutory applications put before the court

on 4 March 1994, the plaintiffs were particularly at pains to secure what has been called a 'derivative use' injunction. There has been some debate before me as to the true emphasis of the parties' concerns on that date, it being contended by the plaintiffs that the issue of diplomatic immunity was, as it were, up front, while the defendants say that the real thrust of the hearing was to debate the rights and wrongs of a derivative use injunction and related matters. I do not find it necessary to go into this at any length. There may to an extent have been different perceptions. Certainly, there had been clear references to issues of immunity in correspondence, the first defendant's affidavit, and (as regards State immunity) in para. 10.1 and 10.2 of the judicial review grounds. But such differences as there may have been between the parties as to how they saw the matter on 4 March 1994 do not in my judgment throw critical light upon the only question relating to that hearing which is relevant for my purpose, namely whether, in words which I shall set out from the transcript, Mr Barker gave a valid waiver of the first defendant's diplomatic immunity effective to expose him to these contempt proceedings for breach of the October undertakings. What surely matters is not the parties' subjective perceptions but the actual words used, and their objective context as revealed by the transcript of the debate before the court.

Mr Alun Jones QC for the plaintiffs said:

> He [Mr Sing] … ought to be required by the Court to swear an affidavit to say what use was put to those documents; what did happen over 31st October; what other copies of documents are there; have any been transmitted out of the jurisdiction; and what use has been made of documents, when he knew there was a live issue as to privilege about those documents, what use was put to them? …
>
> The obvious person who can assist the Court is DS Sing, and he can do that … in the first place by an affidavit, and he can also do it by submitting to cross-examination.

The Court was puzzled by the necessity for such an order given the forthcoming substantive hearing due to take place on 14 March, and asked what was the urgency. Their Lordships also expressed some concern as to how the interlocutory relief sought bore on the issue in the judicial review, which essentially concerned the validity of the warrants. After further exchanges Mr Barker, representing as I understand it the same parties as he had on 5 November 1993, said:

> [Australia] would certainly agree to a derivative use injunction that deals with any representatives of either the Australian Police, or the Australian Tax Authorities, or any law enforcement agent in Australia that may have either sight of these documents or knowledge of them.

After further exchanges Balcombe LJ again pressed counsel as to the urgency of the matter, and Mr Jones responded:

> My Lord, it is the policing of the injunction. My Lord, yesterday evening For the first time, as a result of listing this matter for hearing this morning, we have been told the names of two officers who read the papers … there is a question of … policing the injunction. If my learned friend undertakes that that applies to every Australian Tax officer and the police who may have read this, and he is genuinely instructed to make that application, and can assure the Court that no argument as to diplomatic immunity would ever he put up in this Court, then we can see if that is embodied in an order of the Court today, we all know where we stand … we do not want to find ourselves in the position which we are currently in, where Mr Sing's affidavit says, "I assert immunity" … if it is going to be said in proceedings if ever there was a suggestion that the injunction had been broken, then Mr Sing or others would say, "Well, I am sorry, we are just not going to submit to an English Court about this because we have diplomatic immunity." My Lord, we want to know about that.

Balcombe LJ said: "Let us ask Mr Barker." This was Mr Barker's reply:

> Mr Sing is a diplomat. We have served on the other side a certificate properly signed, in fact we served that on November 5th last year. There is no question that he is a diplomat. He will not claim diplomatic immunity in relation to these proceedings.

Mr Barker went on to say that there was a practical problem in that the first defendant had finished his tour of duty in the UK and was on leave. But he indicated that there would be agreement as to his swearing an affidavit as requested. Shortly thereafter Balcombe LJ said:

> Mr Jones has talked about policing the injunction. At the end of the day, what is important, I would have thought for Mr Jones' client is that there should be a general injunction or undertaking, it matters not, precluding the use of any information derived from these documents which should never have been disclosed.

After further exchanges Mr Jones said:

> In view of what is said about diplomatic immunity, I do not propose to raise that matter further, I would have submitted that DS Sing's attendance or affidavit evidence would nonetheless have been helpful to the Court, but on the basis of what we have been told, can I move on to the last two items?

And so the matter was left until the substantive hearing on 14 March. As it seems to me Mr Jones on behalf of his clients must have been satisfied that he had an effective undertaking, substantially operating

as a derivative use injunction, meantime. In relation to the critical words spoken by Mr Barker—"He will not claim diplomatic immunity in relation to these proceedings"—there is evidence that he may have "mis-spoken", and Mr Barker's oral testimony before me was that he was surprised when he read this passage from the transcript; if he said what is there recorded, he should not have done so; he had no instructions to waive diplomatic immunity, and he had no intention of doing so. He also told me: "Our position throughout was to be as cooperative as we could." Again, Mr Barker was doing his best to assist me. I should say at once that Mr Mayhew for the defendants has pressed no argument either to the effect that Mr Barker did not say what he is recorded as having said, or that he spoke without his clients' authority. I do not have to consider any submission that in the context of diplomatic immunity the ordinary rule that statements by counsel, properly instructed, bind his client is in some way to be qualified or set aside.

At the hearing on 14 March there was agreement that the warrants were bad (principally on the ground that they should not have been applied for nor issued on an *ex parte* basis). The only question before the court was one of costs, which was disposed of in the court's judgment (as it happens given by myself) delivered on 17 March 1994. Issues relating to the legality of the Secretary of State's directions, canvassed at the hearing, were material only to the costs issue. On 17 March orders of *certiorari* were made, going to the warrants and the Secretary of State's directions, and the costs issues were resolved. In addition, final undertakings were accepted by the court, and certain final orders made, requiring *inter alia* that the documents seized on 27 October 1993 be delivered up to Theodore Goddard.

It is not, I think, necessary to recite any more of the primary facts, though I shall have more to say about some of the documentation in dealing with the legal argument.

I turn to the issues of law which I must decide. The question whether the first defendant enjoys diplomatic immunity, so as to constitute an absolute shield against these contempt proceedings, depends for its resolution upon the application to the facts of the Diplomatic Privileges Act 1964. The question in relation to the second defendant is whether he also is shielded from the contempt motion on the ground that the AFP which he represents (and which was represented by his predecessor at the time of the relevant events) enjoyed immunity under the provisions of Section 14 of the State Immunity Act 1978. I should say that he is not sued in his personal capacity but as the appropriate respondent on behalf of the AFP: it is,

I understand, agreed on all hands that the AFP has no legal personality of its own. Mr Pleming seeks to implead the AFP as having, on the facts, been bound by the first defendant's undertakings to Potts J. Before I embark further on the legal analysis which will be necessary to resolve these issues, I should set out the material statutory provisions.

By Section 1 of the Act of 1964, that statute replaced the previous law relating to diplomatic immunity. Section 2(1) provides (subject to a reservation contained in Section 3 to which I need not refer) that those Articles of the 1961 Vienna Convention on Diplomatic Relations set out in Schedule 1 to the Act should have the force of law. The Schedule contains some only of the Articles of the Convention, and I must cite the following:

Article 1

For the purpose of the Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff, and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission …

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent

except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of a receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents … may be waived by the sending State.

2. The waiver must always be express.

3. The initiation of proceedings by a diplomatic agent … shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

It is convenient to interpolate here the terms of Section 2(3) of the Act, which refers to Article 32. It provides:

For the purposes of Article 32 a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State.

I revert to the relevant Articles incorporated in the Schedule:

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post …

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist …

I turn to the State Immunity Act 1978. Section 1 provides:

A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

Section 1(2):

A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Section 2:

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

…

(3) A State is deemed to have submitted—

(a) if it has instituted the proceedings, or

(b) subject to ss. (4) and (5) below, if it has intervened or taken any step in the proceedings.

…

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

…

(7) The head of a State's diplomatic mission in the United Kingdom … shall be deemed to have authority to submit on behalf of the State in respect of any proceedings …

Sections 3 and 4 exclude immunity in the case of proceedings relating to commercial transactions and certain contracts of employment. Section 5 provides:

A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage or loss of tangible property,

caused by an act or omission in the United Kingdom.

Section 12(1) provides:

Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted to the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

Section 13(2):

Subject to ss. (3) and (4) below—

(a) Relief shall not be given against a State by way of injunction or order for specific performance …

Subsection (3):

Ss. (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned …

Section 14:

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or Commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority …

Section 16(1) provides:

This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 …

In order to appreciate the competing merits of the arguments which have been addressed to me, it is first convenient to explain in general terms the juridical setting in which these two statutes have effect. The doctrine of State immunity, under the common law and now as it applies in England through the Act of 1978, exists to recognize and vindicate the sovereign equality of nations. Its governing principle is that a foreign sovereign State is not to be subjected against its will to the compulsory jurisdiction of another State's courts, since that would affront its own sovereignty. It has its roots in the law of nations, a circumstance which itself confers or at any rate gives emphasis to one of its characteristics, namely that its harmonious application depends upon the making of effective reciprocal or mutual legal provisions between one State and another (in the diplomatic context this is exemplified by Section 3(1) of the Act of 1964, which I have not read). Its scope has changed over time. Years ago, the doctrine was thought to be absolute. In the books, the apex of that approach in this century is perhaps to be found in *The Cristina*[9] [1938] AC 485 and *Rahimtoola v. Nizam of Hyderabad*[10] [1958] AC 379. However, as sovereign States increasingly engaged in commercial enterprises, a restrictive rule came to hold sway. It was that immunity applied only to acts of a governmental nature—things done *jure imperii*; and not to acts of a commercial nature—things done *jure gestionis*. In many European countries, this seems to have been the position as early as 1951, and it was adopted in 1952 in the United States by a document known as the Tate letter. These developments are described by Lord Denning MR in *Trendtex*[11] [1977] QB 529 at 555E–556C. For the common law courts, they brought certain problems in their wake. First was whether this restrictive doctrine, emerging or established overseas, should be followed here. That engaged conceptual problems as to the relationship between

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[9. 9 *Ann Dig* 250.]
[10. 24 *ILR* 175.]
[11. 64 *ILR* 122.]

customary international law and the common law. The Court of Appeal had to deal with those in *Trendtex*. Secondly, given that the restrictive rule found its place in the common law, questions arose, on particular facts, concerning the point of departure between acts done *jure imperii* and acts done *jure gestionis*. *I° Congreso del Partido*[12] [1983] 1 AC 244 in the House of Lords is a paradigm instance; see also the earlier decision of the Privy Council in *The Philippine Admiral*[13] [1977] AC 373, and, much more recently, *Littrell (No 2)*[14] [1995] 1 WLR 82. The divide is now recognized and effected by Section 3 of the Act of 1978, and it underlies the exceptions to diplomatic immunity constituted by subparagraphs (a)–(c) of Article 31(1) of the Vienna Convention. Other, linked issues have come before the courts, such as whether a particular body falls to be regarded as an "alter ego or organ" of the government of a foreign State: see again *Trendtex*, dealing with the status of the Central Bank of Nigeria. In light of the submissions made to me (and the expert evidence adduced) concerning the status of the AFP, this last problem is close to home in the present case.

Through all this web of learning the principle which lies at the root of the thing has remained untouched as regards acts done *jure imperii*. Not only this; the principle is closely linked to the basis upon which immunity has been accorded to diplomats. It is worth recalling part of the preamble (not set out in the Schedule to the Act of 1964) to the Vienna Convention:

> *Recalling* that peoples of all nations from ancient times have recognised the status of diplomatic agents [exemplified, perhaps by the Spartan heralds in the *Lysistrata*],
>
> …
>
> *Having in mind* the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States …
>
> …
>
> *Realizing* that the purpose of such privileges [sc. accorded to diplomats] and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States …

The significance is that the law relating to diplomatic immunity is not free-standing from the law of sovereign or State immunity, but is an aspect of it. The "sovereign equality of States" requires not only that one nation should not be compulsorily impleaded in the courts of another, but also that its accredited diplomats enjoy a degree of immunity, whose limits are set in England by the Act of 1964, which is regarded as essential for the proper functioning of the foreign State at the diplomatic level in the receiving jurisdiction. This is itself an aspect of the very sovereignty which constitutes the rationale of State immunity. So to describe the matter places no gloss on the Act of 1964. It is an

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[12. 64 *ILR* 307]
[13. 64 *ILR* 90.]
[14. 100 *ILR* 438.]

approach exemplified, though not expressed, in Section 2(3) and Article 32 of the Convention, which is municipalized in the Schedule. In this scheme of things it is elementary that waiver of diplomatic privilege is not at the option of the diplomat, but is, and only is, the choice of his sending State. This is well illustrated in *Nzie v. Vessah* (1978) 74 *ILR* 519, a decision of the Court of Appeal of Paris (First Chamber).

In written submissions put in with my leave after oral argument, Mr Pleming called into question the notion of a juridical unity between diplomatic and State immunity. He gave an instance in which the diplomat would be immune from suit (absent express waiver of his immunity) for an act or omission in the discharge of his official functions as a member of the mission which damaged another's tangible property in the UK. Assuming, however, that in respect of the act or omission the diplomat acted as the servant or agent of his sending State, the State itself would not be immune, by virtue of Section 5(b) of the Act of 1978. Leaving aside any possible problems which, depending on the precise facts, might arise in relation to the existence or otherwise of vicarious liability upon which the sending State could be impleaded, Mr Pleming may perhaps be right; but his example only shows that under the English statutes the conditions under which diplomatic and State immunity may respectively be lost are not co-terminous, not that they are unrelated in principle as I have described. And it is to be noted that in *Baccus SRL v. Servicio National Del Trigo*[15] [1957] 1 QB 438 at 470 Jenkins LJ pointed out that:

> … the degree of protection afforded to diplomatic personnel under the Act cannot he regarded as superior to the degree of protection afforded to a foreign sovereign.

This background serves to provide a sharp focus to the debate between the parties in these proceedings. Put crudely, Mr Mayhew for the defendants submits that there is nothing in the case to show that the Commonwealth of Australia has relinquished its prima facie right to immunity from this court's jurisdiction, whether by virtue of the first defendant's actions or anything else. By contrast—and this is no less crude a summary—Mr Pleming QC submits that the Commonwealth in effect came here to obtain the warrants, and within the consequent dispute as to their validity the first defendant broke enforceable promises to the court, by which, owing to its own voluntary submission, the Commonwealth as well as the first defendant was bound. This is of course a snapshot which elides the various and sophisticated arguments with which I will have to deal.

To these specific arguments I will now turn. It is convenient to deal first with the position relating to the first defendant.

[15. 23 *ILR* 160.]

Diplomatic immunity

Mr Pleming's overall submissions were admirably summarized in a short supplemental skeleton setting out the bare bones of his argument. That document crystallized his case against the first defendant in four points. All proceed on the premise, which as I have said is necessarily common ground, that Mr Sing was a diplomat at the material time. The first heading was waiver; but the last three raised specific arguments to the effect that even without waiver, on a proper application of the law to the facts the first defendant enjoyed no diplomatic immunity so as to shield him from the plaintiffs' contempt motion. As a matter of logic it is appropriate to deal with these three submissions before addressing the question of waiver.

The first of them asserts that Article 31(1)(c) (which I have set out) applies so as to deprive the first defendant of immunity. The argument is that on 29 October 1993 the first defendant was acting in right of his capacity as a police officer and not that of a diplomat, and for that reason his action in giving the undertakings related to a professional activity. In the course of argument, Mr Mayhew submitted and Mr Pleming accepted that I might properly consider other Articles of the Vienna Convention, not municipalized in the Act of 1964, in the exercise of construing Article 31(1)(c). That in my judgment is plainly right. Article 42 of the Convention provides:

> A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

I should have thought it plain that the expression "professional or commercial activity" means the same as in Article 31(1)(c). I have no hestitation in holding that the phrase refers to activity which might be carried on by the diplomat on his own account for profit; such "professional" activity would arise, for example, in the perhaps unlikely event that the diplomat was a qualified doctor who engaged in some medical practice during his tour of duty. The 5th edition of *Satow's Guide to Diplomatic Practice* has this passage, dealing specifically with Article 31(1)(c), at para. 15.15:

> Article 42 of the Convention prohibits a diplomat from exercising in the receiving state for personal profit any professional or commercial activity. But an exception to immunity is still needed as well. A diplomat may disregard the prohibition on professional or commercial activities. The sending and receiving states may agree that the bar should be waived.

This with respect is clearly right, and it shows that the very rationale of Article 31(1)(c) is to see to it that no immunity enures for the benefit of a diplomat where for one reason or another his activities do not comply with the Article 42 prohibition. So the two provisions refer to

the same subject-matter not only by their similarity of language but also by virtue of their interlinked purposes.

Whatever the right analysis of the first defendant's position, he was plainly not engaged in any professional activity on his own account for profit. I reject this head of Mr Pleming's argument.

The next submission was that by virtue of Article 39(2) the first defendant lost his immunity when he left the UK at the expiry of his tour in December 1993. Mr Pleming says that the giving of undertakings to Potts J was not within the meaning of the phrase appearing in that Article "acts performed … in the exercise of his functions as a member of the mission".

I accept (what I do not conceive was disputed) that the first defendant carries the burden of showing that the relevant acts were done in the exercise of his functions as a member of the mission. I accept also, since the Article cannot otherwise be sensibly construed, that the first defendant's enjoyment of immunity of 29 October 1993 (if indeed he so enjoyed it) does not imply that at that time he was necessarily acting in the exercise of such functions. Mr Pleming correctly submitted that the fact that the first defendant is not deprived of immunity under Article 31 cannot conclude the issue arising under Article 39(2). Article 39(2) proceeds upon the premise that at the time of the act in question the diplomat indeed enjoyed immunity: a premise which by definition does not arise if the case is one within the exceptions prescribed in Article 31.

I must therefore decide whether or not the first defendant in giving the undertakings was acting in the exercise of his functions as a member of the mission. Mr Pleming submits that in fact he acted as a substitute for Sgt Taciak, and that if as was originally intended the Sgt had come to London to further the application for the warrants no question of diplomatic immunity would have arisen in relation to his actions. Mr Mayhew accepts as much. And there is no doubt that the first defendant's actions taken in pursuit of the application for search warrants were done in the interests of the ongoing Australian police investigation, and that his concerns on 29 October 1993 were directed to the same end.

However in my judgment there is no room in this case for the view that the first defendant performed in London two functions which in the eye of the law relating to diplomatic immunity were wholly separate: one as a diplomat, the other as a police officer. His diplomatic status was *as* police liaison officer. It is confirmed by the Directive setting out his terms of appointment and the Guidelines to which I have referred. Under the heading "Role" the former states: "Your role is to represent the interests of the Australian Federal Police on matters of law enforcement, in particular to receive and distribute crime intelligence at post and to facilitate the provision of crime intelligence to Australian

Police Forces." Under "Functions" this is included: "to liaise with law enforcement agencies of countries in your area of responsibility in relation to investigations of significance to the AFP". Almost identical words appear in the Guidelines under"Duties". And under "Role/ Function" the latter document states: "The objective in posting an AFP Liaison Officer to an Australian Diplomatic Mission … is to develop and maintain close liaison to a level of confidence with police and law enforcement agencies in the host country. This facilitates the flow of information to Australian police forces."

Mr Pleming relies on what is said in the Directive under the heading "Responsibilities". He describes this in his principal skeleton argument as perhaps the best description of "the nature of the first defendant's dual role". The text reads:

> As a member of the Australian Federal Police, you remain responsible to me, reporting through the Officer-in-Charge International Division. As a member of staff of the Australian High Commission, London, you will have responsibility to the Head of the Mission and will keep him generally informed of your activities.

Certainly I accept that this shows that the AFP Liaison Officer was to be responsible, as it were, to two lines of management. But it does not begin to demonstrate that as regards the matters for which he remained responsible to the Commissioner he would be acting outwith his role as a member of the mission. Mr Barker may have regarded him *as* the AFP on 29 October 1993. There is certainly much material, relied on by Mr Pleming, to show that he was acting for the AFP. His very task at the time was to prosecute the applications for warrants and preserve the fruits of them. But in my judgment these elements in the case, however high they may be put, cannot establish that the first defendant was present in London in two different legal capacities, one of which engaged the law of diplomatic immunity while the other did not. On the contrary, the tasks he carried out on behalf of the AFP were a very function of his particular diplomatic role, as in my judgment is demonstrated by the documentary references which I have set out. I have heard no convincing argument to refute para. 13 of Mr Carver's second affidavit which I have earlier cited. The analogy with a military attaché seems to me an apt one. The fact that Sgt Taciak would not have enjoyed diplomatic immunity is neither here nor there. The first defendant did. It was integral to his function as a member of the mission that he should further the interests of the AFP, and in October 1993 that included the advancement in the UK of the Australian criminal inquiries. Accordingly I reject Mr Pleming's argument based on Article 39(2) of the Convention.

The last of the three submissions with which I am presently dealing

was that the first defendant was party to the initiation of the proceedings launched to obtain the warrants, that the application before Potts J was in substance part and parcel of the plaintiffs' means of defence or appeal, and that accordingly by force of Article 32(3) the first defendant may not invoke immunity.

If I were of the view that the first defendant had indeed initiated the proceedings, I would hold that Article 32(3) deprived him of immunity vis-à-vis the hearing before Potts J notwithstanding that the *lis* on 29 October 1993 was procedurally wholly separate, and in a different court, from the Old Bailey application. That application having been made *ex parte* (which, as was ultimately conceded, it should not have been) the later judicial review motion was the only means open to the plaintiffs to contest the warrants. Although the application to Potts J was not in form part of the judicial review but anticipated the issue of the writ which was not served, in the events which happened that is a paltry distinction of which Mr Mayhew rightly makes nothing. In substance and in fact it was an application for interim relief to preserve the subject-matter of the forthcoming judicial review.

Article 32(3) would in my judgment plainly have effect to engage the judicial review and thus also, on my view of the matter, the *lis* before Potts J as a "counterclaim", notwithstanding that in our ordinary English civil procedure the term "counterclaim" has a narrower, or rather different, meaning from that of a general defence on the factual or legal merits or a collateral challenge in other proceedings. I am assisted to this conclusion by *High Commissioner for India v. Ghosh*[16] [1960] 1 QB 134, in which Jenkins LJ stated at 140:

> But the High Commissioner and the Union of India have chosen to come to the courts in this country and to submit to the jurisdiction of those courts for the purpose of establishing their claim in debt against the defendant … By bringing their action in this country and submitting to the jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated upon but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately …

And in *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others*[17] [1952] AC 318 subsequent proceedings were held in substance to amount to an 'appeal' preventing the Sultan from invoking sovereign immunity in relation to them, where he had initiated the earlier proceedings. In *Re RFN*, 77 *ILR* 452 the Supreme Court of Austria was directly concerned with Article 32(3). A diplomat had lodged an application for custody of his child. But after the mother had obtained an order for maintenance against him, his application was withdrawn. However the

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[16. 28 *ILR* 150.]
[17. 19 *ILR* 182.]

mother also lodged a cross-petition for custody, in relation to which the father sought to invoke immunity. Amongst other findings the Supreme Court held that the case fell within Article 32(3): "The term counterclaim is dependent not so much on the specific legal proceedings in which the claim is raised but rather on the connection between two competing claims" (p. 456).

The real question on this part of the case is whether the first defendant can be regarded as having initiated the Old Bailey application. In form at least it was made by the Metropolitan Police, and by Section 7(4) of the Act of 1990 (which I have not set out) could not lawfully have been made but for the Secretary of State's direction. In giving the direction the Secretary of State of course acted in pursuance of the request made on 27 August 1993 by the Attorney-General of Australia, the Commonwealth DPP, and the AFP, and did so in light of the understandings arrived at in the Harare Scheme. Whether or not the Harare Scheme constitutes a treaty binding in international law (a question to which some reference was made in the course of argument), it seems clear that as a matter of municipal law the Secretary of State was not legally obliged to comply with the request; and this is of some importance in light of Mr Pleming's submissions. The Scheme has not been incorporated into English law. By Sections 4(2) and 7(4) of the Act of 1990 the Secretary of State enjoys a discretion (a) whether to nominate a court to take evidence to which a request relates and (b) whether to authorize, by a direction, an application for a warrant. No doubt the expectation is that such requests will be complied with, whether or not in a modified form, save in exceptional circumstances. It is of interest that the "United Kingdom Guidelines" on international mutual legal assistance in criminal matters, published by the UK Central Authority (the Home Office) in August 1991, has these passages (paras. 40 and 41):

> The United Kingdom will render the maximum possible assistance, and cases of refusal are expected to be rare … Refusal may be on political, security, or national interest grounds, but may also be unavoidable in certain other cases. [Examples are then given.] … More generally, the rule is that assistance cannot be granted where execution of a request would be contrary to United Kingdom law or established practice.

If the Metropolitan Police were the applicants before Judge Goddard, the first defendant, as a matter of fact, certainly took over its substantive conduct. The first page of the transcript shows him sworn as a witness after short initial exchanges between the judge and DC Fryer. Thereafter the whole hearing was taken up with what he had to say in answer to questions from the judge. She put but two queries to DC Fryer, who also at the very end indicated that he was unaware of any material

subject to legal professional privilege. Mr Pleming referred in addition to passages from the argument on costs in the judicial review on 14 March 1994, in which the Metropolitan police, seeking (perfectly reasonably) to minimize their exposure to costs, were submitting that on the facts the application was, as it were, being driven by the Australian authorities.

Mr Pleming seeks to persuade me that the first defendant should be treated as having initiated the Old Bailey application. It is put this way in his principal skeleton argument:

> It is submitted that the second defendant and/or the Commonwealth of Australia initiated the proceedings through the letter of request asking for the English courts to issue process to obtain the documents in question. The instant detinue proceedings and judicial review proceedings were in substance and fact a challenge to the process initiated by the second defendant. The first defendant was not only a party to that initiation of process but actively contributed in asking the Secretary of State to include other matters, coordinating and making the application to Judge Goddard QC.

The first difficulty with this, in my judgment, is that it is impossible to regard the making of the request as the initiation of proceedings. Given what I have said about the Harare Scheme and the role of the Secretary of State, the request cannot sensibly be treated as anything more than what it purported to be: a request for assistance. The second difficulty is that the first defendant, for all that on 25 October 1993 he procured an enlargement of the Secretary of State's direction so as to include additional material and participated in the hearing before Judge Goddard as I have described, cannot conceivably be said to have initiated the request itself which, on the papers before me, was first made before he became involved.

Mr Pleming's real case against the first defendant on this part of the argument rests crucially on his participation in the Old Bailey application. As regards that, it is no accident that the Metropolitan Police were the applicants before Judge Goddard. No one else had any title to make the application, since the power to make it was wholly grounded in the Secretary of State's direction which had been issued, and only issued, to the Metropolitan Police. It is to be noted that the plaintiffs themselves, in their Grounds for judicial review against the Secretary of State, described the matter in this way (para. C.4): "On October 26th 1993 Judge Goddard QC issued the warrants on an ex parte application made on information by Det Const Fryer with the assistance of Alan John Sing."

Now, I can conceive there may be circumstances in which a diplomat is deprived of immunity under Article 32(3) though he is not, in formal or procedural terms, the plaintiff or applicant in the relevant proceedings. There might be cases where for one reason or another proceedings are

brought by another on his behalf in which he is later personally impleaded and is unable to invoke immunity, by reason of Article 32(3), by virtue of what had gone before. But however that may be, this is not such a case. First, the Metropolitan Police were not a mere nominee. They had a substantive responsibility as regards the manner in which the Secretary of State's direction was to be complied with, as is shown by the fact that on 17 March 1994 the Divisional Court ordered them to pay half the costs of the judicial review proceedings. Secondly, so far as it might be said that the Metropolitan Police are to be regarded as having acted on behalf of anyone else at the Old Bailey hearing (which is itself a proposition not without some difficulty), they were clearly not acting on behalf of the first defendant. He had no personal axe to grind. His part was of course to further the application for the warrants. The interest in obtaining them was that of the AFP (and, no doubt, that of the Australian DPP and Attorney-General). So the first defendant was neither the *formal* applicant nor the *substantive* applicant.

Accordingly I hold that Article 32(3) has no application to the case, and I reject this head of Mr Pleming's argument. It follows from my dismissal of his first three submissions, as I have described them, that the first defendant enjoyed diplomatic immunity when he went before Potts J on 29 October 1993, and also on 1 November 1993, when the fax was sent. Thus in the case relating to the first defendant, there remains only the question whether his immunity has been waived.

This issue has been the subject of much argument. The plaintiffs' case is that immunity was waived (a) by the very giving of the undertakings on 29 October 1993 and (b) by what Mr Barker said on 4 March 1994. The defendants' case is that (a) given the requirement that waiver of immunity must be express (Article 32(2)), the giving of undertakings was no waiver; (b) the first defendant was in any event not authorized by the High Commissioner (or anyone else) to waive immunity on 29 October 1993; and (c) what Mr Barker said on 4 March 1994 is incapable of having effect as a waiver of immunity in relation to any-legal consequences which might flow from breach of the undertakings.

I turn then to the question whether the first defendant waived immunity by giving the undertakings. At first blush, and as a matter of common sense, it seems obvious that if a person enjoying immunity chooses to give an undertaking to the court he must be taken to accept the legal consequences of his doing so, and thus render himself open to process for contempt if he is later shown to be in breach. Mr Mayhew rightly accepts that the giving of an undertaking would constitute a submission to the jurisdiction of the court (and it is part of Mr Pleming's case against the second defendant, to which I will come, that there was here such a submission for the purposes of the Act of 1978, constituted by the undertakings given by the first defendant for whom the AFP was vicariously responsible). However, there are three

problems. The first is that as I have said any waiver of diplomatic immunity must be express (Article 32(2)). The second is that the waiver is a matter for the sending State, not the diplomat himself: see Article 32(1), *R v. Madan*[18] [1961] 2 QB 1 at p. 7, *Nzie v. Vessah*[19] which I have cited above, and Halsbury's Laws (4th edn) vol. 18 para. 1575. (Other authorities were cited to me, but with respect 1 need not I think refer to them). This is necessarily so, since the privilege of immunity, for the reasons I have earlier set out, enures not for the benefit of the diplomat as an individual but for that of the sovereign State which he represents. Thirdly, the notion of submission to the jurisdiction is a different concept from that of waiver.

I shall first say something about this third problem, because it represents on the face of it an apparent mismatch between the respective law relating to diplomatic and State immunity. In fact there is no incongruity. Subject to the Act of 1978 a sovereign State is immune in its right as such. A diplomat by contrast is immune only in right of his sending State. His immunity is conditional, because by definition there exists a higher authority, his own State, which can cancel it: something he has no power to do himself. In the case of the State's own actions, there is of course no higher authority. So it is at the State's choice whether, for its own ends, to accept in any proceedings the legal power of a foreign court: hence the question as regards the State will be whether it has submitted to the jurisdiction. But the diplomat *cannot* by submitting himself to the jurisdiction be stripped of his immunity. It does not belong to him in any right of his own. So the test for loss of immunity is necessarily a different one. However far the diplomat has himself bowed to the foreign court's jurisdiction, he remains immune (subject of course to the exceptions in the Act of 1964, which in this case I have discounted), unless his sending State says otherwise: unless it waives his immunity. This is well illustrated by *Bolasco v. Wolter* (1957) 24 *ILR* 525, a decision of the Tribunal of Luxembourg (an appellate court). An Italian diplomat had contested an action brought against him on the merits, without raising any plea to the jurisdiction. The first instance court treated his defence on the merits as a waiver of immunity, and gave judgment for the plaintiff. On any view, no doubt, the defendant had for his part submitted to the jurisdiction. But the appeal court quashed the judgment: the diplomat had had no authority from his government to waive immunity.

These considerations demonstrate that the second difficulty with Mr Pleming's case on the effect of the undertakings, namely that waiver is the right of the State and not of the diplomat, is no mere procedural rule that might on particular facts be chipped at the edges. It is a defining characteristic of diplomatic immunity; and this is in line with the general observations I have earlier made about the nature of the

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[18. 33 *ILR* 368.]
[19. 74 *ILR* 519.]

immunities with which this case is concerned. In the event, therefore, the fact that the first defendant for his part submitted to the jurisdiction of the court by giving the undertakings (as undoubtedly he did) is of itself neither here nor there. The question is whether, by his doing so, the Commonwealth of Australia waived his immunity. If he had actual authority from the High Commissioner to waive immunity, that would clearly be enough; indeed it would be deemed to be enough: see Section 2(3) of the Act of 1964. But on the findings of fact I have made, he did not. There is no evidence that he possessed legally sufficient authority from anyone. It follows, in my judgment, that his diplomatic immunity was not waived by his giving the undertakings. There is no evidence before me to demonstrate that the Commonwealth of Australia waived it.

That being so, I need take little time with the first problem on this part of the case which I identified earlier, namely the requirement that any waiver must be express. As regards that, it is first clear that the Convention requires no particular form of words, nor even that it be in writing. In *Gustavo* (1987) 86 *ILR* 517 the Supreme Court of Spain held that waiver was effected by the dismissal of a diplomat from his post by his sending State after the relevant (criminal) proceedings had been instituted against him. In my judgment the line drawn by the requirement that waiver be express is not to be found in a simple contrast with what might be implied (which is the usual opposition when these terms are deployed in English law); rather, the rule means that the waiver be intended as such by the sending State, and unequivocally communicated as such to the court. I greatly doubt whether there can be any question of *constructive* waiver.

On the facts of the present case there is in my judgment a good deal of evidence to show that in October/November 1993 it did not occur to the parties that diplomatic immunity had been waived before Potts J. In a letter of 3 November 1993, to which I have not earlier referred, the Commonwealth DPP wrote to the plaintiffs' Australian solicitors saying: "The question of whether diplomatic immunity is to be maintained or waived is one for the Minister of Foreign Affairs and is currently under consideration." There is Clifford Chance's letter to Theodore Goddard of 4 November 1993: "Our clients may wish to claim diplomatic immunity in relation to this matter, although no final decision has been taken on this issue." Theodore Goddard's reply of 4 November 1993 requested "confirmation of the basis upon which [Mr] Sing claims to be entitled to diplomatic immunity, if you intend to take this point". There is also para. 5 of the first defendant's affidavit of 20 December 1993. And I have already found that on 29 October 1993 neither Mr Barker's nor the first's defendant's mind was focused on the question whether immunity was to be waived.

In my judgement Mr Pleming's elegant submissions amount in the

end to no more than an attempt to construct a waiver out of the first defendant's submission to the jurisdiction constituted by his giving undertakings to Potts J. For all the reasons which I have elaborated, it is an endeavour which on principle and authority is doomed to failure.

It follows that on this part of the case there remains only the question whether what Mr Barker said to the Divisional Court on 4 March 1994 was effective to waive the first defendant's immunity so as to expose him to contempt proceedings for breach of the October undertakings. I have already set out the facts, and indicated that in light of the way the arguments have been presented to me nothing turns on the suggestion in the evidence that Mr Barker "may well have mis-spoken". Mr Pleming's case is that Mr Barker's words "He will not claim diplomatic immunity in these proceedings" were not limited to any particular aspect of the proceedings; Mr Mayhew (as I have said) takes no distinction between the judicial review motion and the writ action; the reference to "these proceedings" must have been intended to, or at any rate should be taken to, cover the hearing before Potts J as surely as the instant judicial review. Mr Barker in his affidavit at para. 27 states:

> I was indicating that I understood that Mr Sing would swear an affidavit, after he had returned from leave, and would not reserve his right in that affidavit to claim diplomatic immunity.

With respect to Mr Pleming's argument to the contrary, it seems to me that this evidence is consistent with the exchanges before the court which had preceded Mr Barker's critical words. I have already set out what was said by Mr Jones for the plaintiffs very shortly before Mr Barker said what he did: "… if it is going to be said in proceedings if ever there was a suggestion that the injunction had been broken, then Mr Sing or others would say, 'Well, I am sorry, we are just not going to submit to an English Court about this because we have diplomatic immunity.' My Lord, we want to know about that." It is plain that Mr Jones was there referring to the potential effectiveness of the derivative use injunction which he was seeking.

Mr Pleming has pressed an argument, relying on the judgment of Diplock LJ (as he then was) in *Empson v. Smith*[20] [1966] 1 QB 426 as constituting an important gloss on some words of Lord Parker CJ in *R v. Madan*[21] [1961] 2 QB 1 at p. 7, which I will not set out. The argument is to the effect (as I understand it) that waiver merely removes a procedural bar which diplomatic immunity would otherwise create, and that proceedings involving a diplomat in which at the time there has been no waiver are not thereby "null and void". I have no difficulty in accepting this. The language of nullity, being metaphysical not

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[20. 41 *ILR* 407.]
[21. 33 *ILR* 368.]

practical, is generally of dubious utility in our law other than certain areas of private law where its meaning is clear and specific. But I consider that the relevance of the point is only to the question whether the law might recognize a retrospective waiver of diplomatic immunity: a point specifically left open by Lord Parker himself in the *Madan* case.

I will assume without deciding that there may be retrospective waiver. Mr Fleming in fact disavowed any claim of waiver having retrospective effect; he says he is arguing for no more than waiver "in these proceedings" which, after all, are the words which Mr Barker used. But if his submission is to carry his case forward, it must necessarily assert that Mr Barker waived immunity vis-à-vis the October undertakings, so as to open the way to this contempt motion against him. In my judgment Mr Barker's words taken in their context are not capable of amounting to any such waiver. Certainly, Mr Barker was then acting for the Commonwealth of Australia, so that, no doubt, there is no difficulty as regards his authority to give a waiver on behalf of the sending State. But on the whole of the evidence, I hold that what Mr Barker said was intended, and understood by other counsel and the court, to have effect *in futuro*, and thus to relate to anything which might be said or done by the first defendant in relation to any derivative use injunction (or, no doubt, equivalent undertaking) which thereafter be granted or accepted by the court.

I conceive that this conclusion is in accord with principle. As I have said, it is inherent in the requirement that waiver be express that it must be unequivocally communicated to the court. In *Nzie*[22] to which I have referred, the Court of Appeal of Paris spoke of "the expression of the unequivocal and clear intention necessary to constitute a waiver of immunity from jurisdiction". On the facts here there was no such unequivocal expression of waiver in relation to the October undertakings.

This reasoning concludes the case on diplomatic immunity against the plaintiffs. I should add that, as I understand the parties' positions, I do not have to deal with any issues relating to the fact that by Article 32(4) of the Convention a separate waiver is required as regards execution. On my findings, of course, no question of "execution" against the first defendant arises; but in case the matter goes further, I would have dealt with it had I been asked to do so. Mr Pleming has reserved his position as regards any orders he might submit are appropriate to be made against the first defendant if the latter is amenable to his clients' motion, not knowing, of course, what the first defendant might say on the merits in due course. So the matter rests. Were a higher court to decide that after all the contempt motion is open against the first defendant, the parties would no doubt address argument and adduce evidence at a further hearing in relation to the impact of Article 32(4).

[22. 74 *ILR* 519.]

State immunity

The primary question on this part of the case is whether the AFP fall to be regarded as, or as part of, the 'State' of Australia for the purposes of Section 14 of the Act of 1978. As to this I heard expert evidence, from Professor Crawford for the defendants and Sir Maurice Byers for the plaintiff's. Both were witnesses of great distinction. Certain other written materials were placed before me but, with respect, I need not refer to them: the issue was decisively joined between the parties on the evidence of these two experts, who were both cross-examined.

I may first, and shortly, dispose of one aspect of the debate which was referred to in argument. It is whether the AFP should be regarded as a "separate entity" within the meaning of Section 14(2). In the event I did not understand Mr Mayhew to press a submission asserting immunity in the hands of the AFP on this ground, although such a submission is made in his skeleton argument. The fact is that the evidence of his own expert, Professor Crawford, was that the AFP is not distinct from the Executive organs of government in Australia. Indeed his evidence was to the contrary effect. The true question here is as to the impact of Section 14(1).

In my judgment the AFP enjoys the protection expressed in Section 14(1) only if on the facts it falls within the meaning of the expression "the government" [sc. of Australia] (Section 14(1)(b)), or "any department of that government" (Section 14(1)(c)). Plainly it is no part of "the sovereign or other head of … State" within Section 14(1)(a).

It seems to me obvious, and was not I think disputed, that the references to "government" are to the executive branch of government. The issue therefore is, whether the AFP forms part of the executive government of the Commonwealth of Australia. In England, I conceive that the question would admit of an immediate answer. The police forces here are no part of the executive government. The very fact underpins important freedoms in the British State. They are not there to carry out government policy. Far from it; circumstances might in theory arise in which it would be the duty of the police to investigate the activities of government representatives acting as such. As it seems to me, a person or body may only be treated as falling within Section 14(1)(b) or (c) of the Act of 1978 if he or it is obliged, in whatever capacity, to carry out the executive government's commands or is himself (as it would be with a Minister) responsible for formulating government policy. To postulate that the police lie within any such category would be to offer a grave affront to the rule of law. It is elementary that government, its agents high and low, are as amenable to the law (including the criminal law) as anyone else. If the police were in law or in fact the servants of government, this salutary rule would be undermined.

Authority is hardly needed to support this position. However

Blackburn[23] [1968] 2 QB 118 was cited to me. and I will set out this passage from the judgment of Lord Denning MR:

> He [that is the Metropolitan Police Commissioner, and every chief constable] must decide whether or not suspected persons are to he prosecuted; and if need he, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one … The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher v. Oldham Corporation*, and *AG for NSW v. Perpetual Trustee Co. Ltd.*

Is the law any different in Australia? It would be extremely surprising if it were. But I must respect the fact that while the construction of the 1978 Act, being of course a municipal statute, is a matter for me upon which accordingly the Australian experts have no voice, the facts to which the Act must be applied include facts concerning the autonomous law of the Commonwealth of Australia. So I must examine the question whether a different rule applies there.

Perpetual Trustee [1955] AC 457, referred to by Lord Denning in *Blackburn*, was a decision of the Privy Council. The issue was whether an action lay at the suit of the Government of New South Wales for the loss of the services of a police constable, occasioned by the act of a tortfeasor. It is worth noticing that in the course of argument Viscount Hailsham QC submitted (p. 471) that "It is a characteristic mark of a free society that the police force is not a servant of the executive, and never has been." Delivering their Lordships' judgment Viscount Simonds referred to the decision of the High Court of Australia in *Enever v. R* (1906) 3 CLR 969, which concerned the liability of the Government of Tasmania for the wrongful arrest of the plaintiff by a constable in the intended performance of his duties. In *Enever* the High Court, having recalled that at common law the office of constable was a public office, held that such an officer exercised an original authority; and in *Perpetual Trustee* Lord Simonds, summarizing the Privy Council's conclusion towards the end of the judgment, said (p. 489): "… There is a fundamental difference between the domestic relation of servant and master and that of a holder of public office and the State which he is said to serve. The constable fell within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office …"

This learning, from which with respect I need not cite further, seems to me amply to demonstrate that in the context in which these cases were decided the office of constable was regarded in the same light as

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[23. 52 *ILR* 414.]

it is treated in the law of England: he is not a servant of the executive government. His original authority, exercisable at his own discretion, means that he is not a functionary of the executive government at all. However I am here dealing not with the law of the constituent States of Australia, but with the federal law of the Commonwealth. Does the AFP stand in a different relation to the federal executive government?

The Commissioner of the AFP is appointed by the Governor-General: see Section 17(1) of the Australian Federal Police Act 1979. By Section 13(1) "The Commissioner has the general administration of, and the control of the operations of, the Australian Federal Police." Section 13(2) provides:

> The minister may, after obtaining and considering the advice of the Commissioner … give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.

Section 8 provides for the functions of the AFP which include by Section 8(1)(b)(i): "the provision of police services in relation to … laws of the Commonwealth".

So far, none of this suggests that the AFP stands in an essentially different relation to the federal government than do the state police forces to the state governments or, indeed, the English police forces to the government of the United Kingdom. It is clear that no government minister has the power to tell the AFP Commissioner how to conduct his force's operations. Professor Crawford, I think, accepted as much. Indeed he accepted in terms that were the AFP to be involved in the investigation of alleged wrong-doing by a member or members of central government, they would be obliged to act independently of government. What then is Professor Crawford's true position?

He put it in several ways. At one stage when he was cross-examined he stated that the combination of the circumstance that the Commissioner is appointed by the Governor-General with the fact that the AFP exercises public power is enough to establish that the AFP is part of the executive government. At another stage he asserted that the function of the constables of the AFP is to execute the laws of the Commonwealth under Section 61 of the Constitution (to which I will come), however independent of government their operations may be. He was asked how he would describe the notion of "executive government". His answer was that it is the public body, distinct from the legislature and judiciary, which makes policy decisions and carries them out by the execution of laws. In fairness, this formulation did not of course purport to be a considered definition or a text-book statement; but in my judgment it tends to reveal the root of the fallacy which, with respect to him, I have concluded underlies Professor Crawford's

approach to the whole of this matter. The essence of his stance is that the AFP form part of the executive government because their function is to execute the laws of the Commonwealth. Certainly they do not make government policy (although, no doubt, the Commissioner may advise on certain aspects of policy). The conception of a body which "executes the laws" of the Commonwealth is thus central to Professor Crawford's position.

However, as it seems to me, the conception that it is an integral function of executive governments to execute the laws of the State conceals more than it discloses. Law, of course, is made by Parliament (and in the common law jurisdictions, by the judges also). When statute law is passed, the question who executes it depends on the content of the statute, and upon what the question means. Statute may confer duties and powers on a whole number of functionaries, notably but not exclusively central government itself. It might be said that the law is "executed" when those duties or powers are fulfilled or exercised. Again, the law may be said to be executed by the judgments of the courts, interpreting the statute before them and making orders accordingly. Equally, it is executed by those who have to enforce the orders of the courts, or the orders made by Parliament's delegates under the statute, when there is no voluntary compliance.

These considerations demonstrate that there is no equation between the conception of an executive government and the notion of executing the State's laws. Sometimes government is Parliament's delegate, the recipient of statutory powers and duties. Sometimes it is not. Parliament confers powers and duties on all manner of persons and bodies. Professor Crawford's analysis, however, implies or asserts such an equation, and is in my judgment therefore erroneous. It proves too much: he was constrained to the apparently bizarre conclusion that every member of the AFP is part of the executive government of Australia. Logically, as it seems to me, he is committed also to the view that every bailiff, every tipstaff, many local authority officials, and others who enjoy or are burdened with public power under Act of Parliament are, likewise, members of the executive government. The *reductio ad absurdum* is I think clear; but whether it is or not, Professor Crawford's conclusions fall to be rejected because they are built on the fallacy that a public functionary, with duties to execute or enforce the law, is thereby also a functionary of executive government. He is nothing of the kind.

It may be said that these conclusions, as I have so far expressed them, pay no attention to the specific constitutional arrangements in place in Australia. But when one examines the Constitution, they are plainly vindicated. It has not been suggested to me, nor any evidence given, that I should construe the written Constitution of Australia (or for that matter the Australian Federal Police Act) according to any

canons of interpretation different from those applying in the law of England. Chapter II of the Constitution is headed "The Executive Government". Section 61 provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 62 establishes the Federal Executive Council (in effect, the Cabinet). Section 64 empowers the Governor-General to appoint "officers to administer such departments of state of the Commonwealth as the Governor-General in Council may establish"—these are departmental ministers. Section 67 provides as follows:

> Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council …

Professor Crawford said that for the purposes of Chapter II the AFP are within a department of State, namely the Attorney-General's department. He also asserted that officers of the AFP are within the meaning of the term "other officers" in Section 67. Even unassisted by the evidence of Sir Maurice Byers, I would reject these contentions. Certainly the Commissioner is liable under Section 13 of the AFP Act to comply with general policy directions given by the Attorney-General. But I cannot see how that constitutes him a member of the Attorney-General's office or department. Nor are the members of the AFP "other officers" within Section 67. Commissioned police officers are appointed under Section 25(1) of the AFP Act by the Governor General, but only on the recommendation of the Commissioner, or by the Commissioner himself if so authorized. Non-commissioned police officers are appointed by the Commissioner under Section 26. The arrangements made for these appointments are, in my judgment, wholly outwith what is contemplated by Section 67 of the Constitution.

There is in my judgment nothing in the Constitution of Australia, nor in the Australian Federal Police Act, to favour the conclusion that the AFP is part of the executive government of Australia. Sir Maurice Byers was surely right to say that the functions of the AFP under Section 8 of the AFP Act are "to arrest offenders and preserve the peace and so on—what police are for". He was right also to say that the executive power of the Commonwealth, conferred by Section 61 of the Constitution, has "nothing to do with policemen running round the country". This is good Antipodean common sense, and good law as well. For good measure I should add that Sir Maurice's description of the nature of the executive power was also in my view accurate: it is

conferred on the Queen and exercisable by the Governor-General, as Section 61 provides. Owing to what He described as the doctrine of responsible government—which is the same notion as that of government by Parliamentary democracy under a constitutional monarch—the power is to be exercised only on ministerial advice, and the executive is itself responsible to Parliament. All this is basic in England. It is no less basic in Australia. It is all of a piece with the proposition that the AFP form no part of the executive government.

I was shown some other authorities on this part of the case. I will refer only to one, *The Church of Scientology*, 65 *ILR* 193, on which Professor Crawford placed reliance. I need not go into the facts. It is enough to cite the headnote: "whether a State Act was sovereign or non-sovereign was, according to established case law, to be determined according to the law of the State of the forum. Under German public law, the exercise of police power unquestionably formed part of the sovereign activity of the State and was to be termed an act jure imperii." The case throws no light on the question whether the AFP are, by the law of Australia, part of the executive federal government. In my judgment they are not. Certainly they exercise public power, but not all public power is the power of the executive. They owe, and perform, important obligations to the State, but not all such obligations are owed in right of executive government. The issue on this part of the case does not in my judgment depend upon the well-established distinction between acts done *jure imperii* and acts done *jure gestionis*. Obviously the police function is not a commercial one; but it does not follow that it is a function of the executive. The divide between acts *jure imperii* and acts *jure gestionis* may be critical in a case where it is plain that what has been done has been done by the government, or by a putative separate entity so as potentially to engage Section 14(2). Here however, the question is whether the AFP act as part of the government at all. It is not a premise of the argument, but the very issue falling for decision. For the reasons I have given I hold that they are no part of the federal executive government. I do not understand their Lordships' decision in *Kuwait Airways*[24] [1995] 3 AER 694, which was cited to me by Mr Mayhew, to imply a contrary conclusion. In fact it was a Section 14(2) case. Had I had to consider Section 14(2), I would have held that the AFP have committed no relevant act "in the exercise of sovereign authority". They do not exercise "sovereign authority".

Mr Pleming had a number of submissions to the effect that, if he was wrong about the status of the AFP, nevertheless they were excluded from immunity on specific grounds. The first was that they had initiated the proceedings at the Old Bailey by virtue of the Request. I have already rejected that. The Request did not initiate any proceedings. Secondly, by virtue of Section 5(b) of the Act of 1978 the

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[24. 103 *ILR* 340 at 391.]

AFP is deprived of immunity, because the proceedings before Potts J were in respect of damage or loss of tangible property caused by an act or omission in the United Kingdom. The property is said to be seized documents. I would not have upheld Mr Pleming's argument on this ground. It seems to me that Section 5(b) is concerned with what I may call ordinary private law claims. The section's flavour is given by para. (a), the reference to death or personal injury. There is I think no authority on the point, but I incline to the view that the section's rationale may he in the fact that an accident causing personal injury, or some event causing damage to property (or its loss), is for the most part likely to involve acts or omissions by a servant of the foreign State in question which are incidental to the State's sovereign status, rather than integral to it. Where, as here, property is seized pursuant to an order of the court, obtained following a direction of the Secretary of State following a request made at the international level, neither the seizure nor the property's later retention can in my judgment fall within Section 5(b). It is true that the proceedings before Potts J fall to be regarded procedurally as part and parcel of the writ action which was issued after the hearing; and in form that was a private law claim. But in truth, as I have made clear, it was ancillary to the judicial review. In the alternative I would conclude the Section 5(b) issue against the plaintiffs on the short ground (as submitted in Mr Mayhew's skeleton argument) that the "loss" of the documents was not caused by an act or omission in the UK by Australia, but by the Metropolitan Police acting under Judge Goddard's order.

Mr Pleming had a further submission, which was that the AFP had submitted to the jurisdiction by virtue of the giving of the undertakings by the first defendant. It was conceded before me that for the purposes of this summons I may accept that the AFP was "vicariously responsible" for the acts of the first defendant in London in autumn 1993. So much had been accepted at an earlier hearing, on 1 November 1995. Mr Pleming deployed various factual materials in order to demonstrate that the first defendant was authorized by the AFP to act as he did, both before judge Goddard and before Potts J. Even if for the purposes of argument I accept all of this, it does not demonstrate, I think, that when the first defendant gave the undertakings to Potts J, the Commonwealth of Australia thereby submitted to the court's jurisdiction for the purposes of the Act of 1978. The notion of vicarious responsibility, which of course concerns one person's liability for the torts of another, is not in point. So far as concerns the extent of the first defendant's authority to act as he did, a State's submission to the jurisdiction must surely be at least as clear as a waiver of diplomatic immunity. At the time of the relevant events, nobody had in mind the question whether the AFP was part of the executive government of Australia. It is to be borne in mind that Section 13(2)(a) of the Act of 1978 prohibits the

grant of injunctive relief against a State. An undertaking has of course the same effect as an injunction. If the Commonwealth of Australia submitted to the court's jurisdiction by virtue of the undertakings given by the first defendant, it was actually, and by its own choice, enlarging that jurisdiction. I do not say that that could not be done. But in my judgment it would require a clear and unequivocal act, done with full knowledge by the Commonwealth of the legal consequences. I do not consider that happened here, even assuming (as of course logically I must on this part of the case) that the AFP is part of Australia's executive government. I have already held on the balance of probabilities that the first defendant did not obtain on the telephone any express authority from Australia to give the undertakings.

In the result, I reject the plaintiff's case as regards the first defendant. As regards the second defendant, I hold that the AFP enjoys, and enjoyed in autumn 1993, no State immunity within the provisions of the Act of 1978. It is not for me to determine on this summons, what consequences may flow in light of that finding.

[Report: Unpublished]

[The following is the text of the judgment of the Court of Appeal, delivered by Leggatt LJ:]

This is the judgment of the court to which we have all contributed. Before the court are appeals by the plaintiffs, and by the second defendant, against the decision of Mr Justice Laws whereby he ordered that proceedings for contempt of court could not proceed against the first defendant on the ground of diplomatic immunity, but that they could proceed against the second defendant despite the assertion of State immunity. The plaintiffs are an Australian company called Propend Finance Pty Ltd and individual Australians. The first defendant is Detective Superintendent Alan Sing ("the Superintendent"), who is a police officer in the Australian Federal Police Force ("the AFP") and who between December 1989 and December 1993 (or shortly thereafter) was an accredited diplomat at the Australian High Commission in London serving as First Secretary (Police Liaison). The second defendant ("the Commissioner") is the head of the AFP, and is brought into these proceedings as such, and not in his personal capacity. The documents which are the subject-matter of these proceedings were seized from the offices in London of Theodore Goddard, who are solicitors, and of Stein Richards, who are accountants.

On 27 August 1993 the Attorney-General of Australia, acting pursuant to statutory powers in Australia, asked the Government of the United Kingdom for assistance pursuant to agreements of mutual assistance. The agreements are provided in the "Scheme relating to

Mutual Assistance in Criminal Matters within the Commonwealth", which is known as "the Harare scheme", because it was adopted at the Harare conference held in Zimbabwe in 1986.

The request was to assist him in the United Kingdom by seeking a court order for search warrants. The documents and information sought related to an investigation into alleged tax evasion in Australia. In response to the request on 30 September 1993 the Secretary of State issued a direction to the Metropolitan Police under Section 7(4) of the Criminal Justice (International Cooperation) Act 1990 and Schedule 1 of the Police and Criminal Evidence Act 1984. The direction was widened by the Secretary of State on 25 October 1993 to include additional details supplied to him by the Superintendent. On 26 October 1993 search warrants were issued by Judge Goddard QC pursuant to the Secretary of State's direction. The warrants requested by the Commissioner were applied for by the Metropolitan Police on the direction of the Secretary of State, and the application was presented by DC Fryer. The Superintendent attended and at the invitation of the judge gave evidence on oath as to the nature of the offence alleged. It was not suggested in terms by the defendants before Laws J that the Superintendent gave evidence before Judge Goddard without authority, though he did so without prior preparation or consultation. The premises of Theodore Goddard and of Stein Richards were entered on 27 October 1993; the warrants were executed; and various documents were seized.

On 29 October 1993 the Superintendent took possession of the documents. The plaintiffs, concerned about the legality of the seizure of their documents from their solicitors and accountants, sought agreement from the Metropolitan Police and the Australian authorities to maintain the status quo in relation to the seized documents until the legality of the seizure could be verified. In default of agreement the plaintiffs sought emergency injunctive relief from Potts J on 29 October 1993, before bringing a claim for judicial review. The hearing before Potts J was attended by solicitors and counsel for the plaintiffs, and by counsel (Brian Barker QC) acting for and representing the Superintendent. It has also been suggested that he represented the AFP and the Australian High Commissioner. Undertakings were given by the Superintendent to Potts J on 29 October 1993 that until 4 pm on 5 November 1993 documents seized on 27 October 1993 or copies thereof would not be removed from the jurisdiction of the court or from the Australian High Commission in London. In particular, he agreed that copies of the documents would not be faxed, and that there would be compliance with the spirit and tenor of the undertaking. The undertaking was given by the Superintendent on his own behalf and not in terms by or on behalf of the AFP. The best evidence of what occurred at the hearing before Potts J is as set out in an attendance

note prepared by the plaintiffs' solicitors, which made no reference to Mr Barker informing the judge that the Superintendent was a diplomat. Since the defendants regarded the point as irrelevant, they did not seek to challenge the plaintiffs' evidence about it by cross-examination. There are no affidavits in these proceedings from the defendants themselves, or from the High Commissioner. Laws J held that Mr Barker had informed Potts J that the Superintendent was a diplomat.

On 1 November 1993 (the first working day after the undertaking was given), unbeknown to the plaintiffs or their advisers, the Superintendent appears to have sent extracts from the seized documents to Australia by fax. On 5 November 1993 Mr Justice Brooke gave leave to move for judicial review of the decision to issue the search warrants. Agreement was reached by means of a fresh undertaking by the Commonwealth of Australia, not the Superintendent, to maintain the relief afforded by the undertaking given on 29 October 1993. On 13 December 1993 the Divisional Court continued the injunctive relief by making a consent order sealing the seized documents, ordering their removal from the High Commission and preventing their use in any way until final determination of the matter.

Judge Goddard's decision to issue the warrants and the decision of the Secretary of State to make directions concerning the seized documents were subsequently quashed by the Divisional Court on 17 March 1994. At that hearing a further order and consent order were made which finalized the injunctive relief.

Towards the end of 1994 and during the beginning of 1995 it came to the plaintiffs' notice that the orders of the High Court had been breached. A four-page fax (with 28 pages attached) had been sent from the Australian High Commission in London by the Superintendent to the Attorney-General of Australia on 1 November 1993 containing extracts from the seized documents in apparent breach of the order of 29 October 1993. The plaintiffs claim that that fax, with its attachments, was widely disseminated in Australia; copies of the fax were not sealed or kept in London in breach of the order of 13 December 1993; and in breach of the order of 17 March 1994 the documents were not disclosed or destroyed.

Three bundles of documents said to contain the fax of 1 November 1993 were destroyed in Australia in July 1994. The appellants as a result of various enquiries under the Freedom of Information Act in Australia have now been told by the Attorney-General of Australia that there are further copies of the fax of 1 November 1993, namely, four copies in the Headquarters of the Commissioner, two copies in the High Commission (in addition to another copy retrieved from Clifford Chance), and one copy in the Attorney-General's office. By letter of 31 October 1994 the Attorney-General of Australia has admitted that the fax had been sent on 1 November 1993 but denied it was a

breach of the Order of Potts J. The defendants, by their solicitors, have admitted breaches of the orders of 13 December 1993 and 17 March 1994 in relation to the fax, but state that they amount to a "very limited failure to comply".

The result reached by the judge was an odd one. For the Superintendent was accorded diplomatic immunity while the Commissioner, though at best he was vicariously liable for the Superintendent, enjoyed no form of immunity from contempt proceedings.

The Plaintiffs' Appeal

Waiver of immunity

By virtue of Article 31 of Schedule 1 to the Diplomatic Privileges Act 1964 ("the 1964 Act") a diplomatic agent shall enjoy *inter alia* immunity from the civil and administrative jurisdiction of the receiving State. However under Article 32:

> 1. The immunity from jurisdiction of diplomatic agents … may be waived by the sending State.
> 2. The waiver must be express.
> 3. …
> 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

For the plaintiffs Mr Pleming QC submits that there has been a waiver of immunity with respect to the Superintendent. He accepts that, to be effective, a waiver must be first, express, second, made by the Head of Mission or any person for the time being performing these functions (Section 2(5) of the 1964 Act), and third, must be made in full knowledge of diplomatic rights (*R v. Madan*[25] [1961] 2 QB 1, [1961] 1 All ER 588). Reference is made to the undertaking given by the Superintendent to Potts J on 29 October 1993 that the documents would not be removed from the Australian High Commission for seven days. It was given following a short adjournment of the hearing to enable Mr Barker to take instructions. In his evidence before Laws J, Mr Barker accepted that it was "probable, likely even" that the Superintendent had taken instructions from someone during the adjournment. Mr Barker understood the undertaking to be "genuine and binding". In a letter he wrote on 2 November 1993, the Superintendent said: "Having given the undertaking you may rest assured I have adhered to it." Since the undertaking had substance only if it could be enforced by contempt proceedings, the giving of the undertaking was inconsistent with the maintenance of immunity, it is

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[25. 33 *ILR* 368.]

submitted, and there is no difference between a submission to the jurisdiction and an express waiver. The authority to give the undertaking must have come from the High Commissioner.

The judge found (p. 62) that the Superintendent submitted to the jurisdiction of the court by giving the undertaking but that he had no authority to do so. The judge added:

> It follows in my judgment that his diplomatic immunity was not waived by his giving the undertakings. There is no evidence before me to demonstrate that the Commonwealth of Australia waived it … The rule means that the waiver be intended as such by the sending State, and unequivocally communicated as such to the court.

We agree with Mr Pollock QC that there was a considerable degree of confusion at the hearing before Potts J on 29 October. There is even disagreement between counsel present at the hearing as to whether Mr Barker told the judge (as the judge accepted) that the Superintendent was a diplomat; he said that he did, the recollection of the opposing counsel and solicitor was that he did not. The judge accepted Mr Barker's evidence that so far as the Superintendent was concerned immunity was not an issue at that hearing.

There is no doubt that within days of the undertaking being given, diplomatic immunity was being asserted by solicitors on behalf of the Superintendent and that stance was maintained during the following months. Mr Pollock submits that it is highly unlikely that solicitors would have taken the point in the way that they did if the High Commissioner had waived the Superintendent's immunity only days earlier.

In our judgment, the judge was entitled to find as a fact that, during the adjournment, the Superintendent neither spoke to the High Commissioner directly nor did he telephone Australia. We would have reached the same conclusion and we reject Mr Pleming's submission that the judge was forced to a conclusion, on balance of probability, that there had been an express waiver. His finding that there was no waiver within the meaning of Article 32 cannot be challenged.

As to the events of 4 March 1994, there was a plain statement by counsel acting for the Superintendent that the Superintendent would not claim diplomatic immunity in relation to "these proceedings". The undertaking was in no way restricted, Mr Pleming submits, and "these proceedings" must include the hearing on 29 October. He relies on the words used by Mr Barker, when giving evidence before Laws J, that by "these proceedings" he meant "these interlocutory and judicial review matters". In substance, there was only one set of proceedings. The words involved a plain renunciation of a previously asserted privilege and status. By leading counsel, the Commonwealth of Australia expressly waived the diplomatic immunity of the Superintendent.

The circumstances in which the undertaking was given must be considered. The hearing on 4 March was in the proceedings brought by the plaintiffs to review judicially the order of Judge Goddard to grant a search warrant. In those proceedings the Commonwealth had by then submitted to the jurisdiction. Before the undertaking was given, Mr Barker had agreed that the order of Judge Goddard should be quashed. The plaintiffs were understandably concerned to protect themselves against further disclosure and use of the contents of documents which might already have been inspected. The hearing on 4 March was an interlocutory hearing in the judicial review, and the plaintiffs sought leave to cross-examine the Superintendent so that they could consider the scope of the derivative use injunction required to protect their position. They were seeking a satisfactory order in the judicial review and it was in that context that the undertaking was given on 4 March. Counsel for the plaintiff did not pursue the application to cross-examine once the undertaking had been given.

The notice of motion for contempt had arisen in the writ action in which no further steps had been taken since November 1993. The writ has never been served. In the circumstances, we do not understand Mr Barker's words to cover the writ action. We are quite unable to hold that the undertaking in the judicial review amounted to an express waiver of diplomatic immunity in relation to a notice of motion for contempt in the writ action and the judge was right in holding that there was no relevant waiver.

Loss of diplomatic immunity by reason of Article 32(2)

Article 32(2) of Schedule 1 to the 1964 Act provides that:

> The initiation of proceedings by a diplomatic agent … shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

Mr Pleming submits that the Commonwealth of Australia initiated the proceedings by the letter of request to the government of the United Kingdom for assistance pursuant to the Harare scheme. While the Secretary of State issued a direction to the Metropolitan Police in accordance with the request, the Superintendent was a party to the initiation of the search and seizure procedures. The Metropolitan Police, it is submitted, had no direct interest in the application other than as a matter of international cooperation and acting as a conduit for the Australian authorities. It was the Superintendent who gave evidence before Judge Goddard and effectively it was his, and his government's, application. The only way the plaintiffs could defend themselves against the consequences of the warrant issued by the judge was by the application to Potts J and the application was a "counterclaim" within the broad meaning given to that word in Article

32(2) for example in *High Commissioner for India v. Ghosh*[26] [1960] 1 QB 134, [1959] 3 All ER 659 per Jenkins LJ at page 140 of the former report.

In our judgment, there is no escape from the conclusion reached by the judge that the proceedings were initiated by Detective Constable Fryer of the Metropolitan Police. The application was made by him pursuant to the Police and Criminal Evidence Act 1984 and the Criminal Justice (International Cooperation) Act 1990, Section 7(1) and (2).

The procedure provided by the Harare agreement and the 1990 Act is that a request for assistance is made by a Commonwealth government to the United Kingdom Government followed by action by the United Kingdom Government. Section 7(4) of the Act provides:

> (4) No application for a warrant or order shall be made by virtue of subsection (1) or (2) above except in pursuance of a direction given by the Secretary of State in response to a request received:
>
> (a) from a court or tribunal exercising criminal jurisdiction in the overseas country or territory in question or a prosecuting authority in that country or territory: or
>
> (b) from any other authority in that country or territory which appears to him to have the function of making requests for the purposes of this section; and any evidence seized by a constable by virtue of this section shall be furnished by him to the Secretary of State for transmission to that court, tribunal or authority.

The Act empowers the Secretary of State to direct an application to the English courts pursuant to the Australian request. That request, by one government to another, cannot in our judgment amount to the initiation of proceedings for the purposes of Article 32(2). Neither the Superintendent nor his government had power to make the relevant application to the English court. While the Superintendent gave evidence, and may even have acted as advocate, the application was made, as it had to be, by the United Kingdom police, who thereby initiated the proceedings.

Loss of diplomatic immunity by reason of Article 39(2)

Article 39(2) of the 1964 Act provides that:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable time in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the Mission, immunity shall continue to subsist.

[26. 28 *ILR* 150.]

The plaintiffs' submission is that when the Superintendent left the United Kingdom, as he did at about the end of 1993, he was no longer entitled to diplomatic immunity because the relevant acts had not been performed by him "in the exercise of his functions as a member of the Mission". When he gave the undertaking on 29 October 1993 and when he allegedly broke it a few days later he was acting as an officer of the Australian Federal Police and in no other capacity. The Superintendent had two roles, it is submitted: first, as a diplomat responsible for liaison between the government of Australia and United Kingdom police forces in relation to criminal investigations and matters of mutual concern and, secondly, as an officer of the Australian Federal Police discharging police duties. In giving the undertaking on 29 October 1993, and in allegedly breaking it a few days later, the Superintendent was acting as a police officer. Reliance is placed on the fact that the Superintendent was substituted, as a person to be present at the execution of search warrants, for Detective Sergeant Taciak who could not have claimed diplomatic immunity. Further, the Home Office were told that the Superintendent "will be undertaking the investigations on behalf of the AFP". Diplomatic immunity is not designed for the protection of Commonwealth or foreign police officers conducting police business in the United Kingdom.

Counsel on both sides referred to the documents setting out the "role functions and lines of responsibility of liaison officers". These include a continuing responsibility to the Commissioner of Police but the duties are stated broadly enough to cover the part played by the Superintendent in the application to Judge Goddard. The role of the liaison officer is stated to be:

> to represent the interests of the Australian Federal Police on matters of law enforcement, in particular, to receive and distribute crime intelligence at post and to facilitate provision of crime intelligence to Australian police forces.

We sec no justification for a conclusion that the relevant acts of the Superintendent were other than acts performed "in the exercise of his functions as a member of the Mission". The Superintendent appeared on the London Diplomatic List as "First Secretary (Police Liaison)". His government had an obvious interest in the satisfactory operation of the Harare scheme. The stated purpose of that scheme (Article 1) is "to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters". It provides "for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requested country)". Assistance in criminal matters is said to include assistance in "search and seizure" and in "obtaining

evidence". In cooperating as he did in Detective Constable Fryer's application, he was exercising functions as the High Commission's Police Liaison Officer. Some police functions may be clothed with diplomatic immunity just as the functions of military or cultural attachés may be.

Conclusion

It is to be hoped that the Metropolitan Police will in future carry out directions of the Secretary of State under the 1978 Act more professionally, and will refrain from seeking to instruct counsel without the mediation of the Crown Prosecution Service. The manner in which the initial application for a search warrant was made to Judge Goddard QC reflects little credit on any of those concerned. The plaintiffs' appeal against the order in favour of the Superintendent is dismissed.

The Commissioner's Appeal

The case against the Commissioner

The proceedings against the Commissioner were begun by Notice of Motion dated 1 June 1995. It says only this in relation to the Commissioner's responsibility:

> The First Defendant was at all material times an officer of the Australian Federal Police and he was acting in such capacity when he gave the undertakings referred to in paragraph 1 above and sent the fax referred to in paragraph 4 above. In the premises the Commissioner … is vicariously liable for the contempt of the First Defendant.

Leave to serve out of the jurisdiction (alternatively to effect service here) was given by Master Trench on the same day. The application before Laws J was to set aside the proceedings "on the ground that the Defendants are immune from the jurisdiction of this Honourable Court". The appeal against the judge's decision is on the same basis. As regards any basis in law for holding the Commissioner responsible, it simply says this:

> In so far as the Second Defendant could have any vicarious responsibility for the actions of the First Defendant which are the subject of these proceedings (assumed for present purposes but not admitted), the Second Defendant was acting …

Mr Pollock disclaimed any intention to take any points on the merits of the claim against the Commissioner apart from State immunity. He referred to the peril in terms of deemed submission to the jurisdiction where a State "has intervened or taken any step in the proceedings": Section 2(3)(b) of the 1978 Act.

An order for leave to serve out of the jurisdiction (or substituted service in lieu) does however require, the applicant to show that the case is a proper one for such service: Rules of Supreme Court 1965 Ord 11, r 4(2) and 9(1) and (5). We need not consider whether it would have been open to the Commissioner, without submitting to the jurisdiction, to challenge the suggestion of vicarious responsibility for the Superintendent's alleged contempt of the order of Potts J.

Independent of any steps which may have been taken by a party to litigation, this court has an interest in ensuring that its process is not used for purposes which are not explicable or do not make sense. If it is obvious that proceedings are misconceived, or are being conducted on an unrealistic hypothesis, this court may, in its inherent jurisdiction, take steps to halt their misuse. During the course of the hearing before us, in the context of the issue of State immunity that was argued before us, we sought to understand the basis on which it could be suggested that the Commissioner had some vicarious responsibility for a contempt which was committed, at most, by one of his officers acting in breach of an order directed to that officer personally. We became increasingly concerned that there was and is no coherent or comprehensible basis for such a suggestion.

A difficulty in the plaintiffs' way at the outset is the identity of the Commissioner. The plaintiffs evidently wanted to implead the AFP. But that is not an entity capable of being sued. So they sued the Commissioner to stand for the AFP, acknowledging that he was not sued in his personal capacity. Had he been, the fact that the person who was the Commissioner at the time when the notice of motion was served has since died would have aborted the proceedings against him. So it is said that the Commissioner was sued in the way of his office. The office of Commissioner is not shown to be a corporation sole. The Commissioner might nonetheless have been in a position analogous with that of a chief officer of police in this country, in respect of whom Section 88(1) of the Police Act 1996 provides that—

> The chief officer of police for any police area shall he liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor.

But despite direct questions from the Bench Mr Pleming was unable to cite any Australian statute that would supply the deficiency.

The fallacy upon which the plaintiffs' case against the Commissioner is founded is that vicarious responsibility of this kind is to be equated with the liability of a principal for his agent. Whether

there was vicarious responsibility so as to make the Commissioner liable for any torts committed by the Superintendent is irrelevant. We do not understand how the Commissioner could be liable, vicariously or otherwise, for any contempt committed by the Superintendent. Facts, such as the existence of agency, without which the giving of the undertaking and the breach of it cannot be established against the Commissioner, must be alleged and proved if they are relevant to establish liability on the part of the Commissioner. The Notice of Motion as we have set it out singularly fails to make any allegation of this nature.

It is alleged that before giving the undertaking the Superintendent may have spoken to someone else by telephone. But in view of the shortness of time taken, and the fact that it would then have been the middle of the night in Australia, it is not alleged that the Superintendent took instructions from the Commissioner. So the undertaking cannot have been given with his authority unless some prior authority was vested in the Superintendent. If it was, there would have been no need to obtain it again by telephone. In any event, there is no vestige of evidence that any such authority was given by the Commissioner or received by the Superintendent at any time. If the Commissioner had purported to give authority, it would have had to be shown that he himself had authority to authorize his subordinates to give undertakings such as would have the effect of warning State immunity. *Delegatus non potest delegare*, and it is impossible to suppose, or to proceed upon any assumption, that the relevant Minister would or could have given to the Commissioner power to give that authority to other officers of the AFP. The Commissioner was therefore not party to the giving of the undertaking by the Superintendent.

The notice of motion of 1 June 1995, which seeks the committal for contempt of the Superintendent and the Commissioner, refers to "breach of an undertaking given by the First Defendant on his own behalf and on behalf of the Second Defendant". There is no evidence that any undertaking was given on behalf of the Commissioner. On the contrary, the terms of the undertaking are (so far as material) correctly set out in the notice of motion:

> The Defendant [meaning the Superintendent], his agents or otherwise, will not until 4 pm Friday 5th November 1993 remove any documents seized on 27th October 1993 or copies thereof, from the jurisdiction of this Court.

The other parts of the undertaking similarly relate only to the Superintendent. The notice of motion concludes by stating that:

> The First Defendant was at all material times an officer of the Australian Federal police and he was acting in such capacity when he gave the undertakings

> referred to … In the premises the Commissioner … is vicariously liable for the contempt of the First Defendant.

That could not render the Commissioner party to the giving of the undertaking or put him in contempt if there was breach of it. In these circumstances, were it necessary we would of our own motion have set aside the order made and dismissed the proceedings against the Commissioner, on the ground that they palpably lacked any conceivable merit. As it is, however, the matter can in any event be disposed of by reference to State immunity upon which Mr Pollock's submissions were based.

State immunity

Because the argument before us has mainly been concerned with it, we proceed to consider on its merits the Commissioner's appeal against the judge's rejection of his claim to State immunity. He claims immunity as part of the State of Australia, within the meaning of Section 14(1) of the State Immunity Act 1978, or alternatively under Section 14(2) as a separate entity. Section 14 provides (so far as material) that:

> (1) the immunities and privileges conferred by this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
>
> (a) the sovereign or other head of State in his public capacity;
>
> (b) the government of that State;
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a State … would have been so immune.

The judge did not accept that the Commissioner was entitled to any immunity. The plaintiffs maintain that he was correct in this conclusion. They also rely by Respondents' Notice on three alternative arguments that the Commissioner has no immunity because (i) the present action constitutes "proceedings in respect of … damage or loss of tangible property" within Section 5(b) of the 1978 Act; (ii) the Commissioner instituted the present action and is therefore deemed to have submitted to the jurisdiction and waived any immunity under Sections 2(1) and (3)(a); and (iii) the Commissioner had submitted to the jurisdiction, by the giving by the Superintendent of the undertakings

on 29 October 1993. About the first two we need say no more than that they were succinctly rejected by the judge (at pages 52–3 of his judgment) on grounds with which we agree. To the third we shall refer at the end of this judgment.

During the course of submissions before us, the plaintiffs suggested a new reason why the Commissioner should be regarded as having submitted to the jurisdiction. This was that the State of Australia and its "authorities" or "agencies", including specifically the AFP, had by consent orders dated 14 December 1993 and 17 March 1994 in the plaintiffs' proceedings for judicial review submitted to the jurisdiction of the English court. This was a point never previously suggested and not covered by their Respondents' Notice. It fails for that reason alone. There has been no application to amend the Respondents' Notice, and there would appear to be every reason for refusing any such application, if any had been made. The context of the orders would at the least have merited investigation. Further, on the material which is before the court, any submission by the orders would appear to have been confined to the proceedings for judicial review and their resolution. The present action was at the time addressed only to the Superintendent and dormant. The writ in it was subsequently amended to add the AFP, but not the Commissioner, and even now has not been served on anyone. In these circumstances, even if the court were to address the point on present material, it would appear to be without merit.

Starting with Section 14, the judge heard extensive evidence about the status in Australia of the AFP. He concluded that they occupied a similiar position to the police in this country. The police were, in other words, holders of an independent office under the Crown, fulfilling public duties of maintenance and enforcement of the law. The judge said of Section 14(1) that:

> It seems to me obvious, and was not I think disputed, that the references to the "government" art to the executive branch of government.

He regarded as "apparently bizarre" the conclusion accepted by Professor Crawford, the Commissioner's expert, that every member of the AFP was part of the executive government of Australia. The *reductio ad absurdum*, in his view, was that "every bailiff, every tipstaff, many local authority officials, and others who enjoy or are burdened with public power under Act of Parliament are, likewise, members of the executive government".

The judge thus rejected the Commissioner's evidence and case that the Commissioner was a part of the government of Australia within Section 14(1). The judge seems to have thought that this was an end of the matter, and that Section 14(2) could not really arise. He said:

> The fact is that the evidence of [the second defendant's] own expert, Professor Crawford, was that the AFP is not distinct from the executive organs of government in Australia. Indeed, his evidence was to contrary effect. The only real question here is as to the impact of Section 14(1).

The only comment he therefore made on Section 14(2) was a brief statement near the end of his judgment that:

> Had I had to consider Section 14(2), I would have held that the AFP have committed no relevant act "in the exercise of sovereign authority". They do not exercise "sovereign authority".

We do not follow the judge's reasoning. The rejection of the Commissioner's contention that he fell within Section 14(1), on the ground that he fulfilled a role independent of the executive, was a reason for considering whether Section 14(2) applied, not a reason why Section 14(2) could not apply.

The 1978 Act was passed, at least in part, to give effect to the European Convention on State Immunity of 1972. Chapter 1 of the Convention is entitled "Immunity from jurisdiction" and contains a number of articles setting out circumstances in which "a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State". The final article in Chapter 1, Article 15, provides that "a Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14". Chapter 5 is entitled "General provisions" and Article 27 provides:

> 1. For the purpose of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.
>
> 2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person: however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii).
>
> 3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

Section 14 of the Act is concerned first to define, for the purposes of English law, what is a State and second to give effect to Article 27 and the "entities" contemplated in that Article. The expression "sovereign authority" used in the Article is adopted in the section though without

the bracketed words "acta jure imperii" which appear in many of the cases, English and foreign, in which State immunity is considered.

In our view the word "government" in Section 14(1) must be given a broader meaning than that contemplated by the judge. Ear from leading to bizarre or absurd conclusions, a broad reading corresponds with the requirement of comity and with a body of law from many countries on the scope of sovereign immunity as a concept which covers *acta jure imperii*. In our judgment, Parliament had that jurisprudence in mind when enacting Section 14 and intended a broad interpretation of the word "government" in Section 14(1). The expression "sovereign authority" or a similar expression appears frequently in the authorities. While in Section 14 it appears only in Section 14(2) dealing with separate entities and not in Section 14(1) dealing with "government", it would be curious if separate entities were immune from the jurisdiction in proceedings relating to acts done by them in the exercise of sovereign authority if the government of the State were not also immune. The word government should be construed in the light of the concept of sovereign authority.

In *Playa Larga (Owners of Cargo Lately Laden on Board) v. I° Congreso de Partido (Owners)*[27] [1983] AC 244, [1981] 2 All ER 1064 Lord Wilberforce at page 263 of the former report, described the *Claim against the Empire of Iran* case (1963) 45 *ILR* 57, decided by the Federal Constitutional Court of the German Federal Republic, as a case of "great clarity" and as containing "an instructive view of the law of state immunity over a wide area". Lord Wilberforce cited the passage at page 80:

> As a means of determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private, person, that is in private law.

At page 81, the judgment of the Constitutional Court reads:

> National law can only be employed to distinguish between a sovereign and non-sovereign activity of a foreign State in so far as it cannot exclude from the sovereign sphere, and thus from immunity, such State dealings as belong to the field of State authority in the narrow and proper sense, according to the predominantly held view of States. In this generally recognisable field of sovereign activity are included transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority, and the administration of justice.

[27. 64 *ILR* 307.]

The same Court in the *Church of Scientology* case (1978) 65 *ILR* 193 said in relation to an action brought in Germany against "the Head of New Scotland Yard" that "the way in which the police laws of the United Kingdom classified the defendant's official status has no bearing on the judgment which must be made in accordance with international law".

In *I° Congreso*, the House of Lords considered the doctrine of sovereign immunity at common law, the relevant events having occurred before the 1978 Act came into force. Analysing the transactions involved in that case, Lord Wilberforce at page 262E stated that they did not involve:

> … a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.

At page 267C Lord Wilberforce stated that in considering whether State immunity should be granted or not, the court should consider whether the relevant acts should:

> …be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the State has chosen to engage, or whether the relevant acts should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.

In *Kuwait Airways v. Iraqi Airways*[28] [1995] 3 All ER 694, [1995] 1 WLR 1147 Lord Goff considered the 1978 Act and stated at page 706D of the former report that Section 14 "so far as it relates to separate entities plainly had its origin in Article 27 of the Convention". Lord Goff recognized the distinction in English Law between *acta iure imperii* which when performed by a foreign sovereign attract immunity and *acta iure gestionis* which do not. He recognized the "very broad definition" of commercial transactions in Section 3(3) of the Act. These would be *acta iure gestionis*. To illustrate the distinction, Lord Goff cited passages from *I° Congreso* including those cited above. The distinction between *acta iure imperii* and *acta iure gestionis* has also been considered, in the context of the Visiting Forces Act 1952, in *Littrell v. USA (No. 2)*[29] [1994] 4 All ER 203.

In the *Kuwait Airways* case, Iraqi Airways Company was held to be "a separate entity" and at issue was whether Section 14(2) of the Act applied to the activity involved. Lord Golf stated at page 707H, that the words "in the exercise of sovereign authority" in Section 14(2)(a) should be construed in accordance with the accepted meaning of *acta*

[28. 103 *ILR* 340.]
[29. 100 *ILR* 438.]

iure imperii, especially as that is plainly in accordance with Article 27(2) of the Convention, which is reflected in Section 14(2) of the Act. Once it is established, as it undoubtedly is, that the concept of *acta iure imperii* exists in English law, it is in our view relevant to a determination of what bodies are a part of the "State" and the "government" for the purposes of Section 14(1). The word "government" should not be confined to what in other contexts would in English law mean the government of the United Kingdom. Once the broad scope of governmental or sovereign activity is, for this purpose, accepted, the performance of police functions is essentially a part of governmental activity. The concept of a "separate entity" obviously has its place in the overall scheme but has no application in the present case. The affirmation by Lord Goff in the *Kuwait Airways* case of the concept of governmental or sovereign activity, though made in relation to an entity which was plainly an entity separate from the executive organs of the government, is wholly consistent with a broad definition of government in Section 14(1).

The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, "functionaries") could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself.

This proposition too has wide support in Commonwealth and foreign jurisdictions. In the *Church of Scientology*[30] case, it was held that any attempt to subject State conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign States in respect of sovereign activity. Another example is *Jaffe v. Miller* (1993) 95 *ILR* 446 (Ontario Court of Appeals), where the relevant statute conferred immunity in quite similar terms to the 1978 Act upon a foreign State, including specifically its sovereign or other head and any government or political subdivision (defined as meaning a province, state or other like political subdivision of a federal State) of the foreign State, including any of its departments and any agency of the foreign State. The court held that, for the Act to be effective, it must necessarily confer immunity on any State "functionary", acting in the course of his official duties, embracing in that case two officials of the State of Florida alleged to have committed torts against the plaintiff. A third example is provided by *Herbage v. Messe* (1990) 98 *ILR* 101 (US District Court, District of Columbia). The action was brought by a prisoner in the United States who had been extradited from England. It alleged wrongdoing in the course of

[30. 65 *ILR* 193.]

the extradition proceedings by the English Home Secretary, the former Director of Public Prosecutions, a Detective Inspector of the Hampshire Constabulary and two barristers who had acted for the Director of Public Prosecutions. All these defendants were held entitled to State immunity.

The concept of an "entity … distinct from the executive organs of the government of the State and capable of suing or being sued" is not one which would normally be identified with an individual or natural person. Its background and history suggest that the concept was introduced to address the problem presented by artificial legal entities exercising public functions. Lord Goff in the *Kuwait Airways*[31] case at page 706G pointed out that the language makes it probable that the section has in mind entities "of" or, in other words, created by the State in question. Where such an artificial entity exists and is entitled to immunity, then its servants or officers would of course benefit by immunity in similar fashion to the officers or functionaries of a State entitled to immunity. Further, an individual might possess status as a corporation sole or similar status which could constitute him in that capacity a "separate entity" for the purposes of Section 14.

Looking at the facts of the present case in that light, we have no doubt but that the activity of the Superintendent in this case and any vicarious responsibility of the Commissioner involved acts of a sovereign or governmental nature. The role of the police is to maintain and enforce the law. The days when such responsibility could be left to private policing or police forces are either long since past or not yet come. It is, and was held in *R v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26, [1987] 2 All ER 282, part of the prerogative power of the Crown "to keep the peace, which is bound up with its undoubted right to see that crime is prevented and justice administered": *per* Croom-Johnson LJ at page 44C of the former report.

The fact that the police who undertake this function on a day by day basis do so as officers, rather than servants, and are "answerable to the law and the law alone" (*per* Lord Denning MR in *R v. Commissioner of Police for the Metropolis, ex parte Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763) is not determinative of the present issue. The same applies to the judiciary. The separation of their power from that of the executive is an important feature of our constitution. Nonetheless, for the purposes of the international concept of State immunity, it seems to us clear that judges should and would be entitled to immunity on the ground that they exercise sovereign authority. In this country there may be an understandable reluctance to characterize the activities of either police or judges as "governmental". But this is because, in a

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[31. 103 *ILR* 340.]

domestic context, that word has acquired narrower shades of meaning than it finds in the international context reflected in Section 14 of the 1978 Act.

In the circumstances we have no doubt that the Superintendent's activities, and if vicarious liability were to be established, those of the Commissioner, are covered by State immunity. The Superintendent is a part of the Government of Australia within the meaning of that term in Section 14(1) of the Act. That being so we do not need to consider the effect of the presence of the word "executive" in the last part of Section 14(1).

Finally, by Respondents' Notice the plaintiffs submit that the Commissioner must be treated as having waived State immunity, because the Superintendent was "authorized" to give undertakings to Potts J. The submission rests on a similar fallacy to that involved in the plaintiffs' case that there was a waiver of the Superintendent's diplomatic immunity.

To determine whether sovereign immunity subsists, it is necessary to consider whether the Commonwealth of Australia authorized a waiver of such immunity. As a matter of fact, there is nothing whatever to support any suggestion that anyone ever intended or authorized any waiver of State immunity in respect of any conduct of the Superintendent as a police officer. On the judge's findings, neither the High Commissioner in London nor anyone else with authority to waive immunity on behalf of the Commonwealth of Australia did so. The Superintendent's possible conversation with the High Commission (not the High Commissioner) during the course of the hearing before Potts J cannot therefore have been with anyone who could have waived State immunity. Not, if it were relevant to look at his position, did the then Commissioner either know of the giving of the undertakings before they were given or in any event authorize any such waiver. Even if he had known of what was happening, it appears that he would himself have had to have obtained higher authority from the Special Minister of State and Minister of Foreign Affairs for any such waiver. There is no suggestion that any such authority existed or was obtained. Further, waiver of State immunity requires not only authority, but knowledge of the right being waived: see *Baccus SRL v. Servicio Nacional del Trigo*[32] [1957] 1 QB 438, [1956] 3 All ER 715. The suggestion that there was a waiver in the present case fails at every stage.

Conclusion

The proceedings against the Commissioner were misconceived. But if he were subject to any form of liability for any acts of the Superintendent, he would be entitled to State immunity, which has

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[32. 23 *ILR* 160.]

not been waived. In any event the proceedings appear to have little, if any, continuing utility. The Commissioner's appeal is allowed.

DISPOSITION

Appeal in respect of Respondent Sing dismissed with costs; appeal in respect of the Commissioner is allowed with costs; the Order of Laws J is revoked; the Order of Master Trench giving leave is discharged.

[Report: Unpublished]

ZOERNSCH *v.* WALDOCK AND ANOTHER.

[COURT OF APPEAL (Willmer, Danckwerts and Diplock, L.JJ.), March 19, 20, 24, 1964.]

Constitutional Law—Diplomatic Privilege—Immunity from legal process—Continuance of immunity, in respect of acts done in course of official duties, after envoy ceased to be such—International Organisations—Members of European Commission of Human Rights—Members entitled, in respect of acts done in official capacity, to like immunity of envoy of foreign power—Inclusion of name on list conclusive of entitlement to immunity—International Organisations (Immunities and Privileges) Act, 1950 (14 Geo. 6 c. 14), s. 1, s. 2—Council of Europe (Immunities and Privileges) Order, 1960 (S.I. 1960 No. 442).

The defendant was a member and president of the European Commission of Human Rights from 1954 to January, 1962, when he left office. Since 1958, his name had been included in the list compiled under s. 2 (1)* of the International Organisations (Immunities and Privileges) Act, 1950, of persons entitled to immunities and privileges under s. 1 (2) (b)* of that Act, and it continued to be included after he left office. Article 12 of an order in council†, made in pursuance of s. 1 (2) of the Act provided that members of the Commission should enjoy " in respect of words spoken or written and all acts done by them in their official capacity, the like immunity from civil process as is accorded to an envoy of a foreign sovereign power ". In 1963 the plaintiff brought an action claiming damages against the defendant in respect of acts done by him in 1961 in his official capacity. On appeal against the dismissal of the action on the ground of the defendant's immunity to civil process, the plaintiff contended inter alia, that any immunity of the defendant ceased on his ceasing to hold office.

Held: the defendant was entitled to immunity in accordance with art. 12 of the order in council and his immunity did not cease on his ceasing to hold office for each of the following reasons:

(i) the immunity accorded to an envoy in respect of acts done in his official capacity (as opposed to that accorded to him in respect of acts done in his private capacity) did not cease on his ceasing to be an envoy, and art. 12 conferred on the defendant the like immunity (see p. 261, letters D and I, p. 263, letters F and H, and p. 266, letters D and G, post).

Rahimtoola v. *H.E.H. The Nizam of Hyderabad* ([1957] 3 All E.R. 441) applied.

(ii) the inclusion of his name in the list compiled under s. 2 (1) of the Act of 1950, by virtue of s. 2 (2)‡, was conclusive proof of his entitlement to immunity (see p. 260, letter E, p. 263, letter C, and p. 265, letter C, post).

Per WILLMER, L.J.: apart from (ii) above the defendant would in any case be entitled to immunity for the following reasons—

(a) the immunity claimed was not greater than was required to give effect to an international agreement§ on the immunities of members of the Commission and was accordingly authorised within the proviso to s. 1 (2) (see p. 260, letter G, to p. 261, letter A, post).

(b) the immunity depended on the quality of the " words spoken or written and . . . acts done " and not on the time when suit was brought (see p. 261, letters A and B, post).

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* Section 2 (1) and s. 1 (2) are set out in note (1), pp. 258, 259, post.

† The Council of Europe (Immunities and Privileges) Order, 1960, the material provisions of which are set out in note (2), p. 259, post.

‡ Section 2 (2) is set out in note (1), p. 259, post.

§ Article 3 of the Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, which is set out at p. 260, letter H, to p. 261, letter A, post.

(c) " the . . . immunity . . . accorded to an envoy " was an envoy's immunity while he was an envoy and the fact that the defendant had ceased to hold office was irrelevant (see p. 261, letter D, post).

Appeal dismissed.

[As to immunities of persons connected with international organisations, see 7 HALSBURY'S LAWS (3rd Edn.) 277, 278, paras. 588, 589; as to the duration of the immunity of envoys of foreign powers, see ibid. 270, para. 574, notes (f) (g); and for cases on that subject, see 1 DIGEST (Repl.) 57, *422*, 11 DIGEST (Repl.) 628, 629, *513*, *520*, *523*.

For the International Organisations (Immunities and Privileges) Act, 1950, s. 1, s. 2, Schedule, see 29 HALSBURY'S STATUTES (2nd Edn.) 152, 154, 156.]

Cases referred to:

Johore (Sultan of) v. *Abubakar Tunku Aris Bendahara*, [1952] 1 All E.R. 1261; [1952] A.C. 318; 1 Digest (Repl.) 57, *422*.

Magdalena Steam Navigation Co. v. *Martin*, (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur. N.S. 1260; 121 E.R. 36; 11 Digest (Repl.) 628, *513*.

Musurus Bey v. *Gadban*, [1891-94] All E.R. Rep. 761; [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 11 Digest (Repl.) 629, *523*.

Parlement Belge, The, (1880), 5 P.D. 197; 42 L.T. 273; 4 Asp. M.L.C. 234; 11 Digest (Repl.) 628, *516*.

Rahimtoola v. *H.E.H. The Nizam of Hyderabad*, [1957] 3 All E.R. 441; [1958] A.C. 379; [1957] 3 W.L.R. 884; *revsg.* S.C. sub nom. *Nizam of Hyderabad* v. *Jung*, [1957] 1 All E.R. 257; [1957] Ch. 185; [1957] 2 W.L.R. 217; 1 Digest (Repl.) 59, *434*.

Appeal.

This was an appeal by the plaintiff, Dr. Jur. Carl-Theo Zoernsch, against an order of THOMPSON, J., made on Nov. 20, 1963, affirming an order of Master JACOB made on Nov. 5, 1963, setting aside a writ dated July 15, 1963, in an action by the plaintiff against the defendants, Sir Claud Humphrey Waldock and Mr. A. B. MacNulty, and dismissing the action.

The following statement of the proceedings and facts is summarised from the judgment of WILLMER, L.J. The first defendant was from 1954 until January, 1962, a member and president of the European Commission of Human Rights (hereinafter called " the Commission ") and the second defendant had been since July, 1954, a permanent member of the staff of the Council of Europe (" the Council ") and since January, 1960, secretary to the Commission. The plaintiff complained that he was a victim of injustice at the hands of the courts of the Federal Republic of Germany, in that he was denied a fair trial in violation of one of the rights set forth in the Conventions for the Protection of Human Rights and Fundamental Freedoms, to which the republic was a party. In pursuance of what he conceived to be his rights under the convention the plaintiff instituted proceedings before the Commission by way of petition against the republic, but by two decisions, dated May 31 and Dec. 14, 1961, his petition was rejected by the Commission. The plaintiff complained that the failure of his petition was due to the fact that the second defendant as secretary to the Commission, acting on the instructions of the first defendant, failed to present it properly to the Commission. In these circumstances the plaintiff commenced the present action. The endorsement on the writ was

> " The plaintiff's claim is for damages arising from negligence and corruption in running the business as president (first defendant) and chairman of the secretariat (second defendant) of the Commission of Human Rights of the Council of Europe in Strasbourg."

The defendants entered a conditional appearance to the writ and applied to have it set aside as null and void on the ground that the court had no jurisdiction to

adjudicate on the claim by reason of the immunity from legal process enjoyed by the defendants and each of them. The first defendant claimed to be entitled to the immunity prescribed for members of the Commission by art. 12 of the Council of Europe (Immunities and Privileges) Order, 1960*, which was claimed to be within the powers conferred by s. 1 (2) (b) of, and the Schedule, Pt. 2 to, the International Organisations (Immunities and Privileges) Act, 1950†. The second defendant claimed to be entitled to the immunity prescribed for members of the staff of the Council by art. 11 of the order of 1960*, which was claimed to be within the powers conferred by s. 1 (2) (c) of, and Schedule, Pt. 3 to, the Act of 1950†. It was proved and not denied that the Commission had not waived the immunity from legal process which the first defendant claimed to enjoy and that the Secretary-General of the Council had not waived the immunity which the second defendant claimed to enjoy. It was also proved, by production of a copy of the London Gazette for Aug. 13, 1963, that the name of the first defendant was then included, and had been included since July, 1958, in the list compiled by the Secretary of State of the persons entitled to immunities and privileges conferred under s. 1 (2) (b) of the Act of 1950. The name of the second defendant was not included in any such list, but his employment as a member of the staff of the Council and as secretary to the Commission was proved by a certificate of the Secretary-General of the Council.

A B C D

The plaintiff appeared in person.

M. E. Bathurst for the defendants.

The Attorney-General (*Sir John Hobson, Q.C.*) and *J. R. Cumming-Bruce* appeared as amici curiae.

E

WILLMER, L.J., stated the nature and course of the proceedings, the endorsement on the writ and the facts, which are summarised at p. 257, letter F, ante, set out the material provisions of the International Organisations (Immunities and Privileges) Act, 1950 (1), and the Council of Europe (Immunities and Privileges) Order, 1960 (2), stated the claim to immunity made by the defendants and the matters proved in relation thereto, which are set out at p. 257,

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* The relevant provisions of the order of 1960 are set out in note (2), p. 259, post.

† The relevant provisions of the Act of 1950 are set out in note (1), infra.

(1) The material provisions of the Act of 1950 are:

" Section 1: (1) This section shall apply to any organisation declared by order in council to be an organisation of which the United Kingdom or H.M. government therein and one or more foreign sovereign powers or the government or governments thereof are members. G

(2) His Majesty may by order in council—(a) provide that any organisation to which this section applies (hereinafter referred to as ' the organisation ') shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Schedule to this Act, and shall also have the legal capacities of a body corporate; (b) confer upon—(i) any persons who are representatives (whether of governments or not) on any organ of the organisation or are members of any committee of the organisation or of an organ thereof;

" (ii) such number of officers of the organisation as may be specified in the order, being the holders of such high offices in the organisation as may be so specified; and H

" (iii) such persons employed on missions on behalf of the organisation as may be so specified; to such extent as may be specified in the order, the immunities and privileges set out in Part 2 of the Schedule to this Act; (c) confer upon such other classes of officers and servants of the organisation as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part 3 of the Schedule to this Act; and Part 4 of the Schedule to this Act shall have effect for the purpose of extending to the staffs of such representatives and members as are mentioned in sub-para. (i) of para. (b) of this subsection and to the families of officers of the organisation any immunities and privileges conferred on the representatives, members or officers under that paragraph, except in so far as the operations of the said Part 4 is excluded by the order conferring the immunities and privileges: I

" Provided that the order in council shall be so framed as to secure that there are not, conferred on any person any immunities or privileges greater in extent than those which, at the time of the making of the order, are required to be conferred on that person in

(*Continued at foot of page 259.*)

letter I, to p. 258, letter D, ante, and stated that he was satisfied that there was no ground on which the court would be justified in allowing the appeal. HIS LORDSHIP having said that he would summarise the plaintiff's submissions and give his reasons for rejecting them, continued:

(i) It has been contended that the Commission is not an "organ" of the Council. If this contention were well founded, we should have to hold that art. 12 of the order in council is ultra vires; for unless the Commission is an organ of the International Organisations (Immunities and Privileges) Council, there would be no power under s. 1 (2) (b) of the Act of 1950, to confer, by order in council, any immunities or privileges on its members. This would be fatal to the first defendant's claim to immunity, though it would not, I think, affect that of the second defendant, whose claim to immunity rests on art. 11 of the order in council.

Whether or not the Commission is an organ of the Council seems to me to be a question of fact, to be resolved by a consideration of the provisions of the

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(*Continued from page 258.*)

order to give effect to any international agreement in that behalf and that no immunity or privilege is conferred upon any person as the representative of H.M. government in the United Kingdom or as a member of the staff of such a representative.

"Section 2: (1) Where immunities and privileges are conferred on any persons by an order in council made under sub-s. (2) of the foregoing section, the Secretary of State— (a) shall compile a list of the persons entitled to immunities and privileges conferred under para. (b) of that subsection, and may compile a list of the persons entitled to immunities and privileges conferred under para. (c) of that subsection; (b) shall cause any list compiled under this subsection to be published in the London, Edinburgh and Belfast Gazettes; and (c) whenever any person ceases or begins to be entitled to the immunities and privileges to which any such list relates, shall amend the list and cause a notice of the amendment or, if the thinks fit, an amended list, to be published as aforesaid.

"(2) Every list or notice published under the foregoing subsection shall state the date from which the list or amendment takes or took effect; and the fact that any person is or was included or not included at any time among the persons entitled to the immunities and privileges in question may, if a list of those persons has been so published, be conclusively proved by producing the Gazette containing the list or, as the case may be, the last list taking effect before that time, together with the Gazettes (if any) containing notices of the amendments taking effect before that time, and by showing that the name of that person is or was at that time included or not included in the said list."

"Schedule, Part 2: *Immunities and privileges of representatives, members of committees, high officers and persons on missions.* 7. The like immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to His Majesty. 8. The like inviolability of residence as is accorded to such an envoy. 9. The like exemption or relief from taxes as is accorded to such an envoy.

"Schedule, Part 3: *Immunities and privileges of other officers and servants.* 10. Immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties."

(2) The material provisions of the order of 1960 are:

"Article 1. The Council of Europe (hereinafter referred to as the Council) is an organisation of which H.M. government in the United Kingdom and the governments of foreign sovereign powers are members.

"Article 10. Except in so far as in any particular case any privilege or immunity is waived by the Committee of Ministers, the Secretary-General and the Deputy Secretary-General of the Council shall enjoy the like immunity from suit and legal process, the like inviolability of residence, and the like exemption or relief from taxes, other than income tax, as is accorded to an envoy of a foreign sovereign power accredited to Her Majesty, and exemption from income tax in respect of emoluments received by them as officers of the Council.

"Article 11. Except in so far as in any particular case any privilege or immunity is waived by the Secretary-General, all permanent and temporary members of the staff of the Council shall enjoy: (a) Immunity from legal process in respect of words spoken or written and all acts done by them in their official capacity and within the limits of their authority; . . .

"Article 12: (1) Except in so far as in any particular case any privilege or immunity is waived by the European Commission of Human Rights, members of the Commission shall enjoy: (a) In respect of words spoken or written and all acts done by them in their official capacity, the like immunity from legal process as is accorded to an envoy of a foreign sovereign power accredited to Her Majesty."

Convention of Nov. 4, 1950, whereby it was set up. Reliance is placed by the plaintiff on the fact that the Convention was made by the signatory governments as such, albeit they were described as being members of the Council. It follows that the Commission was set up by agreement between the signatory governments, and not by the Council. This, it is said, shows that the Commission cannot be an organ of the Council. I can see no substance in this contention. I do not think that the fact of the Commission being imposed on the Council by the signatory Governments rather than being set up by the Council itself is in any way decisive. It may still be an organ of the Council even if imposed from without. It is not without significance that the plaintiff himself described the Commission in the endorsement of the writ as " the Commission of Human Rights *of* the Council of Europe ". I think that it is important to look first at the Statute of Europe (3), art. 1 of which makes it clear that one of the principal aims sought to be achieved was the maintenance and further realisation of human rights and fundamental freedoms. To this aim the members of the Council pledged themselves by art. 3 of the statute. This aim is specifically referred to in the recitals to the Convention. I do not think that it is necessary to refer in detail to all the articles of the Convention through which the Attorney-General took us in the course of his helpful argument. Suffice it to say that they reveal a very close nexus between the Commission and the Council. The following articles seem to me to be of special significance (4). These and other provisions of the Convention show that the Commission is so related to, and so bound up with, the Council that it cannot properly be described as anything other than an organ of the Council.

(ii) The plaintiff next submitted that, whatever the immunity to which the first defendant was entitled while he was a member of the Commission, it could not be regarded as having survived after January, 1962, when he ceased to be a member. As to this, I am of opinion that s. 2 (2) of the Act of 1950 is conclusive against the plaintiff's submission, having regard to the fact that the first defendant's name still appears in the list published by the Secretary of State of those entitled to the immunities prescribed by s. 1 (2) (b). I can see no answer to this point. I confess that it would not be an attractive ground for refusing jurisdiction if it were shown that, apart from it, the first defendant would otherwise have lost the immunity which he enjoyed while a member of the Commission. In fairness to the plaintiff, therefore, I think it right to say that quite apart from the provisions of s. 2 (2) of the Act of 1950 I am satisfied that the first defendant would in any case be entitled to the immunity claimed on his behalf. I have reached that conclusion for several reasons:

(a) The immunity claimed is no greater than that authorised by the proviso to s. 1 (2) of the Act of 1950. In this connexion reference should be made to the second protocol (5) to the General Agreement on Privileges and Immunities of the Council of Europe (6) signed at Paris on Sept. 2, 1949. This protocol was dated Dec. 15, 1956, and art. 3 provides as follows:

> " In order to secure for the members of the Commission complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all

(3) Cmd. 7778.

(4) HIS LORDSHIP referred then to arts. 21, 24, 25, 30, 31, 35, 37 and 58 in the following terms: " Article 21 ,which provides that the members of the Commission shall be elected by the Committee of Ministers; art. 24 and art. 25, which provide that references to the Commission, whether by one of the High Contracting Parties or by an individual, shall be made through the Secretary-General of the Council; art. 30 and art. 31, which provide that reports by the Commission or a Sub-Commission shall be transmitted to the Committee of Ministers or the Secretary-General of the Council; art 35, which provides that meetings of the Commission shall be convened by the Secretary-General of the Council; art. 37, which provides that the Secretariat of the Commission shall be provided by the Secretary-General of the Council, and art. 58, which provides that the expenses of the Commission shall be borne by the Council."

(5) Cmnd. 779. (6) Cmd. 7780.

A acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties."

(b) The immunity attaches, under art. 12 of the order in council (7),

" in respect of words spoken or written and all acts done by [the members
B of the Commission] in their official capacity."

I construe this as meaning that the immunity depends on the quality of the words spoken or the acts done, and not on the time when suit is brought. Once attached, it is not lost by the mere fact of the first defendant ceasing to be a member of the Commission.

(c) The immunity conferred is

C " the like immunity from legal process as is accorded to an envoy of a foreign sovereign power."

It is argued by the plaintiff that since an envoy loses his immunity when he ceases to be an envoy, so also a member of the commission loses his immunity when he ceases to be a member. I think that this contention is based on a mis-
D construction of the words used. The immunity is the like immunity as is accorded to an envoy while he is an envoy. If this is right, the fact of the first defendant having ceased to be a member of the commission is not of any necessary relevance.

(d) While it is true, as has been held in a number of the cases to which reference has been made, that an envoy when he ceases to be an envoy loses his immunity in respect of acts done in his private capacity, I do not think that this is by any
E means the case in relation to acts done by him in his official capacity. In so far as he acts in an official capacity, his acts are the acts of the foreign sovereign whom he represents. I do not accept that an envoy, after he has ceased to be an envoy, can be sued in respect of acts performed in his official capacity. For this would involve impleading the foreign sovereign, in the sense in which " impleading " was defined by VISCOUNT SIMON in *Sultan of Johore* v. *Abubakar Tunku Aris*
F *Bendahara* (8), quoting the words of BRETT, L.J., in *The Parlement Belge* (9), as follows:

" Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading."

G That this is so is, I think, clearly shown by the decision of the House of Lords in *Rahimtoola* v. *H.E.H. The Nizam of Hyderabad* (10) where the appellant, after he had ceased to hold office as High Commissioner for Pakistan, was nevertheless held entitled to immunity in respect of an act done by him in his official capacity during his tenure of office. VISCOUNT SIMONDS said (11):

H " No doubt, if a defendant by whatever name he is called be identified with the sovereign state, his task is easy: he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject-matter of the action the defendant is the agent of a sovereign state, that, in other words, the interests or property of the state are to be the subject of adjudication, the same result is reached."

I For these reasons, I am unable to accept the view that the first defendant, upon ceasing to hold office, lost such immunity as he previously enjoyed.

[HIS LORDSHIP then gave his reasons for rejecting the three other following submissions made by the plaintiff. (iii) The plaintiff had relied on the fact that the

(7) I.e. the Council of Europe (Immunities and Privileges) Order, 1960; for the text of art. 12, see footnote (2), p. 259, ante.
(8) [1952] 1 All E.R. 1261 at p. 1268; [1952] A.C. 318 at p. 343.
(9) (1880), 5 P.D. 197 at p. 219. (10) [1957] 3 All E.R. 441; [1958] A.C. 379.
(11) [1957] 3 All E.R. at pp. 445, 446; [1958] A.C. at pp. 393, 394.

second defendant's name was not included in any list compiled by the Secretary of State under s. 2 of the Act of 1950. Nothing, in HIS LORDSHIP'S view was to be inferred from this fact, since (as appeared from s. 2 (1) (a) of the Act of 1950) the compilation of a list was mandatory only in the case of persons falling within s. 1 (2) (b) of the Act and was permissive as regards others; moreover the office held by the second defendant was proved by the certificate of the Secretary-General of the Council. (iv) The plaintiff had submitted that his complaint was in respect of omissions rather than positive conduct and that accordingly the defendants were not covered by the immunity conferred by the order of 1960 which was in respect of words and acts. The answer to this submission was two-fold: (a) the endorsement on the writ did not confine the plaintiff's complaints to omissions, but alleged positive misbehaviour, and (b) an omission by the defendants would not furnish the plaintiff with a cause of action in the absence of a duty owed by them to the plaintiff and no such duty was or could be alleged, particularly in view of art. 25 of the Convention which negatived any duty by the Commission to an individual petitioner. (v) The plaintiff had submitted that the defendants' claim to immunity constituted, by reason of the positions which they held or had held, conduct contra bonos mores. In HIS LORDSHIP'S view, this submission was entirely misconceived, for the defendants had no power to waive the immunities which they enjoyed and the Secretary-General and the Commission, the authorities that had that power, had resolved not to waive them. HIS LORDSHIP concluded:] In all the circumstances, I do not find it possible to say that the plaintiff has shown any good ground for interfering with the order made by MASTER JACOB and affirmed by the learned judge; I would accordingly dismiss the appeal.

DANCKWERTS, L.J., having referred to the nature and course of the proceedings, the endorsement on the writ and the facts, which are summarised at p. 257, letter F, ante, stated that the point on the appeal was whether the two defendants possessed immunities which protected them from proceedings in respect of acts done in the course of their official duties so that the action was not maintainable. HIS LORDSHIP then set out the material provisions of the International Organisations (Immunities and Privileges) Act, 1950 (12), and the Council of Europe (Immunities and Privileges) Order, 1960 (13), and continued: The first question (which affects the first defendant but not the second defendant) is whether the European Commission of Human Rights is an " organ " of the organisation known as the Council of Europe. I have no doubt whatever that it is. An organ has been defined in dictionaries as a body of persons by which some purpose is carried out or functions performed. The relations between the Council and the Commission, as shown by the documents before us, make it clear that the latter body carries on certain purposes and functions of the Council for which the Commission was formed. The first defendant is, therefore, a member of such an organ and was and is entitled to the immunities and privileges which are relevant to his position. The second defendant comes under different provisions and was and is entitled to the immunities and privileges which are relevant to his position as set out in the International Organisation (Immunities and Privileges) Act, 1950 (12) and the Council of Europe (Immunities and Privileges) Order, 1960 (13).

The real question to which most of the arguments were directed was the nature of the immunities so conferred. In the case of the members of the Commission, the immunity conferred (14) is in respect of words spoken or written and all acts done by them in their official capacity, the like immunity from legal process " as is accorded to an envoy of a foreign sovereign power accredited to Her Majesty ".

(12) See note (1), pp. 258, 259, ante.
(13) See note (2), p. 259, ante.
(14) See art. 12 (1) of the order of 1960, which is set out in note (2), p. 259, ante.

A In the case of all permanent and temporary members of the staff of the Council, the immunity is expressed in somewhat different terms (15):

> " Immunity from legal process in respect of words spoken or written and all acts done by them in their official capacity and within the limits of their authority."

B The principal argument for the plaintiff was that as the first defendant had ceased to hold office since January, 1962, he no longer enjoyed any immunity from legal proceedings, because the immunity of an envoy only operates during the period for which he enjoys that office and such reasonable time after his recall as will enable him to make the necessary arrangements for his departure: see 7 HALSBURY'S LAWS (3rd Edn.) 270, para. 574 and cases there referred to. A short C answer which would be fatal to the writ in the present action as regards the first defendant is that as long as his name remains on the list prepared by the Secretary of State that is conclusive that his immunity is still in operation by virtue of the provisions of s. 2 (2) of the Act of 1950. That might, however, be only temporary protection. If the immunity of either of the defendants comes to an end after they leave office in respect of acts done in the course of their official duties, the D protection would be frail and unsatisfactory, and it might well be difficult to get persons to serve in such circumstances.

We have had the advantage of an argument by the Attorney-General as amicus curiae. Counsel for the defendants delivered to us a careful and elaborate argument to show that the conventions and other documents show an intention to require a more complete protection than such temporary immunity as had been suggested as being appropriate. He contended that the statutes and orders made E in this country must accordingly be interpreted in the light of those requirements, and that Parliament must be taken to have fulfilled the obligations which were expected of them and which they must have had in mind. I can see difficulties in this line of approach, but I do not propose to express any opinion on this aspect of the case, because, in my view, there is a much more satisfactory basis for the defendants' claim to immunity (which indeed was counsel's alternative argument).

F The cases relied on by the plaintiff, and cited as authority for the termination of an envoy's immunity after vacating office, are all cases concerned with the private debts and obligations of ambassadors and the like, which they have incurred for their own private purpose, while holding office, but were not incurred for the purpose of or in the course of their official duties. In the case of acts done in the course of their official duties, no legal proceedings can be taken against envoys, G even after they have ceased to hold office. The reason for this situation is that the envoy is the representative of the foreign sovereign whom he represents, and so it is the immunity of the sovereign which is involved, and not that of the envoy as a private person. Support for this principle is to be found in the House of Lords' decision in *Rahimtoola* v. *H.E.H. The Nizam of Hyderabad* (16). The immunity of a sovereign state from legal proceedings has long been recognised as H a principle of international law. For this reason, neither of the defendants is amenable to the legal proceedings of this court. They are protected in respect of acts done by them in the course of their official duties and will continue to be so protected by an indemnity similar to that enjoyed by an envoy in respect of acts done by him in the course of his official duties.

Consequently the present action is not maintainable. The appeal cannot I succeed and must be dismissed.

DIPLOCK, L.J.: The question before us is as to the writ issued by the plaintiff on July 15, 1963, against the first and second defendants, claiming relief

> " for damages arising from negligence and corruption in running the business as President (first defendant) and Chairman of the Secretariat

(15) See art. 11 of the order of 1960, which is set out in note (2), p. 259, ante.
(16) [1957] 3 All E.R. 441; [1958] A.C. 379.

(second defendant) of the Commission of Human Rights of Council of Europe." A

Although the plaintiff has referred freely to a document which he described as a statement of claim, the real issue is whether the court would have jurisdiction to grant to the plaintiff the relief sought by the indorsement on his writ, whatever the facts were on which he relied in support of his claim to that relief. For this reason the plaintiff, who has appeared in person, has been given the opportunity, B of which he has taken full advantage, of telling the court just what it is he would seek to prove if his action were allowed to proceed irrespective of whether such allegations are contained in the statement of claim.

As appears from the indorsement on the writ, the duty which the plaintiff alleges was owed to him by the defendants, and of which he alleges they were in breach, is alleged to be owed to him by them in their official capacities as President and Chairman of the Secretariat respectively of the Commission of Human Rights and not otherwise. Indeed, if I understood him correctly, his real complaint is that the second defendant as secretary of the Commission refused to present to the Commission the plaintiff's claim against the government of the German Federal Republic in the terms in which the plaintiff had drafted it, but presented instead a bowdlerised or edited version. The plaintiff's claim against D the first defendant appears to be that as President of the Commission he is vicariously liable for the acts or omissions of the second defendant.

So far as the second defendant is concerned, once it is established that he is a member of the staff of the Council of Europe and that he was a member of the secretariat of the Commission provided by the Secretary-General of the Council of Europe pursuant to art. 37 of the Convention for the Protection of Human E Rights and Fundamental Freedoms, the plaintiff's case against him seems to me to be unarguable. The immunity from legal process conferred on him by para. 11 of the Council of Europe (Immunities and Privileges) Order, 1960 (17) is clearly intra vires the powers conferred by s. 1 (2) (c) and para. 10 of the schedule to the International Organisations (Immunities and Privileges) Act, 1950, (18) and the proviso to s. 1 (2), since it does not exceed the privileges agreed to be F conferred on officers of the Council by art. 18 (a) of the General Agreement on Privileges and Immunities of the Council of Europe (19). The first defendant's immunity is in my view independent of whether or not the Commission is an " organ " of the Council, for he was acting as secretary of the Commission in his capacity as an officer of the Council provided by the Secretary-General of the Council to perform such secretarial duties and was thus acting in his official G capacity.

So far as the first defendant is concerned, there are two points which seem to me to merit consideration. The first is whether the Commission is an organ of the Council: for it is conceded that if it is not, art. 12 of the Order in Council (20), on which the first defendant relies for his immunity is ultra vires. The second is whether the first defendant's immunity for acts done in his official capacity H continues after he has ceased to be a member of the Commission.

As regards the first question, I have little to add to the judgments which have already been delivered. In the context in which the expression is used in the International Organisations (Immunities and Privileges) Act, 1950, it is plain that " organ " means a body of persons; and " organ " of an " organisation " means, in my view, a body of persons whose function is to do acts for the I purpose of carrying out the aims or objects of the organisation. The only argument against the Commission being an organ of the Council is that it was

(17) For the terms of art. 11, see note (2), p. 259, ante.

(18) For the terms of s. 1 (2) and schedule, para. 10, see note (1), pp. 258, 259, ante.

(19) Article 18, so far as material, reads " Officials of the Council of Europe shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity and within the limit of their authority."

(20) Art. 12 is set out in note (2), p. 259, ante.

A constituted by a separate agreement providing for common action in the maintenance and further realisation of human rights and fundamental freedoms. But this is a method of achieving the aim of the Council which is expressly contemplated by art. 1 of the Statute of the Council of Europe (21). The achievement of this aim of the Council is expressed to be the purpose of the Convention for the Protection of Human Rights and Fundamental Freedoms, B by which the Commission was established, and participation in the Convention is limited to members of the Council. The members of the Commission are elected not by the signatories of the Convention, but by the Committee of Ministers of the Council. They report not to the signatories of the Convention but to the Committee of Ministers who prescribe the action to be taken unless the question is referred to the court. The expenses of the Commission are C borne by the Council and its secretariat is provided by the Council. I am clearly of opinion that the Commission is an organ of the Council in the sense in which that expression is used in the Act of 1950.

The second question is in my view concluded by s. 2 (2) of the International Organisations (Immunities and Privileges) Act, 1950, to which my lords have referred. I should, however, be reluctant to decide the appeal on this ground D if I were of opinion that the Secretary of State had wrongly retained the name of the first defendant on the list of persons entitled to privileges after he had ceased to be entitled to them; for, it is the statutory duty of the Secretary of State under s. 2 (1) (c) to amend the list when any person ceases to be entitled to the immunities and privileges to which the list relates, and that duty he could, in my view, by appropriate proceedings be compelled to peform. I E agree with my lords that the first defendant continues to be entitled to the immunity conferred upon him by art. 12 of the Order in Council of 1960, notwithstanding that he has ceased to be a member of the commission.

The acts done by the first defendant in respect of which the plaintiff claims relief by his writ clearly fall within the terms of para. 12 of the Order in Council of 1960 in their ordinary meaning. The plaintiff's contention, however, is (i) that F s. 1 (2) (b) of and para. 7 of the Schedule to the Act of 1950 only authorised the conferment on the first defendant of " the like immunity from suit and legal process as is accorded to an envoy of a foreign sovereign Power accredited to Her Majesty "; (ii) that the immunity from suit and legal process accorded to a foreign envoy ceases upon his ceasing to be accredited to Her Majesty; and (iii) that if and so far as on its true construction the Order in Council of 1960 purports G to confer on the first defendant any immunity which continues after he ceased to be a member of the Commission, it is ultra vires. The fallacy in this argument lies in its failure to distinguish between the immunity from suit and legal process enjoyed by a foreign envoy in respect of acts done in his private capacity and the immunity enjoyed by him in respect of acts done in his official capacity on behalf of his government. This distinction has recently received statutory H recognition in the Diplomatic Immunities Restriction Act, 1955, where the former type of immunity is referred to as " personal immunities " (22).

Counsel for the defendants has addressed to us a helpful and erudite argument as to the international law on this topic, which he contends, I think correctly, forms part of the law of England administered by the courts. But if the matter required any fine distinctions or detailed examination of English authorities or I of sources of international law, I myself should not have thought it appropriate to dispose of it under the summary procedure for setting aside a writ. For my part, however, I think that the point is a simple one depending on elementary, well-recognised principles. The immunity of an envoy from suit or legal process arises from the duties owed by states to one another in international law. In

(21) Cmd. 7778.

(22) Section 3 (1) of the Act of 1955 reads " In this Act ' personal immunities ' means immunity from suit or legal process (except in respect of things done or omitted to be done in the course of the performance of official duties) and inviolability of residence."

respect of acts done by an envoy in his private capacity the purpose of his immunity from suit or legal process is so that he may perform his duties to his government without harassment while en poste. The immunity is from legal process, not from liability, and its purpose is fulfilled when he has ceased to be en poste and has had a reasonable time to wind up his affairs in the country to which he is accredited. The English cases show that in English law an envoy's immunity from suit and legal process in respect of acts done in his private capacity endures only so long as he is en poste and for a sufficient time thereafter to enable him to wind up his affairs: *Magdalena Steam Navigation Co.* v. *Martin* (23); *Musurus Bey* v. *Gadban* (24). Quite different considerations, however, apply to acts done by him in his official capacity. Such acts are done on behalf of his government. His government being a foreign sovereign government, under principles of English law which are so well known that I refrain from citing authority, is immune from the jurisdiction of the English courts. The propriety of its acts cannot be examined in a municipal court unless it consents to waive its immunity. A foreign sovereign government, apart from personal sovereigns, can act only through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be en poste at the date of the suit.

Even if there were no previous authority on the subject, I should have no hesitation in holding that an envoy's immunity from suit and legal process in respect of acts done in his official capacity was permanent, unless waived by his government, and did not cease with his ceasing to be en poste. I think, however, that there is already authority for this proposition in *Rahimtoola* v. *H.E.H. The Nizam of Hyderabad* (25). The claim there was made against the former High Commissioner for Pakistan personally for money had and received. He succeeded in showing that he had received the money in England in his official capacity as High Commissioner. In these circumstances it was held, in accordance with the principles which I have stated, that an English court had no jurisdiction to entertain the claim. Applying these principles to the present case the Order in Council of 1960 does not purport to confer on the first defendant any immunity in respect of acts done in his private capacity. It confers immunity from suit and legal process in respect of acts done in his official capacity as a member of the Commission. This, under the proviso to s. 1 (2) of the Act of 1950, was all that could be conferred, since it was the extent of the relevant immunity agreed to be granted to members of the Commission under art. 1 (a) to the second protocol (26) to the General Agreement on Privileges and Immunities of the Council of Europe (27). The Order in Council confers immunity from suit and legal process in respect of acts done by members of the Commission without any limit to the duration of the immunity and it would indeed have been a breach of art. 3 of the second protocol (28) if the order in council had not so done. In my view the Secretary of State was right in retaining the first defendant's name on the list of persons entitled under s. 2 (1) of the Act of 1950 to immunities notwithstanding that he had ceased to be a member of the Commission. That being so, this appeal fails as against the first defendant also.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors: *Herbert & Gowers & Co.* (for the defendants); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(23) (1859), 2 E. & E. 94. (24) [1891-94] All E.R. Rep. 761; [1894] 2 Q.B. 352.
(25) [1957] 3 All E.R. 441; [1958] A.C. 379. (26) Cmnd. 579.
(27) Cmd. 7780. (28) For the text of art. 3, see p. 260, letter H, to p. 261, letter A, ante.