
Immunity versus Human Rights: The Pinochet Case

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Abstract

In the Pinochet case the former head of state of a foreign country has been held accountable for the first time before a municipal court for acts of torture allegedly committed while he was in his post. The unprecedented character of the case causes one to ask whether municipal courts may properly complement international tribunals in the enforcement of international criminal law, and, if so, to what extent a plea of immunity or non-justiciability may be available. The divide within the House of Lords on the interpretation of the scope of application of jurisdictional immunities to foreign heads of state as regards crimes of international law hardly hides a more profound conflict based on the different perception of what values and interests should be accorded priority in contemporary international law. This article argues that neither jurisdictional immunities nor act of state and other doctrines of judicial self-restraint are consistent with the notion of crimes of international law and that the quest for normative coherence should induce a reappraisal of the relationship between human rights law and the law of jurisdictional immunities.

1 Introduction

Individual accountability for crimes of international law is a topic which recently has gained considerable momentum. It should thus be of little surprise that the legal proceedings, currently under way in the United Kingdom, for the extradition to Spain of the former head of state of Chile, General Augusto Pinochet Duarte, have spurred a wave of interest which goes well beyond academic circles and reaches out to the world public opinion at large. Inevitably, the numerous legal facets of the case have been largely overshadowed by the highly sensitive political aspects of the matter. In fact, the *Pinochet* case should be a cause for international lawyers to inquire afresh whether former heads of state and other state officials may be held responsible before the municipal courts of a foreign state for acts, qualified as criminal under international

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law, which have allegedly been committed when they were in post. In essence, this is the query around which the recent decision of the House of Lords in the *Pinochet* case revolves.¹

Although the Law Lords were bound to apply the relevant provisions of the State Immunity Act, which regulates the jurisdictional immunities of foreign states and their organs in the United Kingdom, international law played a crucial role in the interpretation of the municipal statute. The interplay of municipal law and international law has long secured the adjustment of the doctrine of jurisdictional immunities to the changing demands of the international community. Recent attempts to resort to municipal courts for the adjudication of cases involving issues of state or individual responsibility for serious violations of international law call for a reassessment of this interaction. In particular, due heed should be paid to the issue of whether municipal courts may aptly complement international law enforcement mechanisms whenever this is necessary to foster those common interests and values which are perceived as fundamental by the international community as a whole.

Little, if any, doubt exists that the charges originally brought by Spain against General Pinochet are of the utmost gravity. Genocide, torture, hostage-taking and murder on a massive and systematic scale attain the status of crimes of international law either via customary or treaty law.² Nor is the principle of individual criminal responsibility under international law any longer disputed.³ What remains controversial is whether the domestic courts of a foreign state are a proper forum for prosecuting individuals for crimes of international law and, if so, what immunity, if any, should be granted to former heads of state. While there is a concordance of views among scholars and many provisions can be traced in the statutes and recent practice of international tribunals to the effect that no plea of immunity is available in case of crimes of international law, the case law of domestic courts is scant and hardly conclusive on the point. Most cases concern civil suits brought against individuals whose states have either waived their immunity or even acted as plaintiffs in the relevant legal proceedings. Also the cognate doctrine of act of state or non-justiciability, alternatively referred to by some Law Lords as a possible bar to criminal proceedings against General Pinochet in the United Kingdom, is worth addressing. In

¹ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3)*, Judgment of 24 March 1999, reported as *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* in [1999] 2 All E.R. 97 [hereinafter *Ex Parte Pinochet (HL 2)*].

² See, *inter alia*, S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997); L. S. Sunga, *The Emerging System of International Criminal Law* (1997); J. J. Paust *et al.*, *International Criminal Law* (1996); M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1992); L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1991).

³ See by this author, 'Individual Accountability for Crimes Against Humanity. Reckoning with the Past. Thinking of the Future', 19 *SAIS Review* (1999), at 223 *et seq.*

particular, the availability of a plea of non-justiciability in cases concerning the responsibility of individuals for crimes of international law must be the object of careful scrutiny as it may considerably restrain the role of municipal jurisdictions in enforcing applicable rules of international law.

The remarkable impact which the decision will most likely have on the future development of a fair and comprehensive system of international criminal law enforcement is a cause for testing its correctness against the background of contemporary standards of international law. The aim of this paper is to address the legal issues, sketchily outlined above, with a view to ascertaining whether the House of Lords was right in interpreting international law to the effect of denying immunity to the former head of a foreign state indicted of acts of torture and crimes against humanity, thus allowing extradition proceedings to continue. Before turning to the relevant issues, however, a cursory account of the legal proceedings in the United Kingdom may be apt.

2 Legal Proceedings in the UK: the Interaction of Municipal and International Law

A The High Court Decision

As is well known, General Pinochet entered the United Kingdom in September 1997. Just before his return to Chile, after undertaking surgery in London, he was arrested on the basis of two provisional arrest warrants issued by UK magistrates, at the request of Spanish courts,⁴ pursuant to the European Convention on Extradition.⁵ General Pinochet's counsel immediately moved to have the two arrest warrants quashed by the High Court. On 28 October the Divisional Court of the Queen's Bench Division ruled⁶ that the first arrest warrant was bad as the crimes for which extradition had been requested by Spain were not extradition crimes under the UK Extradition Act.⁷ As regards the second arrest warrant, the Lord Chief Justice held that General Pinochet was immune from jurisdiction as the acts that he had allegedly

⁴ The first provisional warrant had been issued, on the basis of the 1989 Extradition Act, by Mr Nicholas Evans, a Metropolitan Stipendiary Magistrate on 16 October 1998. The allegations concerned the murder of Spanish citizens in Chile, which offences were within the jurisdiction of Spain. The second provisional arrest warrant was issued by another Stipendiary Magistrate, Mr Ronald Bartle. This time more offences were alleged, including conspiracy to commit acts of torture, hostage-taking and conspiracy to murder.

⁵ European Convention on Extradition, 1957, incorporated in the UK by the European Convention on Extradition Order 1990 (SI 1507 of 1990) as amended.

⁶ The High Court of Justice, Queen's Bench Division, Divisional Court, *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum. Re: Augusto Pinochet Duarte*, 28 October, 1998, reproduced in 38 ILM (1999) 68.

⁷ According to the principle of double criminality, an extradition crime is an act which is criminal in both the requesting and the requested state. Since the murder of a British citizen by a non-British citizen outside the United Kingdom would not constitute an offence in respect of which the UK could claim extraterritorial jurisdiction, the murder of Spanish citizens by non-Spanish citizens in Chile cannot be qualified as an extradition crime.

committed were official acts performed in the exercise of his functions of head of state. The legal basis of the decision was Section 20 of the UK State Immunity Act, which grants to heads of states the same privileges and immunities as those conferred on the heads of diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations, incorporated by reference into the Act and applicable ‘with necessary modifications’ to heads of states.⁸ Particularly relevant to the instant case was Article 39(2) of the Vienna Convention which, with the necessary adjustments to the position of heads of states, provides that heads of states shall continue to be immune from the criminal jurisdiction of foreign states, once they are no longer in post, for acts performed in the exercise of their functions as heads of state. Lord Bingham rejected the argument that a distinction could be made, within the category of the official acts of a head of state, between crimes of a different gravity and, consequently, upheld the claim of immunity. In his opinion the Lord Chief Justice indirectly relied on the decision of the English Court of Appeal (Civil Division) in *Al Adsani v. Government of Kuwait*⁹ to state that if a state is entitled to immunity for acts of torture, it should not be surprising that the same immunity is enjoyed by a head of state. Justice Collins, concurring in the Lord Chief Justice’s opinion, added that ‘history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups’ and that he could see ‘no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists’.¹⁰ The quashing of the second warrant, however, was stayed, as the Court granted leave to appeal to the House of Lords, certifying as a point of law of general public importance ‘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’.¹¹

B The First Ruling by the House of Lords

The House of Lords on 25 November 1998 reversed the lower court’s ruling and held, by a three to two decision, that a former head of state is not entitled to immunity for such acts as torture, hostage-taking and crimes against humanity, committed while he was in his post.¹² Lord Nicholls, in whose opinion Lord Hoffman concurred, held

⁸ Part I of the SIA was deemed inapplicable to criminal proceedings under Art. 16(4), which expressly excludes criminal proceedings from the scope of application of Part I. Also the House of Lords agreed on this construction.

⁹ Decision of 12 March 1996, reported in 107 ILR 536.

¹⁰ See para. 80 of the High Court’s judgment.

¹¹ *Ibid.*, at para. 88.

¹² House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen’s Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen’s Bench Division)*, Judgment of 25 November 1998, 37 ILM (1998) 1302 [hereinafter *Ex Parte Pinochet (HL 1)*]. For a comment see Fox, ‘The First Pinochet Case: Immunity of a Former Head of State’, 48 *ICLQ* (1999) 207. The House of Lords took into account also the formal request of extradition transmitted by the Spanish Government on 6 November to the UK Government. In the official request further charges were added, including genocide, mass murders, enforced disappearances, acts of torture and terrorism.

that international law, in the light of which domestic law has to be interpreted,¹³ 'has made it plain that certain types of conduct . . . are not acceptable on the part of anyone' and that 'the contrary conclusion would make a mockery of international law'.¹⁴ In the view of Lord Nicholls, General Pinochet was not immune under Section 20 of the SIA, as the Act confers immunity only in respect of acts performed in the exercise of functions 'which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution'. Nor was he entitled to any customary international law doctrine of residual immunity, potentially covering all state officials, for acts of torture and hostage-taking, 'outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability'. Finally, both the Torture and Hostage-Taking Conventions permit the extraterritorial exercise of criminal jurisdiction by municipal courts. On a similar line of reasoning Lord Steyn maintained that genocide, torture, hostage-taking and crimes against humanity, condemned by international law, clearly amount to conduct falling beyond the functions of a head of state.¹⁵ By contrast, the two dissenting Law Lords held that it is not right to distinguish 'between acts whose criminality and moral obliquity is more or less great' and that the test is 'whether the conduct in question was engaged under colour of or in ostensible exercise of the Head of State's public authority'.¹⁶ Consequently, 'where a person is accused of organizing the commission of crimes as the head of the government, in cooperation with other governments, and carrying out those crimes through the agency of the police and the secret service, the inevitable conclusion is that he was acting in a sovereign capacity'.¹⁷ Lord Lloyd basically agreed with the construction offered by Lord Bingham that the only

The Spanish *Audiencia Nacional* had upheld Spanish jurisdiction over the above offences on the basis of the *Ley Organica del Poder Judicial* of 1985, Art. 23 of which allows Spanish courts to exercise jurisdiction over crimes committed by Spanish or foreign citizens outside Spain when such crimes can qualify, under Spanish law, as genocide, terrorism or any other crime which, according to international treaties or conventions, must be prosecuted in Spain. The ruling of the *Audiencia Nacional* sitting in plenary was rendered on 30 October 1998 and the reasoning of the court was released on November 5 (the judgment can be retrieved from the Internet at the following site: <<http://www.elpais.es/p/d/especial/autochile.htm>> (10 Nov. 1998)). The same conclusion was reached by the *Audiencia Nacional* as regards prosecution in Spain of crimes committed in Argentina at the time of the military *junta* (the judgment can be retrieved from the Internet at the following site: <<http://www.elpais.es/p/d/especial/autargentini.htm>> (10 Nov. 1998)). The two decisions as well as Judge Garzon's extradition order were promptly published in Spain: *El caso de España contra las dictaduras Chilena y Argentina* (1998).

¹³ See *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529. It is of note that also Lord Slynn of Hadley referred to *Trendtex* to state that the principle of immunity should be evaluated in the light of the developments of international law relating to international crimes (*Ex Parte Pinochet (HL 1)*, *supra* note 12, at 1311).

¹⁴ *Ibid.*, at 1333. Lord Nicholls limited his analysis to torture and hostage-taking. The relevant international conventions have been incorporated into the UK legal system respectively by the Criminal Justice Act 1988 and the Taking of Hostages Act 1982.

¹⁵ *Ibid.*, at 1338.

¹⁶ *Ibid.*, at 1309 (Lord Slynn). The latter quote is from Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *RdC* (1994), at 56.

¹⁷ *Ibid.*, at 1323 (Lord Lloyd). Part of the allegations against General Pinochet concerned his coordinating, in cooperation with other governments, the so-called 'Operation Condor', aimed at the systematic repression of political opponents.

meaningful distinction for the purpose of head of state immunity is that between private acts and official acts performed in the execution or under colour of sovereign authority. A former head of state would be entitled to immunity for the latter acts under both common law and statutory law, as the acts in question were clearly of a governmental character. Lord Slynn of Hadley admitted the possibility that the immunity *ratione materiae* retained by a former head of state after ceasing service could be affected by the emerging notion of individual crimes of international law. He added, however, that this could be so only to the extent that an international convention clearly defines the crime and gives national courts jurisdiction over it, and that the convention, which must, expressly or impliedly, exclude the immunity of the head of state, is incorporated by legislation in the UK.¹⁸

On 10 December, the Home Secretary issued an authority to proceed in order to allow the continuation of extradition proceedings. In doing so he said to have had regard to such relevant considerations as the health of General Pinochet, the passage of time since the commission of the alleged acts and the political stability of Chile. While denying authority to proceed on the charge of genocide,¹⁹ the Home Secretary stated that all the other charges alleged in the Spanish request of extradition amounted to extradition crimes and were not of a political character.²⁰

¹⁸ *Ibid.*, at 1313–1314 (Lord Slynn). Lord Slynn found nothing in international conventions and UK implementing legislation which could take away immunity. Art. 4 of the Genocide Convention which clearly does so as regards ‘constitutionally responsible leaders’ was not incorporated into UK law, whereas neither the Torture Convention nor the Hostage-Taking Convention contain any express exclusion of immunity for heads of states.

¹⁹ Interestingly enough, the Spanish National Audience in upholding the jurisdiction of Spanish courts over the alleged acts of genocide had interpreted broadly the definition of the expression ‘genocide’ in the Genocide Convention. After stating, generally, that ‘[s]in distingos, es un crimen contra la humanidad la ejecución de acciones destinadas a exterminar a un grupo humano, sean cuales sean las características diferenciadoras del grupo’, the Court interpreted the Convention systematically within the broader context of the logic of the international legal system and held that the genocide ‘no puede excluir, sin razón en la lógica del sistema, a determinados grupos diferenciados nacionales, discriminándoles respecto de otros’. Therefore, also acts committed against ‘aquellos ciudadanos que no respondían al tipo prefijado por los promotores de la represión como propio del orden nuevo a instaurar en el país’ could be qualified as genocide (see *El caso de España*, *supra* note 12, at 313–316).

²⁰ The Home Secretary acted pursuant to section 7(4) of the Extradition Act 1989.

C *The Rehearing of the Case and the New Judgment of the House of Lords*

On 17 December 1998 the House of Lords decided to set aside its prior judgment, on the grounds that Lord Hoffman, who cast the deciding vote, by failing to disclose his ties to Amnesty International, which, incidentally, had been admitted as an intervener in the proceedings,²¹ was disqualified from sitting.²² A new hearing before a panel of seven Law Lords was scheduled and, eventually, on 24 March 1999, the House of Lords rendered its decision on the case.²³ By a majority of six to one, the House of Lords in a lengthy and rather convoluted judgment held that General Pinochet was not immune for torture and conspiracy to commit torture as regards acts committed after 8 December 1988, when the UK ratification of the Torture Convention, following the coming into force of section 134 of the Criminal Justice Act 1988 implementing the Convention, took effect. The second judgment of the House of Lords profoundly differs from the previous one for the treatment given to two issues: the qualification of extradition crimes and the role that some of the Law Lords attributed to the Torture Convention for the purpose of denying immunity to General Pinochet.²⁴ On the one hand, the intertemporal law question of which critical date is relevant for the double criminality principle was solved by interpreting the applicable provisions of the Extradition Act to the effect of requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct. While Lord Bingham for the Divisional Court and Lord Lloyd in the first ruling of the House of Lords,²⁵ had held that the critical date was the date of the request of extradition, the large majority of the Law Lords sitting in the second Appellate Committee agreed that the critical date was the date of the actual conduct.²⁶ Besides being contrary to the wording of the Extradition Act and to settled practice,²⁷ this interpretation had the effect of remarkably narrowing down the number of

²¹ Lord Hoffman chaired the charitable arm of Amnesty International in the UK (Amnesty (Charity) International Ltd.); see *The Times*, 8 December 1998.

²² *The Times*, 18 December 1998. The opinions of the Lords of Appeal are reproduced in 38 ILM (1999) 430.

²³ *Ex Parte Pinochet (HL 2)*, *supra* note 1.

²⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 23 ILM (1984) 1027, as modified 24 ILM (1985) 535.

²⁵ *Ex Parte Pinochet (High Court)*, Lord Bingham, at para. 44; *Ex Parte Pinochet (HL 1)*, Lord Lloyd, at 1318. As Lord Browne-Wilkinson stated, probably at the first hearing it was conceded that all the charges against General Pinochet were extradition crimes.

²⁶ Lord Browne-Wilkinson reached this conclusion via a systematic interpretation of the Extradition Act 1989, also in the light of its predecessor, the Extradition Act 1870. No other Law Lords objected to this construction.

²⁷ On the double criminality principle see G. Gilbert, *Aspects of Extradition Law* (1991) at 47 *et seq.* See also M. C. Bassiouni, *International Extradition. United States Law and Practice* (1996), stating that for the purpose of double criminality US and Swiss law do not require that the relevant conduct be criminal in both the requesting and the requested state at the time the alleged crime was committed (at 391–392). On UK extradition law see A. Jones, *Jones on Extradition* (1995).

offences for which General Pinochet can be extradited.²⁸ Since torture only became an extraterritorial offence after the entry into force of section 134 of the Criminal Justice Act 1988, alleged acts of torture and conspiracies to commit torture outside the UK before that time did not constitute an offence under UK law.²⁹ Therefore, they could not be qualified as extradition crimes under the principles of double criminality. Only Lord Millett maintained that UK courts would have jurisdiction at common law over acts of torture from a much earlier date, when international law recognized that such acts could be prosecuted by any state on the basis of universal jurisdiction.³⁰

On the issue of immunity, only Lord Goff of Chieveley, entirely endorsing Lord Slynn's opinion in the first ruling, held that General Pinochet enjoyed immunity. In particular, Lord Goff maintained that nothing in the Torture Convention could be construed as an express waiver of state immunity. Nor could such a waiver be reasonably implied.³¹ The other Law Lords, albeit on different grounds, found non-immunity in the circumstances of the case. In particular, Lord Browne-

²⁸ A schedule of the charges against General Pinochet had been prepared by Alun Jones of the Crown Prosecution Service. The charges are analysed and discussed in detail in Lord Hope's opinion (*Ex Parte Pinochet (HL 2)* at 132b *et seq.*). Only charges of torture and conspiracy to commit torture after 29 September 1988 (the date in which Section 134 of the Criminal Justice Act came into force) were thought to be extradition crimes (charges 2 and 4 of the above schedule) as well as a single act of torture alleged in charge 30. Also 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, were deemed to be extradition crimes. The majority, however, held Pinochet immune for such acts. As to the charges related to hostage-taking (charge 3), Lord Hope found them not to be within the scope of the Taking of Hostages Act 1982, as the relevant statutory offence consists of taking and detaining a person to compel somebody else to do or to abstain from doing something, whereas the charges alleged that the person detained was to be forced to do something under threat to injure other parties (which is exactly the opposite of the statutory offence). It might be worth remembering that the charges of genocide were not the object of discussion as the Home Secretary had refused to issue an authority to proceed as regards those charges.

²⁹ No one argued that section 134 could operate retrospectively so as to make torture committed outside the UK before the coming into force of the Criminal Justice Act 1988 a crime under UK law.

³⁰ Lord Millett held that the jurisdiction of English courts, although mainly statutory, is supplemented by the common law. Therefore, 'English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law', including 'the systematic use of torture on a large scale and as an instrument of state policy' which had already attained the status of an international crime of universal jurisdiction. Eventually, Lord Millett yielded to the view of the majority and proceeded on the basis that Pinochet could not be extradited for acts of torture committed prior to the coming into force of section 134 of the Criminal Justice Act. (*Ex Parte Pinochet (HL 2)* at LI 78b–d).

³¹ Besides finding no trace in the *travaux préparatoires* of discussions concerning the waiver of state immunity, Lord Goff's stance against immunity heavily relied on policy considerations. The fear of malicious allegations against heads of state, particularly of powerful countries in which they often perform an executive role, should cause one to be cautious in ruling out immunity. By way of example, Lord Goff cites the possibility that a Minister of the Crown or other lower public official may be sued on allegations of acts of torture in Northern Ireland in countries supportive of the IRA. Furthermore, the scope of the rule of state immunity would be limited to what he considers exceptional cases, such as when the offender is found in a third state or in a state where one of its nationals was a victim, the more frequent occurrence being that the offence is committed in the national state of the offender, in which case the latter would have no immunity (*Ex Parte Pinochet (HL 2)* at 128–129a).

Wilkinson, the presiding Law Lord, after stating that the prohibition of torture became 'a fully constituted international crime' only by the adoption of the Torture Convention, which set up a 'worldwide universal jurisdiction',³² held that the 'notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention' and that torture, as defined in the Convention, 'cannot be a state function'.³³ Therefore, starting from the moment in which the UK became party to the Convention, Spain and Chile having already ratified it, all the parties involved had agreed to exercise extraterritorial jurisdiction over acts of torture committed by or with the acquiescence of state officials.³⁴ On a similar line of reasoning, Lord Hope of Craighead held that Chile had lost its right to object to the extraterritorial jurisdiction

³² Lord Browne-Wilkinson's reasoning is not deprived of ambiguities. After recognizing that torture on a large scale is a crime against humanity which has attained the status of *jus cogens* (relying on *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber of the ICTY, Judgment of 10 December 1998, reproduced in 38 ILM (1999) 317 para. 153) and which justifies states in taking jurisdiction on the basis of the universality principle, he said that he doubted that before the entry 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 organization of state torture could not rank for immunity purposes as performance of an official function' (*Ex Parte Pinochet (HL 2)* at 114 *et seq.*). This reasoning is inherently flawed. If one characterizes — as Lord Browne-Wilkinson does — the prohibition of torture on a large scale as a *jus cogens* norm, the inevitable conclusion is that no other treaty or customary law rule, including the rules on jurisdictional immunities, can derogate from it. Another aspect in Lord Browne-Wilkinson's opinion which remains rather unclear is what he means by saying that the crime of torture did not become 'a fully constituted international crime' until the Torture Convention set up a system of 'worldwide universal jurisdiction' (via the joint operation of Articles 5, 6 and 7). The tautology inherent in the argument is apparent: on the one hand a crime against humanity would entail universal jurisdiction, on the other only when universal jurisdiction can be established over it would an offence become an international crime. A much more coherent argument would have been that torture on a large scale as a crime against humanity entails universal jurisdiction, whereas single acts of torture have become a crime and are subject to universal jurisdiction only via the Torture Convention (see the reasoning of Lord Millett). No such distinction, however, appears in Lord Browne-Wilkinson's opinion.

³³ Among the reasons for holding that acts of torture cannot be qualified as a function of a head of state, Lord Browne-Wilkinson mentioned the following: i) international law cannot regard as official conduct something which international law itself prohibits and criminalizes; ii) a constituent element of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an official capacity'. It would be unacceptable if the head of state escaped liability on grounds of immunity while his inferiors who carried out his orders were to be held liable; iii) immunity *ratione materiae* applies to all state officials who have been involved in carrying out the functions of the state; to hold the head of state immune from suit would also make other state officials immune, so that under the Torture Convention torture could only be punished by the national state of the official (*Ex Parte Pinochet (HL 2)* at 114j–115a–e).

³⁴ See Art. 1 of the Torture Convention. The Convention entered into force on 26 June 1987. Spain ratified on 21 October 1987, Chile on 30 September 1988 and the UK on 8 December 1988.

of the UK upon its ratification of the Convention, which would prevent the parties from invoking immunity *ratione materiae* 'in the event of allegations of systematic or widespread torture'.³⁵ Both Lord Browne-Wilkinson and Lord Hope followed Lord Slynn's analysis,³⁶ their views departing from his only as regards the impact of the Torture Convention on the rule of immunity *ratione materiae*. Lord Saville concurred in holding that the provisions of the Torture Convention are inconsistent with immunity, which, consequently, is inapplicable to the conduct in question, at least in the reciprocal relations among the parties.³⁷ Lord Hutton found that acts of torture, already outlawed by international law at the time of adoption of the Torture Convention, are not amenable within the functions of a head of state and that 'there is no waiver issue as the immunity to which Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to acts of torture'.³⁸ Lord Millett's opinion is at variance with that of his colleagues. According to Lord Millett, universal jurisdiction existed well before the Torture Convention over crimes committed in violation of *jus cogens* and which gravity and scale could be regarded 'as an attack on

³⁵ Immunity *ratione materiae* would shield General Pinochet as regards the other charges. Lord Hope qualifies as an international crime divesting a former head of state of his immunity only systematic or widespread torture. Only such an offence would attain the status of *jus cogens*, compelling states to refrain from such conduct under any circumstances and imposing an obligation *erga omnes* to punish this conduct. Although state torture was already at the time of the early allegations against General Pinochet an international crime under customary international law it was not until the Torture Convention, which enabled states to assume jurisdiction over such offences, that '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' (*Ex Parte Pinochet (HL 2)* at 152c). Lord Goff's analysis is not entirely convincing. If one assumes, as he does, that the prohibition of systematic torture, which most of the time requires state action, is a *jus cogens* rule, violations of which every state is under an obligation to punish, it is difficult to see how such an obligation could be discharged unless domestic courts are given the possibility of investigating, prosecuting and punishing the individuals who have committed such heinous acts. Furthermore, it is hard to see how the distinction between systematic torture and single instances of torture for the purpose of state immunity can be drawn on the basis of the Torture Convention.

³⁶ See *supra* note 18 and accompanying text.

³⁷ Since the Convention prohibits so-called 'official torture', to Lord Saville, 'a former head of state who it is alleged resorted to torture for state purposes falls . . . fairly and squarely within those terms' (*Ex Parte Pinochet (HL 2)* at 169j). States parties to the Convention have clearly and unambiguously accepted, in the view of Lord Saville, that official torture can be punished 'in a way which would otherwise amount to an interference in their sovereignty' (*ibid.*, at 170c). For the same reason, Lord Saville held that also a plea based on act of state would fail in the circumstances of the case (*ibid.*, at 170e).

³⁸ (*Ex Parte Pinochet (HL 2)* at 166e. According to Lord Hutton, although the alleged acts were carried out by General Pinochet 'under colour of his position as head of state . . . 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.' (*ibid.*, at 165d) Lord Hutton, while accepting the limitation inherent in the qualification of extradition crimes under UK law, which prevents consideration of allegations of torture prior to the coming into force of section 134 of the Criminal Justice Act, said *in dictum* that 'acts of torture were clearly crimes against international law and that the prohibition of torture had acquired the status of *jus cogens* by that date' (*ibid.*, at 164c). He later added that not only torture committed or instigated on a large scale but also a single act of torture qualifies as a crime of international law.

the international legal order'.³⁹ Relying on *Eichmann* and *Demjanjuk*,⁴⁰ he said that any state is permitted under international law to assert its jurisdiction over such crimes and that the commission of such crimes in the course of one's official duties as a responsible officer of the state and in the exercise of his authority as an organ of that state is no bar to the exercise of jurisdiction by a national court. The Torture Convention simply expanded the cover of international crimes to single instances of torture, imposing on states the obligation to exercise their jurisdiction over the crime. According to Lord Millett, recognition of immunity would be 'entirely inconsistent with the aims and object of the Convention'.⁴¹ Finally, Lord Phillips of Worth Matravers held that crimes of such gravity as to shock the consciousness of mankind cannot be tolerated by the international community and that state immunity *ratione materiae* cannot coexist with international crimes and the right of states to exercise extraterritorial jurisdiction over them. While doubting that customary international law recognizes universal jurisdiction over crimes of international law, Lord Phillips held that on occasion states agree by way of treaty to exercise extraterritorial jurisdiction, which, once established, should not exclude acts done in an official capacity.⁴²

While all the Lords agreed on the need for the Home Secretary to reconsider his decision on allowing extradition proceedings to go ahead, in the light of the new ruling, no one stressed that the UK has the obligation under the Torture Convention

³⁹ *Ex Parte Pinochet (HL 2)* at 177d. Lord Millett correctly notes that the very official or governmental character of the offences characterizes crimes against humanity and that '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 legal order' by the time General Pinochet seized power in 1973 (*Ex Parte Pinochet (HL 2)* at 177a).

⁴⁰ *Attorney General of the Government of Israel v. Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961), *aff'd* 36 ILR 277 (Supreme Court of Israel, 1962); *Demjanjuk v. Petrovsky*, 603 F. Supp. 1468, *aff'd* 776 F. 2d 571 (6th Cir. 1985).

⁴¹ The reasoning of Lord Millett is clear and straightforward. Since the offence can only be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, '[t]he 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.' (*Ex Parte Pinochet (HL 2)* at 179a.)

⁴² *Ex Parte Pinochet (HL 2)* at 188j and 189a–b. Lord Phillips of Matravers found that no rule of international law requiring states to grant immunity *ratione materiae* for crimes of international law can be traced in state practice. Lord Phillips was the only one to object to the construction of section 20 of the SIA being applicable to acts of the head of state wherever committed. He held that the provision had to be interpreted simply to the effect of equating the position of a visiting head of state with that of the head of a diplomatic mission in the UK. In fact, other Law Lords had considered the issue but eventually found in the light of parliamentary history that the original intent to limit section 20 to heads of state 'in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom' had been superseded by an amendment of the Government. Lord Phillips maintained that the relevant statutory provision should be interpreted against the background of international law and consequently be limited to visiting heads of state (*ibid.*, at 191–192).

either to extradite General Pinochet to Spain or to any other country that has submitted an extradition request or to refer the case to its judicial authorities for prosecution in the UK.⁴³ On 15 April the Home Secretary issued an authority to proceed, thus allowing extradition proceedings to continue with regard to the remaining charges.⁴⁴

D A Tentative Appraisal

Given the impact that the *Pinochet* case may have on the future development of the law of jurisdiction and jurisdictional immunities, a tentative appraisal of the way in which the House of Lords interpreted the relevant rules of international law pertaining to the case may be useful. While the decision of the House of Lords turns mainly on the application of UK law, the extensive reliance of the Law Lords on international law arguments for construing municipal law makes such an endeavour a legitimate exercise. Indeed, recourse to international law for interpreting domestic law is the first noticeable feature of the case.⁴⁵ The somewhat convoluted reasoning of some of the individual opinions, the frequent lack of clarity in framing the relevant issues as well as occasional incongruities in construing and presenting arguments should not overshadow the willingness of the Law Lords to decide the case consistently with international law standards. Secondly, the principle that individuals may be held accountable for acts which are regarded as criminal at international law was clearly asserted. Whether individual responsibility may be enforced before foreign municipal courts was thought to be an issue to be determined *in casu*, depending on the nature of the crime as well as on relevant international and municipal law provisions concerning enforcement, but the very outcome of the case proves that this may occur. Yet another important finding to be derived from the House of Lords decisions is that contrary to what the High Court had held, a distinction can be aptly drawn at international law between the wrongful acts of state organs and acts which for their gravity can be regarded as crimes of international law. Different consequences would be attached to the latter under international law, particularly as regards the permissibility of the exercise of extraterritorial jurisdiction over them and the inapplicability of immunity *ratione materiae* before international tribunals and, under certain circumstances, before foreign municipal courts. Overall, the frequent reference to such notions as *jus cogens*, obligations *erga omnes* and crimes of international law attests to the fact that the emerging notion of an international public order based on the primacy of certain values and common interests is making its way into the legal culture and common practice of municipal courts.

As regards the issue of immunity more specifically, a large majority of the Law Lords agreed that, while current heads of state are immune *ratione personae* from the

⁴³ The obligation is imposed by the joint operation of Art. 7 and Art. 5. By the end of 1998 several states, including Switzerland, France and Belgium, had submitted requests of extradition to the UK.

⁴⁴ See *The Times*, 16 April 1999.

⁴⁵ See *Alcom Ltd. v. Republic of Colombia* [1984] AC 580, 597 per Lord Diplock. See also the reliance of some Law Lords on *Trendtex Trading Co. v. Central Bank of Nigeria* [1977] QB 529 for the relevance of customary international law.

jurisdiction of foreign courts, both civil and criminal, a plea of immunity *ratione materiae* in criminal proceedings may be of no avail to former heads of state depending on the nature of the crime. While the majority in the first Appellate Committee held that this is so because acts which amount to international crimes can never be qualified as official acts performed by the head of state in the exercise of his functions, most of the Law Lords sitting in the second Committee confined their analysis to acts of torture. In the view of many of them, immunity would simply be incompatible with the provisions of the Torture Convention, which clearly indicates the official or governmental character of torture as a constituent element of the crime. Only Lord Phillips went a step further in saying that no rule of international law requires that immunity be granted to individuals who have committed crimes of international law and that the very notion of immunity *ratione materiae* cannot coexist with the idea that some crimes, in light of their gravity, offend against the very foundation of the international legal system. If one were to follow strictly the reasoning of the majority probably the plea of immunity *ratione materiae* could only be defeated by those crimes of international law which presuppose or require state action. Arguably, this would include crimes against humanity in a wider sense.

On universal jurisdiction under international law, regardless of any treaty-based regime, Lord Browne-Wilkinson maintained that torture on a large scale is a crime against humanity and attains the status of *jus cogens*, which, in turn, would justify the taking of jurisdiction by states over acts of torture wherever committed. Lord Millett went as far as to say that universal jurisdiction exists under customary international law with regard to crimes which have attained the status of *jus cogens* and are so serious and on such a scale as to be regarded as an attack on the international legal order. Lord Millett added that the increasing number of international tribunals notwithstanding, prosecution of international crimes by national courts 'will necessarily remain the norm'. This latter remark paves the way for broaching one of the most important and controversial issues underlying the proceedings against General Pinochet.

3 Are Municipal Courts a Proper Forum for Prosecuting Individual Crimes of International Law?

A preliminary issue to be addressed concerns the long-debated issue of whether municipal courts can be a proper forum for prosecuting crimes of international law. This problem can be framed in the more general debate on the suitability of municipal courts to enforce international law. As is known, some authors have argued that municipal courts can aptly subrogate for the scant number of enforcement mechanisms at international law.⁴⁶ Others have rightly stressed that the extent to which municipal courts can apply international law depends, especially in dualist countries, on how international law is incorporated into the state's domestic legal

⁴⁶ See, generally, B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993); R. A. Falk, *The Role of Domestic Courts in the International Legal Order* (1964).

system.⁴⁷ Legal culture and individual judges' backgrounds in international law are other factors which are relevant to explaining the more or less active role that municipal courts can play in enforcing international law in different jurisdictions.⁴⁸

Be that as it may, the case for having municipal courts adjudicate cases involving individual crimes of international law seems compelling. Theoretical and practical considerations mandate this solution. The very notion of crimes of international law postulates that they constitute an attack against the international community as a whole⁴⁹ and, therefore, any state is entitled to punish them. On a more practical level, the absence of a permanent international criminal court makes international prosecution merely illusory. Nor can the establishment of international criminal tribunals by way of Security Council resolutions be an effective strategy of enforcement.⁵⁰ Consensus within the Security Council may be difficult to reach and the creation of *ad hoc* judicial bodies to deal with particular situations in specific countries entails an element of selectivity in the enforcement of international criminal law which may seriously jeopardize its consolidation and further development. Even with the prospective entry into force of the International Criminal Court, the Statute of which was opened for signature last year,⁵¹ it would be unrealistic to expect that international criminal law can effectively be enforced only by international tribunals. International tribunals may play a strong symbolic role and are more likely to be perceived as an impartial forum, but prosecution by municipal courts will remain crucial.⁵² It is of note that Article 17 of the ICC Statute somewhat defers to the jurisdiction of municipal courts, stipulating the inadmissibility of a case when the latter is being investigated or prosecuted by a state with jurisdiction over it or when

⁴⁷ See A. Cassese, 'Modern Constitutions and International Law', 192 *RdC* (1985-III) 331.

⁴⁸ R. Higgins, *Problems & Process. International Law and How We Use It* (1994), at 206 *et seq.*

⁴⁹ See *Prosecutor v. Erdemović*, Sentencing Judgment, Case No. IT-96-22-T, Trial Chamber I, 29 Nov. 1996 (108 ILR 180), defining crimes against humanity as '... inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must per force demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.' (at 193)

⁵⁰ See SC Resolutions 808 and 827 (1993) and SC Resolution 955 respectively establishing, under Chapter VII of the UN Charter, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The statutes of the two tribunals are reproduced, respectively, in 32 ILM (1993) 1192 and 33 ILM (1994) 1602.

⁵¹ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9 of 17 July 1998, reprinted in 37 ILM (1998) 999. For a comment see Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 22.

⁵² See Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 555.

the accused has already been tried for the conduct which is the subject of the complaint.⁵³

Although the record of national prosecution of crimes of international law after the end of World War II is far from being satisfactory, domestic courts have lately manifested an increased activism, especially as regards the prosecution of war crimes and violations of humanitarian law during armed conflict.⁵⁴ This development has been favoured by the enactment in several jurisdictions of statutes which expressly allow the exercise of jurisdiction over this type of offence.⁵⁵ With specific regard to crimes against humanity, their prosecution by domestic courts has been episodic. Despite occasional and mostly unsuccessful attempts by some countries to investigate, prosecute and punish individuals for crimes committed under past regimes in the same country,⁵⁶ most prosecutions have been carried out by foreign courts. Besides

⁵³ The Court may determine that a state is unable or unwilling genuinely to carry out an investigation or prosecution. Paras 2 and 3 of Art. 17 list the circumstances which the Court will take into account in determining the unwillingness or inability of national courts to prosecute. These factors include unjustified delays, instances in which the proceedings are not conducted independently or impartially, or when, due to the substantial collapse or unavailability of the interested state's judicial system, the state is unable to carry out the proceedings.

⁵⁴ In 1997 the Supreme Court of Bavaria condemned one Mr Dzajic, a former Yugoslav national, for abetting murder in 14 cases and for attempting murder in another case during the conflict in former Yugoslavia (*Public Prosecutor v. Dzajic*, No. 20/96, Supreme Court of Bavaria, 3rd Strafsenat, May 23, 1997, excerpted in 1998 *Neue Juristische Wochenschrift* 392, comment by Safferling in 92 *AJIL* (1998) 528). See also the recent case in which a Swiss military tribunal tried, on the basis of the universality principle of jurisdiction, and eventually acquitted a former Yugoslav national, born in Bosnia-Herzegovina, for having beaten and injured civilian prisoners at the prisoner-of-war camps of Omarska and Keraterm in Bosnia (*In re G.*, Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997, comment by Ziegler in 92 *AJIL* (1998) 78). A few years earlier in a decision of 25 November 1994, the Danish High Court had convicted one Mr Saric for having committed violent acts against prisoners of war in the Croat camp of Dretelj in Bosnia, in violation of the Geneva Conventions (see Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 *EJIL* (1995) 260).

⁵⁵ Some statutes provide for universal jurisdiction over war crimes (see Articles 109–114 of the Swiss Military Penal Code); some are limited to crimes committed during World War II (War Crimes Act, 1991, ch. 13, para. 1(1) (UK)); War Crimes Amendment Act, 1989 Austl. Acts No. 3, para. 9(1) (Australia); Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, para. 1(a), as quoted in *Attorney-General of the Government of Israel v. Eichmann*, *supra* note 40; some others are more general in character and cover also crimes against humanity (see Articles 211–1 and 212–1 (amending the French Penal Code), in the annex to 'Lois n. 92–684 du 22 Juillet 1992 portant réforme des dispositions du Code pénal relatives à la répression des crimes et des délits contre le personnes', J.O., 23 Juillet, 1992, at 9875 (France)) and Sec. 6(1.91),(1.94),(1.96) of the Canadian Criminal Code permitting the prosecution of foreign persons for crimes committed abroad against foreigners, provided that at the time of the crime Canada could exercise its jurisdiction over that person, based on his presence in Canada, and later that person is found in Canada.

⁵⁶ See Ratner and Abrams, *supra* note 2, at 146 *et seq.* See also the current debate on the prosecution by Cambodia of the leaders of the Khmer Rouge, who surrendered at the end of 1998, for crimes against humanity, to which Prime Minister Hun Sen seems to have eventually consented (see *Keesing's Record of World Events*, vol. 45/1 (1999), at 42733). Under Art. VI of the Genocide Convention, to which Cambodia is a party, there is an obligation on the part of the state in which territory the acts of genocide took place to try the responsible persons. It should be noted that the crime of genocide is widely believed to attract universal jurisdiction.

the well-known *Eichmann* case,⁵⁷ in which the Supreme Court of Israel convicted on charges of war crimes, genocide and crimes against humanity the Head of the Jewish Office of the Gestapo, who was among the principal administrators of the policy of extermination of the Jews in Europe, French courts convicted to life imprisonment for crimes against humanity Klaus *Barbie*,⁵⁸ head of the Gestapo in Lyons and Paul *Touvier*,⁵⁹ a French national heading the French Militia in Lyons during the Vichy regime. In another interesting case, *Regina v. Finta*,⁶⁰ the Canadian High Court of Justice convicted a Hungarian national for deporting Jews during the war. The latter case is particularly interesting for it establishes that any state may exercise its jurisdiction over an individual found in its territory, irrespective of the place where the alleged offences took place, when such offences can be categorized as crimes against humanity.⁶¹ While not unprecedented, the assertion of universal jurisdiction over crimes against humanity by domestic courts is relatively rare,⁶² given the wide doctrinal consensus on its applicability under general international law.⁶³

The practice of enforcement, briefly summarized above, highlights the importance of the *Pinochet* case, as one of the few cases not concerning the prosecution of crimes committed during World War II either by Nazis or by Nazi collaborators, as if the international community had deliberately chosen only to reckon with the atrocities committed at that time. In fact, the prosecution of crimes committed during the war has simply paved the way for consolidating the notion of individual accountability for crimes of international law. Current investigations concerning crimes against humanity and other human rights violations in Chile and Argentina by European

⁵⁷ *Attorney-General of the Government of Israel v. Eichmann*, *supra* note 40.

⁵⁸ *Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR 124 (French *Cour de Cassation* 1985); 100 ILR 330 (French *Cour de Cassation* 1988).

⁵⁹ 100 ILR 338 (French *Cour de Cassation* 1992). Touvier was convicted to life imprisonment for giving instructions for and thereby becoming an accomplice in the shooting of seven Jews at Rillieux on 29 June 1944, as a reprisal for the assassination of the Vichy Government Minister for Propaganda.

⁶⁰ *Regina v. Finta*, Canada, High Court of Justice, 10 July 1989, 93 ILR 424.

⁶¹ *Ibid.*, at 426–427.

⁶² See *Eichmann*, *supra* note 40; *In the Matter of Extradition of John Demjanjuk*, 776 F. 2d 571 (6th Cir., 1985) at 582–583, *cert. denied*, 457 U.S. 1016 (1986). See also the quote from the decision of the *Cour d'Appel*, reported by the *Cour de Cassation Chambre Criminelle*, in its judgment of 6 October 1983 in *Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie* (78 ILR 128): 'by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign'.

⁶³ See, among others, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 113; Meron, *supra* note 52, at 554 and 569; Randall, 'Universal Jurisdiction Under International Law', 66 *Texas L. Rev.* (1988) 785, at 814; *Restatement, infra* note 72, § 404.

courts further attest to the increasing activism of municipal courts in enforcing international criminal law.⁶⁴

Mention should be made also of civil remedies as a complementary means of enforcement of international criminal law. In some jurisdictions civil redress may be sought by plaintiffs under particular statutes. In the United States, for instance, the Alien Tort Claims Act (ATCA)⁶⁵ and the Torture Victim Protection Act (TVPA)⁶⁶ provide such a remedy. Under the ATCA district courts have jurisdiction over civil actions brought by aliens for a tort only, committed in violation of the law of nations. On this basis, starting from the landmark case of *Filartiga v. Peña Irala*,⁶⁷ federal courts have been able to assert their jurisdiction over tortious conduct abroad in violation of international law, particularly human rights abuses. The TVPA, in turn, provides a cause of action in civil suits in the United States against individuals who, under actual or apparent authority, or colour of law of any foreign nation, subject an individual to torture or extrajudicial killing. The record of enforcement of the two statutes bears witness to the willingness of municipal courts to implement the legislator's intent that human rights abuses be effectively punished.⁶⁸

While it is arguable that customary international law requires states to punish the perpetrators of crimes of international law,⁶⁹ many treaties lay down the obligation either to prosecute or extradite individuals who have committed certain offences of universal concern.⁷⁰ It is unfortunate that too often states fail in applying directly the relevant treaty provisions or in enacting implementing legislation whenever this is necessary to enforce them. This is particularly true for international criminal law

⁶⁴ See *supra* note 12.

⁶⁵ 28 U.S.C. (1994) § 1350.

⁶⁶ 28 U.S.C. (1994) § 1350 note.

⁶⁷ 630 F. 2d 876 (2nd Cir., 1980) and 577 F. Supp. 860 (EDNY, 1984).

⁶⁸ *Cabiri v. Assasia Gyimah*, 921 F. Supp. 1189 (SDNY, 1996) (arbitrary detention and acts of torture); *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir., 1995) (genocide, war crimes, torture, summary executions); *Xuncax v. Gramajo*, 886 F. Supp. 162 (DMA, 1995) (torture, arbitrary detention, summary executions and enforced disappearance); *In re, Estate of Ferdinand Marcos Human Rights Litigation*, 25 F. 3d 1467 (9th Cir., 1994) (torture, summary executions, disappearances); *Trajano v. Marcos*, 978 F. 2d 493 (9th Cir., 1992) (torture); *Paul v. Avril*, 812 F. Supp. 207 (SD Florida, 1992) (torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention); *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal., 1987) (torture, extrajudicial killings, disappearances and prolonged arbitrary detention).

⁶⁹ See Condorelli, 'Le Tribunal Penal International pour l'Ex-Yougoslavie et sa jurisprudence', in Bancaja Euromediterranean, *Courses of International Law*, vol. I, (1997) 241, at 270. See also Paust, 'Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies', 33 *Tex. Int'l L. J.* (1998) 631, at 640–641.

⁷⁰ See, *inter alia*, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (2 ILM (1963) 1042); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking)(10 ILM (1971) 133); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage)(10 ILM (1971) 1151); the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (16 ILM (1977) 41); the 1976 European Convention on the Suppression of Terrorism (15 ILM (1976) 1272); the 1998 International Convention on the Suppression of Terrorist Bombings (37 ILM (1998) 249). As regards specifically terrorism, whose status as an international crime remains controversial, a thorough review of the complex network of international treaties and other instances of state practice has been made recently by Kolb, 'Universal Criminal Jurisdiction in Matters of International Terrorism: Some

which often requires the enactment of *ad hoc* criminal rules. It would be desirable indeed that states, regardless of any particular treaty obligation, exercised their jurisdiction over acts which by the *communis opinio* are regarded as crimes of international law. Since the end of World War II states have made it clear that certain acts are attacks against the fundamental interests and values of the international community as a whole. If their statements are to be taken as more than an exercise in political rhetoric, then they must bring their legislation in conformity with international law and give domestic courts the tools to enforce its rules.⁷¹ The rule of statutory construction, widely applied in both common law and civil law jurisdictions, whereby domestic law should be interpreted as much as possible in conformity with international law, has a potential of application which should not be underestimated.⁷² As the *Pinochet* case shows, the interpretation of domestic statutes in light of contemporary standards of international law may, at least in principle, remedy domestic legislation ambiguities and correctly implement the principles and rules of international law which have a bearing on the case at hand.

4 What Immunity for Former Heads of State?

The immunity of heads of state in international law is a complex topic.⁷³ The early view that monarchs enjoy an absolute immunity has given way to other consider-

Reflections on Status and Trends in Contemporary International Law', 50 *Revue Hellenique de Droit International* (1997) 42–88. It is of note that terrorism does not appear in the list of crimes over which the International Criminal Court (see *supra*, note 51 and accompanying text) will have jurisdiction.

⁷¹ Attention to this problem has been drawn also in the press commenting on the proceedings against Pinochet: see *The Economist*, 28 Nov.–4 Dec. 1998, at 26.

⁷² On the rule, generally, see Conforti, 'Cours général de droit international public', 212 *RdC* (1988-V) 56–57. On the application of the rule in common law countries see F. A. Mann, *Foreign Affairs in English Courts* (1986), at 130; *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, § 114. In the United States this rule of statutory construction dates back to the last century: see *The Charming Betsy*, 6 U.S. (2 Cranch) (1804) 132, 143. On the use of international human rights law to interpret domestic law, see Possner, 'Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis', 41 *Hastings L. J.* (1990) 824 and with specific regard to the United Kingdom, Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: the United Kingdom', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights Before Domestic Courts* (1997) 37.

⁷³ The complexity of the regime was hardly acknowledged by the House of Lords. In the first ruling of the House of Lords, all the parties agreed that current heads of state enjoy an absolute immunity. The fact that the issue was irrelevant to the case at hand may have played a role in achieving unanimity on this point of law. In the second ruling, perhaps for not too dissimilar reasons, the immunity enjoyed by current heads of state was deemed to be absolute and was described as an immunity *ratione personae*, which pertains to the particular status of the holder. The person of the head of state is inviolable and his conduct would be immune from the legal process of foreign courts regardless of the public or private nature of his acts. Lord Hope went as far as to qualify this type of immunity as a *jus cogens* norm (*Ex Parte Pinochet (HL 2)* at 149e). An immunity which is attached to the office is lost when the individual is no longer in post. All the Law Lords agreed that after loss of office the former head of state continues to be immune for official acts performed in the exercise of his authority as head of state. This immunity *ratione materiae* is of an entirely different nature from the immunity *ratione personae* enjoyed by serving heads of state. Otherwise referred to as *residual* or *functional* immunity it is meant to cover all those official

ations. After the formation of modern states the position of head of state has radically changed and nowadays it may remarkably vary depending on the constitutional organization of the state.⁷⁴ The immunity of heads of state may become relevant in many different ways before foreign municipal courts. It may concern current heads of state visiting officially another country or leading an official mission,⁷⁵ or, regardless of their physical presence in the forum state, it may arise in connection with acts carried out by them in their own state.⁷⁶ Moreover, the issue of immunity may vary depending on the nature of their activities and on the type of proceedings in which they are involved.⁷⁷ As rightly noted, this is an area of the law ‘which is in many respects still unsettled, and on which limited state practice casts an uneven light’.⁷⁸

Even more troubling is the question of what, if any, immunity protects former heads of state, once they lose their office. Are they still entitled to claim immunity? If so, on what basis and for what acts should they be held immune? Should one distinguish between private acts and official acts performed in the exercise of their functions? Is the alleged criminal character of the acts committed while they were in post relevant for the purpose of immunity? Can one distinguish between offences of a different gravity? Last, would any such immunity apply to the conduct of heads of state in particular or would it rather be applicable to any foreign state’s official regardless of his rank? All these issues underlined the *Pinochet* case. For the first time, a former head of state faced criminal proceedings in a foreign municipal court on charges

activities performed by state organs in the exercise of their functions. Such acts would be more properly attributed to the state rather than to the individual organs who, in principle, could not be held accountable for them.

⁷⁴ See Watts, ‘The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers’, 247 *RdC* (1994) 9, at 21 *et seq.*

⁷⁵ See the 1969 Convention on Special Missions. Heads of states are also included in the scope of application of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

⁷⁶ See *Re Honecker* (80 ILR 365), in which the then Chairman of the Council of State of the GDR was held to be immune as head of state of a foreign country from criminal proceedings brought in the FRG against him on charges of arbitrary deprivation of liberty. See also *Saltany v. Regan*, 80 ILR 19, in which a US District Court (DC) granted head of state immunity, upon the suggestion of the executive, to the Prime Minister of the United Kingdom in an action in tort for personal injuries and damage to property brought by civilian residents of Libya, in the aftermath of the US bombing of Libya. The Prime Minister of the UK had allowed military bases in the UK to be used by US air forces for the operation against Libya. Interestingly enough, head of state immunity was also granted in the US to Prince Charles as heir to the British throne (*Kilroy v. Windsor*, 1978 Dig. U.S. Practice Int’l L. 641–643).

⁷⁷ The UK State Immunity Act makes a distinction between civil proceedings, to which the general regime of state immunity under Part I is applicable, and criminal proceedings covered by Part III, Section 20 of the Act. The legislative history of Section 20 is fairly interesting. Originally devised to equate the position of a head of state visiting the country to that of the head of the diplomatic mission within the country, following an amendment proposed by the executive, the words which made the Act applicable to heads of states who were ‘in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom’ were deleted (the matter is discussed in Lord Browne-Wilkinson’s opinion). Only Lord Phillips disagreed with the majority, saying that the conduct of a head of state outside the United Kingdom remains governed by the rules of public international law (see *supra* note 42).

⁷⁸ See Watts, *supra* note 74, at 52.

concerning crimes of international law allegedly committed while he was the serving as head of state of Chile. The unique character of the case may well justify the difficulties in framing the relevant issues in their proper legal context.

As a matter of methodology, any attempt to evaluate the content of the rules concerning the jurisdictional immunities of heads of state should be made in the light of contemporary standards of international law. Reliance on precedents dating back to the last century is inherently contradictory with the asserted intention of interpreting the SIA in the light of contemporary standards of international law. Their many peculiarities notwithstanding, the *Duke of Brunswick* and *Hatch* cases were decided at a time when the unfettered deference to the status of foreign sovereigns was the obvious tribute to the indisputable principle of absolute respect for state sovereignty.⁷⁹ Nor is the argument that the slow and uncertain progress made by the doctrine of individual crimes should yield to the long and firmly established rule of head of state immunity particularly convincing.⁸⁰ In historical perspective, the opposite stance should be taken.⁸¹ While the development of the human rights doctrine and the principle of individual responsibility for crimes of international law have rapidly emerged as the fundamental tenets of the international community, jurisdictional immunities of foreign states and their organs have been the object of a process of steady erosion.

A closer look at recent practice shows that there is no clear-cut answer to the above queries. Immunity for heads of state and lower state officials for acts performed in the exercise of their functions has given rise to a scant and fairly inconclusive case law. While some authority supports the view that former heads of state would not enjoy

⁷⁹ *Duke of Brunswick v. The King of Hanover* (1848) 2 H.L. Cas. 1 (action brought by the former reigning Duke of Brunswick against his former guardian, the reigning King of Hanover, for the latter's involvement in removing him from his ruling position and for the maladministration of his estate): 'A foreign Sovereign, coming into this country cannot be made responsible here for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad . . .'; *Hatch v. Baez* (1876) 7 Hun. 596 (action for injury suffered at the hands of the former President of the Dominican Republic): 'The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of President of that Republic. . . . The general rule, no doubt is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law' (at 599–600); *Underhill v. Hernandez* (1897) 168 U.S. 250 (action for wrongful imprisonment brought by American citizen residing in Venezuela against the former commander of revolutionary forces which later prevailed): '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' (at 252).

⁸⁰ See Lord Slynn's opinion (*Ex Parte Pinochet (HL 1)* at 1313), subsequently endorsed by Lord Goff (*Ex Parte Pinochet (HL 2)* at 116h–j; 117a–d).

⁸¹ See Lord Millett's opinion (*Ex Parte Pinochet (HL 2)* at 180a).

immunity for their private acts during their term of office,⁸² few are the cases which deal with criminal conduct amenable within the range of official functions.⁸³ As Lord Phillips rightly stressed, it is difficult to provide sufficient evidence that customary international law entitles a former head of state to immunity from criminal process in respect of crimes committed in the exercise of his official functions. Most of the existing case law is concerned with civil proceedings and is strongly influenced by the content and interpretation by courts of domestic codification of state immunity and related issues. In the recent Canadian case *Jaffe v. Miller*, concerning an action in tort against a foreign state's officials for laying false criminal charges and for conspiracy to kidnap, the Ontario Court of Appeal found that immunity should be granted to them, otherwise state immunity could be easily circumvented by suing state functionaries.⁸⁴ In the United Kingdom, the SIA had been recently interpreted, in the context of civil proceedings, to the effect of granting to heads of states of recognized states the same immunity the state has when the former act in their official capacity, whereas when they act in their private capacity they would be entitled to the immunities enjoyed by diplomatic agents under Section 20 of the SIA.⁸⁵

In the United States, the Foreign Sovereign Immunities Act (FSIA) does not expressly include provisions on heads of state and the Act has been deemed inapplicable by American courts to heads of states. The prevailing view seems to be that the head of state immunity is a common law doctrine applicable to the person the

⁸² Reference was made in the *Pinochet* case to the following cases: *Ex King Farouk of Egypt v. Christian Dior, S.A.R.L.*: (1957) 24 ILR 228; *Soc. Jean Dessès v. Prince Farouk* (1963) 65 ILR 37; *Jimenez v. Aristeguieta*, 311 F. 2d 547 (5th Cir. 1962). For a complete and detailed account of the legal status of deposed heads of state see Decaux, 'Le Statut du Chef d'État Déchu', 26 *AFDI* (1980) 101. Presumably, even the type of criminal acts mentioned by way of example by Lord Steyn in the first ruling of the House of Lords (the killing of the gardener in a fit of rage or the torturing of a person for his own pleasure) could be amenable within the category of private acts.

⁸³ Counsel for Chile made reference to the case *Marcos & Marcos v. Department of Police* (102 ILR 198), in which a Swiss Federal Court held that public international law grants immunity to former heads of states, even with regard to criminal acts allegedly committed while they were in power, unless the immunity is waived by their state (which the Republic of the Philippines did in the case at hand). Perhaps reference could have been made to the *Honecker* case, in which proceedings had been brought against the former Chairman of the GDR State Council for homicide. Although the proceedings against him were discontinued after the Supreme Constitutional Court of Berlin held that the continuation of proceedings against a person who is expected to die before they come to an end is an infringement of the human dignity of the defendant, the fact that he was standing trial for acts committed while he was in post can be interpreted to the effect that he was not held immune for criminal acts performed in the exercise of his functions (*Honecker Prosecution Case* (Case No. VerfGH 55/92), Federal Republic of Germany, Supreme Constitutional Court (VerfGH) of Berlin, 12 January 1993, 100 ILR 393), although other considerations concerning the unification of Germany may explain his not being granted immunity (see Watts, *supra* note 74, at 89, note 201).

⁸⁴ *Jaffe v. Miller*, [1993] 95 ILR 446, at 458–459.

⁸⁵ See *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v. Price Waterhouse (A Firm) and Others*, England, High Court, Chancery Division, 5 November 1996, reported in 111 ILR 604: 'In so far as the sovereign or head of state is acting in a public capacity on behalf of that state, he is clothed with the immunity that the state has. When acting in this capacity, the head of state and the state are, to some extent, indistinguishable. On the other hand, when acting in any other capacity, it is sensible that he should have immunity equivalent to that enjoyed by the state's diplomatic staff' (at 610).

United States government acknowledges as the official head of state and that courts defer to the executive's determination of who qualifies as a head of state.⁸⁶ This attitude has been recently confirmed in *Flatow v. Islamic Republic of Iran et al.*, holding that head of state immunity, regarded by the court as more a matter of grace and comity than of right, applies only to individuals qualified by the political branch of government as legitimate heads of recognized states.⁸⁷ Immunity would also be denied if the foreign state has expressly waived it.⁸⁸ Interestingly enough, the FSIA has been held to apply to officials of foreign states acting in their official capacity,⁸⁹ unless the relevant acts exceed the lawful boundaries of a defendant's authority.⁹⁰ The latter qualification was instrumental in *Cabiri v. Assasie-Gyimah*⁹¹ to deny immunity to the Deputy Chief of National Security of Ghana for arbitrary detention and acts of torture against a Ghanaian citizen. Similarly, in *Xuncax v. Gramajo*⁹² an action brought by citizens of Guatemala against former Guatemala's Minister of Defence for acts of torture, arbitrary detention, summary executions and enforced disappearance was thought not to be barred by the FSIA, which is 'unavailable in suits against an official arising from acts that were beyond the scope of the official's authority'. While the latter case law is of some relevance to our analysis for the distinction it draws between official acts and acts which exceed the lawful boundaries of official authority, it should be stressed that both cases relate to civil proceedings.⁹³ Although there seems to be no

⁸⁶ See *U.S. v. Noriega*, 117 F. 3d 1206 (Court of Appeals 11th Cir., 1997); *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir., 1995); *Alicog et al. v. Kingdom of Saudi Arabia et al.*, 860 F. Supp. 379 (SD Texas, Houston Division, August 10, 1994); *Lafontant v. Aristide*, 844 F. Supp. 128 (EDNY January 27, 1994). See also the interesting dictum of the court in *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla, 1990), in which the court, denying head of state immunity to General Noriega, as he had never been recognized as the head of state of Panama, held that the grant of immunity is a privilege which the United States may withhold from any claimant. Furthermore, the court held that had head of state immunity been granted to Noriega 'illegitimate dictators [would be granted] the benefit of their unscrupulous and possibly brutal seizure of power' (at 1521).

⁸⁷ 99 F. Supp. 1 (DC Columbia, 1998), in which denial of immunity to Iran, to Ayatollah Khomeini, qualified as the Supreme Leader of the Islamic Republic of Iran, and to Mr. Rafsanjani, former president of the Islamic Republic of Iran for providing material support and resources to the Shafaqi faction of the Palestinian Islamic Jihad, which caused the wrongful death of an American citizen in Israel was justified under the recent amendment to the FSIA (see *infra*, note 130 and accompanying text), which expressly provides for the denial of immunity to foreign states and their officials that facilitate terrorist activities. The statutory provision (see *infra*, note 130) overrides the common law doctrine of head of state immunity.

⁸⁸ See *Paul v. Avril*, 812 F. Supp. 207 (SD Florida, 1993).

⁸⁹ See *Chuidian v. Philippine National Bank*, 912 F. 2d 1095, 1103 (9th Cir., 1990). For a comment and comparison with English law see Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', 41 *ICLQ* (1992) 848.

⁹⁰ The FSIA was held to be inapplicable to activities not carried out under the authority of the state: see *In re Estate of Ferdinand Marcos Human Rights Litigation*, 978 F. 2d 493 (9th Cir., 1992), at 498 and *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F. 3d at 1472.

⁹¹ 921 F. Supp. 1189 (SDNY, April 18, 1996).

⁹² 886 F. Supp. 162 (DMA, April 12, 1995).

⁹³ On issues of immunity and justiciability in the United States involving foreign heads of states see also Paust, 'It's No Defense: *Nullum Crimen*, International Crime and the Gingerbread Man', 60 *Albany Law Review* (1997) 657, at 658 *et seq.* On the availability of civil remedies for grave violations of human rights

case law on this specific point, it is fair to presume that heads of state would also be entitled to the residual immunity provided by the FSIA.⁹⁴

As recent studies purport, apart from the case of the immunity of diplomats and consuls for their official (and authorized by the territorial state) activities, it is difficult to establish the existence, under customary international law, of either a general regime of residual or functional immunity for high and low rank foreign state officials for acts performed in the exercise of their functions, or an ad hoc rule on heads of state.⁹⁵

On the other hand, considerable support can be drawn from state practice to maintain that individuals are accountable for crimes of international law regardless of their official position. Besides the well-known quotes from the Nuremberg judgment,⁹⁶ many provisions can be traced in treaties proscribing specific crimes⁹⁷ as well as in the statutes⁹⁸ and practice of international tribunals⁹⁹ to the effect that no plea of immunity is available in case of crimes of international law. The principle was endorsed also by the Israel Supreme Court in the judgment against *Eichmann*.¹⁰⁰ Most recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundzija* held that the principle that individuals are personally responsible for acts of

see Damrosch, 'Enforcing International Law through Non-forcible Measures', 269 *RdC* (1997) 13, at 155 *et seq.*

⁹⁴ On the uncertain status of head of state immunity in the United States see Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', 86 *Columbia Law Review* (1986) 169.

⁹⁵ P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996).

⁹⁶ 'The principle of international law, which under certain circumstances, protects the representative of a state, 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 in appropriate proceedings . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law' (22 *Trial of the Major War Criminals Before the International Military Tribunal* (1949) 466).

⁹⁷ See, for instance, Art. IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948).

⁹⁸ See Art. 7 of the Nuremberg Charter (1945); Art. 2 of the Allied Control Council Law No. 10 (1945); Art. 6 of the Tokyo Charter (1946); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (UN Doc. A/1316 (1950), reprinted in 4 *AJIL* (1950) 126); Art. 7(2) of the Statute of the International Tribunal for Former Yugoslavia (1993); Art. 6(2) of the Statute of the International Criminal Tribunal for Rwanda (1994); Art. 7 of the UN Draft Code of Offences against the Peace and Security of Mankind (1996) and Art. 27 of the Statute of the International Criminal Court (1998). It is also of note that, according to the UN Secretary General's Report to the Security Council, pursuant to SC Res. 808 (1993), concerning the establishment of an International Criminal Court, there was universal consensus among states that the Statute of the Court should contain provisions providing for the personal criminal responsibility of heads of state, government officials and other persons acting in an official capacity (UN Doc. S/25704, 3 May 1993, para. 55).

⁹⁹ Top political leaders and high military commanders have been indicted by the ICTY (see *Prosecutor v. Karadzic & Mladic*, No. IT-95-18-I, Indictment (14 Nov. 1995) and the former Prime Minister of Rwanda, Kambanda, has been recently convicted to serve a life term in prison for crimes against humanity (see *Prosecutor v. Kambanda*, No. ICTR-97-23-9, 4 Sept. 1998, reprinted in 37 *ILM* (1998) 1411).

¹⁰⁰ *Attorney General of Israel v. Eichmann*, *supra* note 40, at 47-48.

torture, whatever their official position, even if they are heads of state or government ministers, is 'indisputably declaratory of customary international law'.¹⁰¹ Nor does the argument that the responsibility of heads of state and other government officials for crimes of international law can only be enforced before international tribunals carry much force with it.¹⁰² Besides the difficulty of establishing international criminal tribunals, it would be odd indeed, were the international normative standards to vary depending on the court which has to apply them.

Even if one is not convinced that the above instances of state practice can be persuasively interpreted to the effect of demonstrating the existence of a positive rule which requires states not to grant immunity to heads of state in cases in which the commission of crimes of international law is involved, the same conclusion could be reached via a different reasoning. It is not infrequent that courts have to decide cases for which there is no precedent or where no established or accepted rule comes in handy to provide the rule of decision. In any such case, the court ought to interpret the law systematically and in accordance with what are perceived as the basic principles and goals of the legal system it is called upon to interpret. The more the rule of decision is grounded on and consistent with accepted general principles, the more the decision will be perceived as legitimate and fair. In many respects, this is the type of analysis which several Law Lords endeavoured to carry out. The divide between the Law Lords sitting in the first Appellate Committee is evidence of the sense of uncertainty over which values and principles should be accorded priority in contemporary international law. The two opposite poles of the spectrum are evident. On the one hand, there stands the principle of sovereignty with its many corollaries including immunity; on the other, the notion that fundamental human rights should be respected and that particularly heinous violations, be they committed by states or individuals, should be punished. While the first principle is the most obvious expression and ultimate guarantee of a horizontally-organized community of equal and independent states, the second view represents the emergence of values and interests common to the international community as a whole which deeply cuts across traditional precepts of state sovereignty and non-interference in the internal affairs of other states. The two views are not mutually exclusive. Occasionally, however, they may come to clash as the interests and values they support are remarkably different. This is all the more likely when no established rule exists to provide the rule of decision in a case and courts have to make recourse to general principles to fill in the lacunae or to interpret controversial points of law.

The inconsistency of the very notion of crimes of international law with any form of immunity which shields individuals behind the screen of their official position is apparent. Immunity as a form of protection which international law grants, under certain circumstances, to particular categories of individuals is incompatible with conduct which runs counter to the fundamental principles of the international legal system. The argument is one of logic. International law cannot grant immunity from

¹⁰¹ *Prosecutor v. Anto Furundzija*, *supra* note 32, at para 140.

¹⁰² See Watts, *supra* note 74, at 82.

prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole. Nor can the principle of sovereignty, of which immunity is clearly a derivative, be persuasively set forth to defeat a claim based on an egregious violation of human rights.¹⁰³ As the ICTY held in *Tadić*, '[it] would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights'.¹⁰⁴ The compelling force of the argument cannot be limited to cases involving the immunity *ratione materiae* of former heads of state or other state officials. The alleged commission of international law crimes should also dispose of a claim of immunity *ratione personae*.¹⁰⁵ Were it not so, one would be left with the impression that it is power more than law which protects office holders and that no matter whether they place themselves well beyond the legitimate boundaries of their official authority, they will be protected by law as long as they retain their power, whereas they will be left to their fate once that power comes to an end.¹⁰⁶ Incidentally, the need to reassess the scope of diplomatic immunities for violations of human rights had been signalled long before the *Pinochet* case.¹⁰⁷

The objection can be raised that denial of immunity may cause misguided or even malicious allegations to be brought against heads of state or lower state officials.¹⁰⁸ While it would be simplistic to reject such a concern as unfounded, the point can be made that several instruments exist to limit vexatious claims. First, immunity should only be denied in relation to offences recognized as crimes of international law. Secondly, such remedies as sanctions against frivolous claims and such instruments of judicial administration as the discretionary power of prosecutors to start proceedings

¹⁰³ Besides the well-known dicta of the Nuremberg Tribunal (see *supra* note 96), see also *Prosecutor v. Erdemović*, *supra* note 49 in which the Trial Chamber of the ICTY characterized crimes against humanity as crimes which 'transcend the individual, because when the individual is assaulted, humanity comes under attack and is negated' (at 149).

¹⁰⁴ *Prosecutor v. Tadić*, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453, at 483.

¹⁰⁵ While extensive reliance was placed on Sir Arthur Watts Hague Lectures on the position of heads of states in international law, particularly where he recognizes that heads of states may be personally held accountable for 'international crimes which offend against the public order of the international community', no heed was paid to the circumstance that this statement was not confined to the position of heads of state after loss of office.

¹⁰⁶ See Decaux, *supra* note 82, at 139: '*La moralisation du droit international trouve très vite ses limites. Se contenter de mettre en accusation les souverains déçus, c'est oublier la responsabilité des Chefs d'Etat au pouvoir. Seul un paradoxe permet de dire que le chef d'Etat criminel perd toutes ses immunités de juridiction parce qu'il est criminel: il les perd parce qu'il est vaincu et détrôné. C'est le pouvoir qui le protégeait, non le droit. Et, le pouvoir déchu, l'ancien chef d'Etat se trouve soumis à la lois du vainqueur.*' Given the extreme fragmentation of the legal position of former heads of state, Decaux expressed the need for international law to fix general standards to direct state practice. Although sceptical, he acknowledged that agreement could be reached as regards the punishment of crimes of international law as defined in Nuremberg (*ibid.*).

¹⁰⁷ See Orrego Vicuña, 'Diplomatic and Consular Immunities and Human Rights', 40 *ICLQ* (1991) 34, holding that 'by no standard can such acts [the violation of human rights] be considered as part of the diplomatic function, and thus neither can be considered an official act' (at 47).

¹⁰⁸ This concern was expressed by Lord Goff of Chieveley in his opinion (see *supra* note 31).

could be aptly used at the domestic law level to reduce the alleged risk.¹⁰⁹ In any event, practical considerations, however important, cannot by themselves direct a change in the interpretation of the law to the detriment of the primary value of securing respect for some fundamental aspects of human dignity.

A last note concerns the link established in the opinion of some of the Law Lords between immunity, crimes of international law and universality of jurisdiction. To hold that under customary international law there can be no immunity for crimes of international law and that the exercise of extraterritorial jurisdiction over certain grave offences is permitted on the basis of the universality principle does not exclude that immunity can be granted by treaty or, unilaterally, by states on the basis of either municipal legislation or considerations of comity and international courtesy to visiting heads of state. However, if one characterizes the prohibition of torture and, arguably, other crimes of international law as norms of *jus cogens*, it becomes difficult to argue that immunity, whatever its legal basis, can coexist with them. As was argued in *Siderman*, quoted and relied upon by some Law Lords in the second ruling on the *Pinochet* case, since *jus cogens* norms enjoy the highest status within international law, they prevail and invalidate other rules of international law.¹¹⁰ It is perhaps not unfair to speculate that some of the Law Lords, whose reasoning on the characterization of the prohibition of torture as a *jus cogens* norm may have been influenced also by the recent *Furundzija* case,¹¹¹ did not fully grasp the consequences of qualifying a rule of international law as preemptory.

5 The Inconsistency between Head of State and State Immunity

State immunity and the immunity *ratione materiae* enjoyed by heads of state are closely intertwined doctrines, as a large majority of the Law Lords acknowledged. Given such a close link, one may wonder what impact, if any, the decision of the House of Lords will have on the future development of the law of state immunity. As is known, foreign sovereign immunity is a doctrine of international law, whose origins remain uncertain. While many maintain that the doctrine is grounded on the principle of sovereign equality and independence of states, authoritative commentators have traced its origin to heads of state immunity, at a time in which the state and the sovereign coincided.¹¹² With the formation of modern states, the entitlement

¹⁰⁹ See the decision of the Amsterdam Public Prosecutors Department not to initiate proceedings against General Pinochet while on a private visit to Amsterdam. The decision, appealed by the Dutch branch of the Chile Committee, was upheld by the Court of Appeal (see 28 *Netherlands Yearbook of International Law* (1997) 363).

¹¹⁰ *Susana Siderman de Blake et al. v. the Republic of Argentina*, 965 F. 2d 699 (9th Cir., 1992), at 717. *Accord Smith v. Libya*, 101 F. 3d 239 (2nd Cir., 1996), at 243.

¹¹¹ See *Prosecutor v. Anto Furundzija*, *supra* note 32, discussing the consequences at both state and individual levels of the qualification of torture as a *jus cogens* norm (see, esp. paras 153–157).

¹¹² See Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYbIL* (1951) 220.

to immunity was passed to the state and to its agents and instrumentalities. According to the mainstream of legal scholarship, the jurisdictional immunity of states before foreign municipal courts used to be absolute. Only when governments and their agencies became frequently involved in international trade and finance did the law change. Particularly, due to the judicial activism of some municipal courts, immunity started being denied for private or commercial acts of the foreign state. At some point, in order to facilitate the task of domestic courts in determining which acts of the foreign states should be qualified as private or commercial, the law of state immunity was codified by statute in many jurisdictions. All domestic statutes list a series of exceptions, mainly, though not exclusively,¹¹³ concerned with private and commercial transactions, and retain immunity as the general rule.¹¹⁴

When individuals started seeking redress for violations of human rights before domestic courts against foreign states, mainly alleging acts of torture by state officers, domestic courts were bound to apply the residual rule of immunity under their domestic legislation. While lower courts, especially in the United States, had resorted to a variety of interpretative devices to avoid granting state immunity to foreign violators of human rights,¹¹⁵ in 1993 the Supreme Court in *Nelson* held that, however monstrous, acts of torture by police officers are by definition sovereign acts and as such they entitle the foreign state to immunity.¹¹⁶ The binding force of the Supreme Court precedent has caused lower courts, although in some cases reluctantly,¹¹⁷ to adjust their case law accordingly. In 1996 the English Court of Appeal (Civil Division) reached the same conclusion in *Al Adsani*, concerning the torture of a dual British/Kuwaiti national by Kuwaiti officials in Kuwait.¹¹⁸ In both cases the upholding of the claim to immunity was thought to be prompted by the plain and unambiguous text of the relevant statutes on state immunity.¹¹⁹ Particularly in the United Kingdom, the rule of statutory construction, whereby Parliament cannot be presumed to have

¹¹³ The most notable exception is the so-called 'tort exception', which allows denying immunity to foreign states for their illegal acts which cause death or personal injury or loss of or damage to property in the forum state. Occasionally, this exception has been applied to cases of political assassination allegedly committed by the foreign state in the forum: see *Letelier v. Republic of Chile*, 488 F. Supp. (1980) and *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir., 1989).

¹¹⁴ The best account of the development of the international law of state immunity, with particular regard to recent developments, remains C. H. Schreuer, *State Immunity: Some Recent Developments* (1988).

¹¹⁵ Such practice is reviewed in Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J. Publ. Int'l L.* (1994) 195.

¹¹⁶ *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), at 1480.

¹¹⁷ See *Susana Siderman de Blake et al. v. the Republic of Argentina*, *supra* note 110: 'when a state violates jus cogens, the cloak of immunity provided by international law falls away, leaving the State amenable to suit' (at 718). See also *Smith v. Libya*, *supra* note 110, recognizing that, as a matter of international law, state immunity would be abrogated by *jus cogens* norms (at 244).

¹¹⁸ *Al Adsani v. Government of Kuwait*, England, Court of Appeal, 12 March 1996 (107 ILR 536).

¹¹⁹ In the United States the Supreme Court before *Nelson* had already authoritatively determined that violations of international law not expressly mentioned in the FSIA are not admissible exceptions to the general rule of immunity (see *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 818 (1989)). For a comment see Bianchi, 'Violazioni del diritto internazionale ed immunità degli Stati dalla giurisdizione civile negli Stati Uniti: il caso Hercules', 72 *Rivista di diritto internazionale* (1989) 546.

legislated contrary to the international obligations of the United Kingdom, can only be triggered by the unclear or ambiguous character of the relevant statutory provisions.¹²⁰

The *Al Adsani* case was relied on by Lord Bingham in the Divisional Court to maintain that '[i]f the Government there could claim immunity in relation to alleged acts of torture, it would not seem surprising if the same immunity could be claimed by a defendant who had at the relevant time been the ruler of that country'.¹²¹ In fact, after the ruling of the House of Lords there should be no surprise if the argument is reversed. The Law Lords, with a few exceptions,¹²² generally regarded the above case law as irrelevant for its being concerned exclusively with civil proceedings.¹²³ Some of them, however, recognized, although without enthusiasm, that there is some authority to maintain that in the field of civil litigation immunity should be granted to state officials, regardless of the lawful character of their conduct.¹²⁴ Presumably, after the *Pinochet* case, while state and state officials would continue to be held immune in civil proceedings in the United Kingdom for acts of torture and, arguably, other crimes of international law, as regards criminal proceedings they might be held accountable and no plea of immunity might be available to them.¹²⁵ To the present writer this creates a manifest inconsistency which ought to be remedied by denying immunity also to state and state officials in civil proceedings.

¹²⁰ The rule has been restated recently in *R. v. Secretary of State for the Home Department ex Parte Brind* [1991] 1 AC 696. As Ward LJ put it: 'Unfortunately the Act is as plain as it 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 the jurisdiction.' (*Al Adsani v. Government of Kuwait*, *supra* note 118, at 549).

¹²¹ *Ex Parte Pinochet* (High Court), *supra* note 6, at para. 73.

¹²² Lord Lloyd (*Ex Parte Pinochet* (HL 1) at 1324) quoted *Al Adsani* and *Siderman* to hold that allegations of torture may not trump a plea of immunity.

¹²³ See, for example, the opinions of Lord Nicholls (*Ex Parte Pinochet* (HL 1) at 1331) and Lord Hutton (*Ex Parte Pinochet* (HL 2) at 158c–d).

¹²⁴ See Lord Phillips (*Ex Parte Pinochet* (HL 2) at 187f), quoting the 'impressive, and depressing' list of cases in which the immunity of the foreign state has been upheld in cases concerning serious human rights violations.

¹²⁵ See the opinion of Lord Millett, *Ex Parte Pinochet* (HL 2) at 179f–j. Lord Millett saw nothing wrong in drawing the distinction between civil and criminal proceedings and noted that 'the same 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' (*ibid.*, at 175a). Before the *Pinochet* case, the inconsistency between allowing extraterritorial jurisdiction over acts of torture committed by individuals and upholding immunity for acts of torture in the context of civil proceedings against foreign states had been noticed by Marks, 'Torture and the Jurisdictional Immunities of Foreign States', 8 *Cambridge Law Journal* (1997), at 10.

The pros and cons of having domestic courts adjudicating cases involving the international responsibility of states have been highlighted by scholars.¹²⁶ It is not within the scope of this paper to reopen that debate.¹²⁷ It will suffice here to note that the argument that the immunity *ratione materiae* of state officials is necessary not to circumvent the immunity of the state can be used to maintain that once it is held that no plea of immunity is available to state officials for crimes against international law which presuppose or require state action, the immunity of the state can be easily circumvented by bringing criminal proceedings against state officials. Nor is the argument that the degree of interference would be higher if the state is directly impleaded particularly persuasive. For such systematic and massive violations of human rights as the ones allegedly committed by General Pinochet close and extensive scrutiny of state policies and actions is required. Ultimately, any argument based on state sovereignty is inherently flawed. First, external scrutiny of state action as regards human rights is permitted under contemporary standards of international law and sovereignty can no longer be invoked to justify human rights abuses. Secondly, and perhaps most importantly, human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values.¹²⁸ Finally, the characterization of the prohibition of torture and other egregious violations of human rights as *jus cogens* norms should have the consequence of trumping a plea of state immunity by states and state officials in civil proceedings as well. As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities.

If interpretative techniques are of no avail in securing the adjustment of domestic law to contemporary standards of international law, it would be desirable that in

¹²⁶ A particularly exhaustive account of the reasons why domestic courts should not be permitted to exercise jurisdiction over foreign states for acts of torture in defiance of state immunity is given by Garnett, 'The Defence of State Immunity for Acts of Torture', 18 *Australian Yearbook of Int'l Law* (1997) 97.

¹²⁷ The views of this writer were expressed in Bianchi, *supra* note 115.

¹²⁸ See also Higgins, *supra* note 72, at 53: 'Acts in the exercise of sovereign authority (*acta jure imperii*) are those which can only be performed by states, but not by private persons. Property deprivation might fall in this category: torture would not.' (footnote omitted).

those countries where domestic laws have, perhaps inadvertently,¹²⁹ had the effect of granting immunity, the law should be amended accordingly.¹³⁰

6 Crimes of International Law and Non-justiciability

Contrary to foreign sovereign immunity, act of state is a domestic law doctrine of judicial self-restraint whereby domestic courts will abstain from passing judgment over the acts of a foreign sovereign done in its own territory. This doctrine generally applies to the merits of the case and can be pleaded by anyone regardless of the status of the defendant in the instant case.¹³¹ While there might be international law underpinnings to the doctrine, the modern view is that act of state is neither a rule of international law nor is its application mandated by the international legal system.¹³²

¹²⁹ The use of the adverb is not fortuitous. It seems unlikely that at the time of enactment of the relevant statutes, domestic legislators were aware of the possibility that foreign states would be sued for serious violations of human rights before domestic courts. Furthermore, as rightly observed by some commentators, the choice of leaving immunity as the residual rule of general applicability is questionable as a matter of international law (see Sucharitkul, 'Developments and Prospects of the Doctrine of State Immunity. Some Aspects of the Law of Codification and Prospective Development', 29 *Netherlands Int'l L. Rev.* (1982) 252; Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 *Netherlands Int'l L. Rev.* (1982), at 265 *et seq.*).

¹³⁰ See the recent amendments to the Foreign Sovereign Immunities Act: Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104–132, Title II, § 221(a), (April 24, 1996), 110 Stat. 1241, codified at 28 U.S.C.A. 1605), creating an exception to immunity 'for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency' (§ 1605(a)(7)). It is unfortunate that the amendment applies only to the immunity of those states that are currently designated by the Department of State as states sponsors of terrorism (Cuba, Syria, Iraq, Lybia, Sudan and North Korea), when the act has been committed outside the foreign state and when the claimants and victims are US nationals. Recently a further amendment to § 1605 (a)(7) has made punitive damages available in actions brought under the state-sponsored exception to immunity (see Civil Liability for Acts of Terrorism (September 30, 1997), enacted as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. 104–208, Div. A, Title I § 101(c), 110 Stat. 3009–172, reprinted at 28 U.S.C. § 1605 note). This latter amendment is known as the Flatow Amendment. For the first judicial applications of the above amendments to the FSIA see *Alejandro v. The Republic of Cuba*, 996 F. Supp. 1239 (SD Florida, 17 December 1997)(concerning Cuba Air Force's extrajudicial killing of pilots of civilian aircrafts flying above international waters); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (DC Columbia, 11 March 1998) (wrongful death of US citizen in Israel resulting from an act of state-sponsored terrorism); *Cicippio v. Islamic Republic of Iran*, (DC Columbia, 27 August 1998) (tortious injuries suffered by US citizens kidnapped, imprisoned and tortured by agents of Iran in Beirut).

¹³¹ *Contra*, see the submission of Iraqi Airways Co. (Mr Plender, counsel) in *Kuwait Airways Corp. v. Iraqi Airways Co.* (House of Lords), 1 WLR 1147 at 1164 ff., according to which the principle of non-justiciability, as set forth by the House of Lords in *Buttes* (see *infra*, note 141, and accompanying text) would be one which limits the jurisdiction of courts, rather than operating as a substantive defence.

¹³² See A. Watts and R. Jennings (eds), *Oppenheim's International Law* (9th ed., 1992), at 369. That the act of state doctrine is not a general rule of international law was held by the German *Bundesverfassungsgericht* in the *Border Guards* case (100 ILM 364 at 372).

The doctrine, not unknown in civil law countries,¹³³ has mainly developed in common law jurisdictions. Although cross-references between the case law of their respective courts is frequent, the doctrine has taken up different connotations in the United States and in the United Kingdom.¹³⁴

Despite early assertions of the doctrine in fairly sweeping terms,¹³⁵ its scope of application in the United States has been remarkably narrowed down over the years. An increasing number of exceptions to its operation has been conceived since the seminal *Sabbatino* case¹³⁶ and, recently, the US Supreme Court in *Environmental Tectonics*¹³⁷ has restricted its scope of application to cases requiring courts to ascertain the validity of the sovereign acts of foreign states. As regards more specifically human rights, it is arguable whether a specific exception to the application of the doctrine has emerged.¹³⁸ The Restatement (Third) of the Foreign Relations Law of the United States maintains that any plea based on act of state would probably be defeated in cases involving violations of human rights, as human rights law permits external scrutiny of states' conduct.¹³⁹

It is quite interesting to note that US lower courts, in order to avoid the application of both the foreign sovereign immunity and the act of state doctrines, have drawn a distinction between official and unofficial public acts. Certain crimes such as torture and other clearly established violations of fundamental human rights could not be regarded as official public acts of a foreign state. Regardless of the colour of authority under which state organs act when committing such crimes, their acts cannot be

¹³³ See Conforti, *supra* note 46, at 20 *et seq.*; Weil, 'Le contrôle par les tribunaux nationaux de la liceité internationale des actes des États étrangers', *Annuaire Français de Droit International* (1971), at 9 *et seq.*; P. Kinsch, *Le fait du prince étranger* (1994), esp. at 384 *et seq.*

¹³⁴ Singer, 'The Act of State of the United Kingdom: An Analysis with Comparison to the United States', 75 *AJIL* (1981), at 283 *et seq.*

¹³⁵ See the classical formulation of the act of state doctrine by the US Supreme Court in *Underhill v. Hernandez* (168 U.S. 250 (1897) at 252): '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.' Quite curiously, the Supreme Court took almost *verbatim*, but without quoting, a passage of the House of Lords in *Duke of Brunswick v. King of Hanover* (1848) 2 H.L. Cas. 1, at 17 (Lord Cottenham).

¹³⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The *Sabbatino* litigation arose from the action brought by a Cuban state-owned bank seeking recovery of sugar delivered to a US purchaser that had refused to pay, alleging, *inter alia*, that the bank lacked title to the property, as the sugar had been expropriated by Cuba in violation of international law.

¹³⁷ *W.S. Kirkpatrick v. Environmental Tectonics* 493 U.S. 400 (1990). The case concerned two US companies bidding for a Nigerian defence contract. Allegedly, one bidder had paid bribes to Nigerian government officials. The other company filed a federal antitrust and RICO action against the former successful bidder.

¹³⁸ On the numerous exceptions to the application of the act of state doctrine in the United States see G. B. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996) at 729 *et seq.*

¹³⁹ *Restatement (Third)*, *supra* note 72, § 443, Comment c: 'A claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.'

qualified as governmental, as foreign states are unlikely to have enacted legislation or overtly adopted policies to direct their organs to violate human rights.¹⁴⁰

In the United Kingdom the scope of application of the doctrine seems wider than in the United States. The modern English version of the act of state doctrine was formulated in fairly sweeping terms by Lord Wilberforce in the *Buttes Gas* case in the early 1980s. According to Lord Wilberforce, there would be in English law a general principle of judicial abstention, inherent in the very nature of the judicial process, which would prevent courts from adjudicating directly on the transactions of foreign sovereign states.¹⁴¹ This all-encompassing principle of non-justiciability is rather unique as it precludes judicial scrutiny of any transactions between foreign states. Since the doctrine applies to transactions of foreign states which have a direct bearing on the private claims before the court, the practical effect of holding such issues non-justiciable is to prevent the courts from discharging their natural function of administering the law. Although the doctrine is probably a derivative of foreign sovereign immunity in its early absolute version, its consistency could be aptly disputed in light of the many instances in which courts are allowed to rule upon transactions between a state and a private party.¹⁴²

From the different perspective of conflict of laws, UK courts in *Oppenheimer* had refused to give effect in the forum on grounds of public policy to the 1941 Nazi decree depriving German Jews residing abroad of German citizenship and confiscating their properties.¹⁴³ The House of Lords held that ‘so grave an infringement of human rights’ should lead to the refusal of recognition of the German decree as law.¹⁴⁴ More importantly for our purposes, the House of Lords, while acknowledging that judges ought to be cautious in refusing recognition of foreign laws in matters in which the foreign state clearly has jurisdiction — as they may not have adequate knowledge of the circumstances in which legislation was passed and may cause embarrassment to the executive branch of government in the field of foreign relations — unambiguously stated to be the public policy of the United Kingdom to give effect to clearly established rules of international law.¹⁴⁵ While limited to defining public policy as a limit to the operation of foreign laws in the United Kingdom, this passage from *Oppenheimer* seems to imply that UK courts would generally enforce international law rules, provided that they have been duly incorporated into the legal system and that no act of Parliament conflicts with them. It is somewhat surprising that Lord Steyn, who stated that ‘the act

¹⁴⁰ See, *inter alia*, *Filartiga v. Peña Irala*, 630 F. 2d 876 (2nd Cir., 1980); *Forti v. Suarez Mason*, 672 F Supp 1531 (ND Cal., 1987); *Evans et al. v. Avril*, 812 F Supp 207 (SD Florida, 1993); *Kadic v. Karadzic*, 70 F. 3d 232, (2nd Cir., 1995). See also *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir., 1989). For a similar reasoning applied in the context of the applicability of the FSIA see *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (SDNY, April 18, 1996) and *Xuncax v. Gramajo*, 886 F. Supp. 162 (DMA, April 12, 1995).

¹⁴¹ *Buttes Gas v. Hammer* (Nos. 2 & 3), [1981] 3 All ER 616 at 628; (no. 3) [1982] AC 888 at 931 *et seq.* *Accord*, *J.H. Rayner Ltd. v. Department of Trade* (House of Lords) [1989] 3 WLR 969 at 1001–1002.

¹⁴² Higgins, *supra* note 48, at 212–213.

¹⁴³ *Oppenheimer v. Cattermole* 1976 AC 249.

¹⁴⁴ *Ibid.*, at 278.

¹⁴⁵ *Ibid.*, at 277–278.

of state doctrine depends on public policy as perceived by the courts in the forum at the time of the suit', did not rely on *Oppenheimer* to support his view.¹⁴⁶

The *dicta* of the Law Lords in the first *Pinochet* case, touching upon the non-justiciability doctrine, proved that *Buttes* is the controlling precedent as far as the application of the doctrine in the UK is concerned. The Law Lords in the majority, while acknowledging that no justiciability issue had actually arisen in the case at hand, held that any plea based on act of state would be defeated by parliamentary intent.¹⁴⁷ By enacting legislation implementing both the Convention against Torture and the Convention on the Taking of Hostages, the British Parliament had clearly intended that UK courts could take up jurisdiction over foreign governmental acts.¹⁴⁸ Moreover, Lord Steyn, in language reminiscent of the recent case law developed by US courts, added that the high crimes with which General Pinochet had been indicted could not be regarded as official acts performed in the exercise of the functions of a head of state and therefore could not trigger the non-justiciability doctrine.¹⁴⁹ While the doctrine was given less consideration in the second judgment of the House of Lords, Lord Saville held that any plea based on act of state or non-justiciability must fail because the parties to the Torture Convention, which expressly prohibits torture by state officials, have accepted that foreign domestic courts may exercise jurisdiction over the acts of their organs in violation of the Convention. Lord Millett, in turn, by holding that the immunity *ratione materiae* denied to Pinochet for the acts in question is almost indistinguishable from the act of state doctrine, indirectly agreed that the doctrine was of no avail in the case at hand.

Neither the act of state nor other related judicial self-restraint doctrines should stand in the way of adjudicating cases involving individual crimes of international law.¹⁵⁰ It is widely believed that the doctrine originates from and is grounded on separation of powers concerns. In particular, a ruling by domestic courts on foreign policy issues might embarrass the executive branch of government in the conduct of foreign relations and trespass on its prerogatives. Furthermore, its application would be required especially when international normative standards are unclear.¹⁵¹ In the view of this writer there cannot be any embarrassment by the executive, nor any prejudice to its prerogatives, when domestic courts are called upon to enforce clear

¹⁴⁶ *Ex Parte Pinochet (HL 1)*, at 1338.

¹⁴⁷ *Ex Parte Pinochet (HL 1)*, at 1332 and 1338.

¹⁴⁸ See, esp., Criminal Justice Act 1988 as regards acts of torture and Taking of Hostages Act 1982. While the former expressly permits the scrutiny of state officials' conduct, parliamentary intent was indirectly inferred from the latter in the light of the type of situations the act covers.

¹⁴⁹ *Ex Parte Pinochet (HL 1)*, at 1338.

¹⁵⁰ Reference can be made also to the US 'political question doctrine', imposing self-restraint on courts when required to review congressional or executive acts pertaining to the conduct of foreign affairs (see D. F. Vagts, H. J. Steiner and H. H. Koh, *Transnational Legal Problems* (4th ed., 1994), at 124 *et seq.*). On the inapplicability of the doctrine to human rights violations see *Linder v. Portocarrero*, 963 F. 2d 332 (11th Cir., 1992).

¹⁵¹ Both reasons were set forth in *Sabbatino*, *supra* note 136, by the US Supreme Court. The idea that the rationale of the act of state doctrine has to be traced to separation of powers concerns was restated by Justice Scalia in *Environmental Tectonics*, *supra* note 137.

and unambiguous standards, which are shared by the international community as a whole.¹⁵² To hold the contrary view would amount to an acknowledgement that the wide support manifested by states to both human rights and international criminal law instruments is nothing but political propaganda. Finally, even if one identifies the rationale of the rule with the same principle of respect for the independence and sovereign equality of foreign states which also inspires the foreign sovereign immunity doctrine, compelling reasons exist to hold the doctrine inapplicable. To prevent the adjudication of the merits of a case on grounds of non-justiciability, once the jurisdictional bar of immunity has been done away with, would have the effect, hardly justifiable as a matter of logic, of upholding the validity of the same considerations which had been deemed inapplicable in the early stages of the proceedings when jurisdictional issues were addressed. In fact, although the two doctrines of foreign sovereign immunity and non-justiciability remain logically distinct, it is hard to envisage how a court could reasonably abstain from passing judgment on the conduct of individuals who have committed crimes of international law, after having recognized that international law grants no immunity either *rationae personae* or *ratione materiae* in such cases. To uphold the applicability of the act of state doctrine after denying immunity would amount to reintroducing in the guise of non-justiciability the immunity which had been removed.¹⁵³

This is not to deny that political considerations are relevant, but — as stressed by Lord Nicholls¹⁵⁴ — they should be considered by the executive when deciding, exercising its discretion within the limits of international obligations and national legislation, whether or not to extradite.

7 The Asynchronous Development of International Law and the Quest for Normative Coherence

To attribute the aura of controversy surrounding the proceedings against General Pinochet solely to the highly sensitive aspects of international politics involved in the case would be a rather simplistic exercise. In fact, most of the controversial issues underlying the case are of a legal character. The conflicting arguments submitted by the parties before the House of Lords go well beyond the dynamics of argumentation strategies inherent in the judicial process. They reflect also different conceptions of international law, which eventually have come to clash. Indeed, the *Pinochet* case may well signal ‘a shift from a State-centred order of things’.¹⁵⁵ The notion of individual accountability for crimes against humanity, the active role of municipal

¹⁵² On the inapplicability of the act of state doctrine to crimes against humanity see Malanczuk, *supra* note 63, at 122.

¹⁵³ See *A Limited Bank v. B. Bank and Bank of X, England*, Court of Appeal, judgment of 31 July 1996 (111 ILR 591), quoting Kerr LJ in *Maclaine Watson & Co. v. International Tin Council* [1988] 3 WLR 1169 at 1188.

¹⁵⁴ *Ex Parte Pinochet (HL 1)*, Lord Nicholls, at 1334.

¹⁵⁵ The expression is used by Fox, *supra* note 12, at 207.

courts in the enforcement of international criminal law as well as the steady process of erosion of the foreign sovereign immunity doctrine are all elements which are hardly amenable within the traditional representation of the international legal system as a horizontally-organized community of sovereign and independent states. The disagreement among the Law Lords involved in the proceedings, however, attests to the fact that the current state of evolution of international law is the object of divergent evaluations. This discrepancy can be partly due to the asynchronous development of different areas of international law. The emergence and relatively rapid consolidation of both human rights and international criminal law has deeply affected, but not decisively altered, the structure and process of international law.¹⁵⁶ The understandable resilience of states to accepting a moving away from a strictly 'State-centred order of things' creates a strain between yet unsystematized notions of international public order and the traditional precepts of international law, largely based on the sovereignty paradigm. The *Pinochet* case is illustrative of this situation. In strictly positivistic terms it would have been equally difficult to demonstrate conclusively on the basis of state practice either that former heads of states enjoy immunity or that they do not. Between two legally plausible solutions, the House of Lords faced a policy choice in finding for or against immunity. Although one may doubt that this was intended by the Law Lords, the House of Lords' final finding against immunity provided the result which best conforms with the ends and values of the international legal system.

As noted earlier, the notion of individual accountability for crimes against humanity can be fully grasped only in connection with the international human rights doctrine and other recent developments in the structure and process of international law. Particularly relevant, in this respect, is the notion of obligations *erga omnes*, namely obligations which are not owed to any particular state but to the international community.¹⁵⁷ This, in turn, entails that every state has a legal interest in their fulfilment. The pre-eminence of these obligations over others, in light of their content,¹⁵⁸ stipulates a hierarchy of values in the international legal system in which norms concerning the protection of fundamental human rights certainly enjoy the highest-ranking status. The persuasive force of the argument is reinforced by the emergence of *jus cogens*, i.e. a set of norms from which no derogation is ever admitted under international law. The importance of certain rules and principles to the international community is such that any unilateral action or international agreement which violates them is absolutely prohibited.¹⁵⁹ Elementary logic supports this conclusion, as the law cannot tolerate acts which run against its very foundation. Despite scholarly disputes as to what norms qualify for the category of *jus cogens*, there

¹⁵⁶ See Bianchi, 'Globalization of Human Rights: the Role of Non-state Actors', in G. Teubner (ed.), *Global Law without a State* (1997), at 179 *et seq.*

¹⁵⁷ See *Barcelona Traction Light and Power Co. Ltd.*, ICJ Reports (1970), at 32.

¹⁵⁸ On obligations *erga omnes* see, recently, M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

¹⁵⁹ See Article 53 of the 1969 Vienna Convention on the Law of Treaties. Generally, on *jus cogens* see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988).

is hardly any doubt that genocide, apartheid, torture and, when committed on a large scale or as a matter of state policy, murder, arbitrary detention and enforced disappearance of individuals can be legitimately included in the list.¹⁶⁰

All the above developments converge in purporting the existence of an international public order based on a commonality of core values and interests which are regarded as fundamental by the international community as a whole.¹⁶¹ Inevitably, the perceived fundamental character attached to these values and interests implies special consequences for their violation. The rapid consolidation of the notion of individual criminal responsibility is coupled by the attempt to introduce similar notions of criminal responsibility at the inter-state level.¹⁶² Scholarly disputes and political opposition by some states as to their consequences might prevent the codification of state crimes from being included in the International Law Commission Draft Articles on State Responsibility, but can hardly hide the widespread acceptance by large sectors of the international community and the world public opinion of the idea that violations of fundamental international obligations must be treated differently from other wrongful acts.¹⁶³ This implies not only attaching a sense of opprobrium to the violation but also devising ways and means to punish effectively the wrongdoer, possibly allowing states, other than the injured one, to react individually or collectively to the violation.¹⁶⁴

This novel structure of international law is slowly making its way into traditional precepts of classical doctrine. However, still many principles, rules and doctrines of both international and domestic law are reminiscent of an old-fashioned and no longer viable approach to international law, which regards respect for the sovereignty of states as *the* fundamental value of the international system. While state sovereignty

¹⁶⁰ The list is clearly non-exhaustive and refers mainly to the charges alleged in the *Pinochet* case. For an in-depth analysis of which norms in the field of human rights attain the status of *jus cogens*, see Hannikainen, *supra* note 159, at 425 *et seq.* For an interesting discussion on the relationship between non-derogable rights in human rights treaties and norms of *jus cogens* see Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) 1. The *Restatement*, *supra* note 72, lists as *jus cogens* norms genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention and systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights, when practised, encouraged or condoned as a matter of state policy (§ 702 Comm. N, Reporters' Note 11).

¹⁶¹ See H. Mosler, *The International Society as a Legal Community* (1980).

¹⁶² See Art. 19 of the Draft Articles on State Responsibility, adopted by the International Law Commission on second reading in 1996, distinguishing between international delicts and crimes. The latter may result, *inter alia*, from a serious violation on a widespread scale of an international obligation of essential importance for safeguarding the human being.

¹⁶³ See the *First Report* of the newly appointed Rapporteur to the International Law Commission on State Responsibility, Professor James Crawford, proposing the deletion of Art. 19 of the Draft Articles and separate treatment of the subject of international crimes (see UN Doc. A/CN.4/490/Add.3, para. 101, 11 May 1998); see also the articles in the Symposium on State Responsibility in this issue.

¹⁶⁴ See Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law', in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 150.

remains one of the pillars on which the system hinges,¹⁶⁵ its actual content has undergone a gradual process of erosion. Matters which once indisputably belonged to the domestic jurisdiction of states, such as the way a state treats persons under its jurisdiction, nowadays may be the object of international scrutiny.

The strain between old rules and new principles causes inconsistencies in the international legal system which should be gradually reduced. The achievement of a higher degree of normative coherence is going to be an important challenge for international law in the near future. Coherence of single rules and particular regimes with the fundamental principles and goals of the system is likely to enhance the latter's credibility and legitimacy.¹⁶⁶ As regards the subject at hand, namely individual responsibility for crimes against humanity, normative consistency would require, in the view of this writer, a number of adjustments in international law-making and law enforcement.

First, a comprehensive code of crimes universally accepted as crimes against humanity should be adopted.¹⁶⁷ Existing definitions are strongly influenced by the particular contexts in which they were formulated and it is controversial whether certain particular acts are amenable within the category of crimes against humanity or rather stand in their own way. The proliferation of ad hoc treaties and attempts at codification have not necessarily favoured uniform definitions and standards. The issue is not deprived of practical relevance when one realizes that the characterization of a crime as a crime against humanity is not meant merely to convey a sense of moral reprobation but also to entail a set of specific legal consequences, including the exercise of extraterritorial jurisdiction by any state over such offences. Also the inapplicability of statutes of limitation and the unavailability of the superior orders defence as an exonerating circumstance, should not be controversial elements of the regime.

Perhaps the most astonishing example of the inconsistencies between different areas and doctrines of international law is the one concerning consideration of the foreign sovereign immunity doctrine and its ancillary act of state doctrine as potential bars to judicial enforcement at the level of domestic courts. Reliance on such obsolescent doctrines, which express an unfettered deference to the status of certain subjects, is oblivious of contemporary standards of international law which clearly

¹⁶⁵ For an interesting re-assessment of the role of state sovereignty in international law see Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

¹⁶⁶ On the role of coherence as a means of legal justification see McCormick, 'Coherence in Legal Justification', in *Theorie der Normen. Festgabe für Ota Weinberger zum 65 Geburtstag* (1984) 37. On coherence as a fundamental element for determining the legitimacy of international law rules and, consequently, state compliance with them see T. Franck, *The Power of Legitimacy among Nations* (1990); *Idem*, *Fairness in International Law and Institutions* (1995) 38 *et seq.* Accord, R. Dworkin, *Law's Empire* (1986), at 190–192.

¹⁶⁷ See Bassiouni, ' "Crimes against Humanity": The Need for a Specialized Convention', 31 *Columbia J. of Transnat'l L.* (1994) 457. Upon its entry into force, the ICC Statute will be the only binding international law instrument providing a definition of crimes against humanity: see Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 *AJIL* (1999) 43.

condemn certain conduct as crimes against the very foundations of the international system. Moreover, their application may hamper the adjustment of legal standards and cultures to the new demands of the international community. There should be no ambiguity on the fact that international law does not and cannot require any deference to states and states' organs, including heads of state, when they commit crimes against humanity or other comparable human rights atrocities. Neither should domestic courts abstain from passing judgment as a matter of comity or on the basis of other judicial self-restraint doctrines when sufficiently clear and judicially manageable standards exist.

Obviously, municipal courts must be given the tools to help enforce international criminal law. Particularly, states should incorporate properly their international law obligations in accordance with their constitutional rules. Attaching reservations to fundamental treaty provisions or denying by statutory provision the self-executing character of entire treaties, rather than leaving it to the courts to determine in each particular case which provisions are self-executing in the light of their content, are policies which may undermine any serious efforts at effectively prosecuting human rights violators.¹⁶⁸

Another noticeable inconsistency concerns the different treatment of crimes of war and crimes against humanity in terms of legal entitlement to prosecution by states. Universal jurisdiction, whose applicability to war crimes is almost uncontested, should also be uncontroversial as regards the prosecution of crimes against humanity. If the rationale of the principle is that of ensuring the punishment of individuals who are regarded as *hostes humani generis* for committing crimes which, by their very nature, affect the interests of all states, elementary logic seems to require that any such crime, be it a war crime or a crime against humanity, should be subject to the same jurisdictional regime.

The latter remark paves the way for addressing another issue of compelling interest in setting the agenda for the future: consistent enforcement. The argument has been made that the attempt to prosecute individuals for international law crimes is going to be a vain effort, as their systematic prosecution is a naive expectation or utopic ambition. Moreover, given the many practical difficulties in apprehending and bringing to justice high-ranking state officials or top political leaders, prosecution will only concern a scant number of individuals with minor responsibilities. First, as the *Pinochet* case indicates, these allegations are not entirely founded. Secondly, even in domestic legal systems the apprehension and prosecution of offenders is far from systematic. What really matters is to set clear normative standards and to enforce them consistently whenever prosecution is possible under the circumstances. Consistent enforcement requires that no double standard be used in determining jurisdictional and substantive rules, as is a fundamental principle of justice, common

¹⁶⁸ See Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker', 89 *AJIL* (1995) 348, and Stewart, 'U.S. Ratification of the Covenant on Civil and Political Rights: the Significance of the Reservations, Understandings and Declarations', 14 *Human Rights L.J.* (1993) 77 and the text of the reservations, *ibid.*, at 123–124.

to all jurisdictions, that like cases should be treated alike. Over time, the risk of being punished is likely to produce in would-be criminals a deterrent effect which should not be underestimated.

At this point it may be noticed that some states have chosen to deal with their past of human rights atrocities by enacting amnesty laws which have the effect of barring proceedings against the perpetrators of such crimes, thus leaving them unpunished. The underlying policy is meant to restore political and social stability and foster the process of democratization of countries which have either undergone long periods of social and political unrest or endured oppressive or dictatorial regimes.¹⁶⁹ While it may be argued that many treaties impose an obligation to punish certain conduct,¹⁷⁰ it would be difficult to prove that customary international law prohibits the enactment by states of such laws. Surely, however, there is no duty by other states to recognize their effects. Nor would a defence based on them be likely to succeed before an international criminal tribunal or a foreign domestic court.¹⁷¹

Finally, to ensure the firm rooting of the principle of accountability in the international community, prosecution of crimes against humanity ought to be perceived as legitimate and fair.¹⁷² This, in turn, entails the further refinement of the principle of fairness of judicial proceedings. Defendants must be tried by an impartial tribunal, be it national or international, on the basis of clear laws, not having a retroactive effect, and must be in the position to effectively exercise their fundamental rights of defence.¹⁷³ In this respect, it is worthy of note that in recent practice, both international and domestic, plenty of evidence can be traced to show that due process requirements have been fully met and the rights of the defendants duly respected. By way of example, one may refer to the decision of the ICTY in the *Erdemovic* case where, after a long and controversial discussion among the judges, the Appeals Chamber remitted the case to the Trial Chamber to give the opportunity to the defendant to re-plead in full knowledge of the nature of the charges and the consequences of his

¹⁶⁹ See the interesting decision of the Constitutional Court of South Africa of 25 July 1996, *Azanian Peoples Organization v. President of the Republic of South Africa*, Case CCT 17/96, comment by Wilhelm in 91 *AJIL* (1997) 360, upholding the constitutionality of the Promotion of National Unity and Reconciliation Act of 1991.

¹⁷⁰ See General Comment No. 20 to Art. 7 of the International Covenant on Civil and Political Rights drafted by the Human Rights Committee in 1994, holding amnesty laws 'generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'

¹⁷¹ The best analysis of the above issues is Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale L. J.* (1991) 2537. See also Nino, 'The Duty to Punish Past Abuses of Human Rights Put in Context: the Case of Argentina', 100 *Yale L. J.* (1991), at 2619 *et seq.* and Orentlicher's response, 100 *Yale L. J.* (1991), at 2641.

¹⁷² On the fundamental importance of perceptions of legitimacy and fairness for ensuring compliance with international principles and rules see Franck, *The Power of Legitimacy*, *supra* note 166; *Idem*, *Fairness*, *supra* note 166.

¹⁷³ The list of factors is somewhat reminiscent of Fuller's requirements for the inner morality of law (see L. L. Fuller, *The Morality of Law* (rev. ed., 1969)).

plea.¹⁷⁴ As regards the legitimacy of the establishment of the ICTY and the ICTR, both tribunals have addressed allegations that they would not have been established by law and that they would lack the necessary independence. Due consideration was given to the objections raised by the defence, respectively in *Tadić* and *Kanyabashi*, and, eventually, the arguments were rejected on legally founded and persuasive grounds.¹⁷⁵

The fulfilment of the three policy goals expounded above, namely normative coherence, consistent enforcement and judicial fairness, will give further strength to the principle of individual accountability for crimes of international law. More generally, it would contribute to further consolidating the restructuring of the international community on the basis of a commonality of values and interests, respect for which must be secured by all of its members.

8 Concluding Remarks

The decision of the House of Lords in the *Pinochet* case is the first judgment rendered by a municipal court in which a former head of state of a foreign country has been held accountable at law for acts of torture committed while in post. Whether this is going to be a landmark in the history of international criminal law depends on what interpretation will be given to it by scholars and to what extent other courts in different jurisdictions will follow it. While in the first ruling the Law Lords had taken a clear, albeit conflicting, stance on the matter of immunity of a former head of state for acts of torture and other crimes of international law, the narrow focus of the second ruling as well as the convoluted reasoning of some of the Law Lords' individual opinions partly obfuscated the most relevant points of international law. In many respects the decision is a missed opportunity to shed light on issues whose relevance extends well beyond the boundaries of the law of jurisdiction and jurisdictional immunities to reach out to some fundamental aspects concerning the structure and process of contemporary international law. Presumably, scholars too will split over the interpretation and assessment of the likely impact of the case drawing on those parts of the judgment which best fit their beliefs. It would be desirable that they overtly state their premises in doing so. As for this writer, he believes that the very notion of crimes of international law is inconsistent with the application of jurisdictional immunities and domestic doctrines of judicial abstention, particularly as regards

¹⁷⁴ *Prosecutor v. Erdemović* (Sentencing Appeal), Case No. IT-96–22-A, 111 ILR 298 (1998). As regards domestic case law, see the acquittal of John Demjanjuk, indicted for serving as operator of the gas chambers in the Treblinka extermination camp, by the Supreme Court of Israel on the basis of a reasonable doubt concerning the real identity of the defendant: see *Ivan (John) Demjanjuk v. State of Israel*, Cr. A. (Criminal Appeal) 347/88, summarized in English in 24 *Israel Y.B. of Human Rights* (1994) 323.

¹⁷⁵ See *supra* note 104; *Prosecutor v. Kanyabashi*, Decision on Jurisdiction Case No. ICTR-96–15-T (18 June 1997); comment by Morris in 92 *AJIL* (1998) 66. In *Kanyabashi*, the Court referred to the *Tadić* decision and held that in determining whether or not the Tribunal had been 'established by law' due account had to be taken of the Tribunal's keeping with the proper international standards providing all the guarantees of fairness and justice. Furthermore, the independence of the judges would guarantee that any accused had a fair trial in the light of the Statute and Rules of Procedure of the Tribunal (*ibid.*, at 10).

those crimes which by their very nature either presuppose or require state action. If immunity were granted to state officials or courts refused to adjudicate cases on the merits, prosecution of such crimes would be impossible and the overall effectiveness of international criminal law irremediably undermined.

The emergence and subsequent consolidation of the notions of *jus cogens* and obligations *erga omnes* provide a solid conceptual background to justify the exercise of jurisdiction by state over individuals, regardless of their official position, who commit offences which are universally regarded as attacks against the common interests and values of the international community. The majority of the Law Lords acknowledged the non-derogable character of the rules of international law proscribing torture and crimes against humanity, but eventually failed to draw the inevitable conclusion that no immunity can be granted to their violators.