Pinochet Cases

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A. The Extradition Proceedings and Their Aftermath

1. The Extradition Proceedings in the United Kingdom

1 During a private visit for medical treatment to the United Kingdom ('UK') on 17 October 1998 General Augusto Pinochet Ugarte, former Head of State and dictator of Chile (see also → *Heads of State*), was arrested by the London Metropolitan Police on an international warrant issued by the Spanish examining magistrate Judge Baltasar Garzon (see also → *European Arrest Warrant*). The arrest warrant alleged the murder of Spanish citizens in Chile during the military regime established after the coup of 11 September 1973 and charged Pinochet with the crimes of → *genocide* and → *terrorism*. The Crown Prosecution Service, acting on behalf of the Kingdom of Spain, applied for General Pinochet's → *extradition* to Spain. The basis for extradition was the European Convention on Extradition, which was given effect in the UK by the Extradition Act 1989 (UK). Being made aware of the difficulties that his first arrest warrant would encounter in UK extradition proceedings, on 22 October Judge Garzon issued a more detailed second arrest warrant, charging Pinochet with torture and conspiracy to torture (see also → *Torture, Prohibition of*), hostage-taking and conspiracy to hostage-taking (see also → *Hostages*), murder and conspiracy to murder. On 28 October 1998 a panel of three judges headed by Lord Chief Justice Bingham of Cornhill of the Divisional Court of England and Wales upheld Pinochet's claim to → *State immunity* (*Re Augusto Pinochet Ugarte*). In the meantime arrest warrants had also been issued by Belgian, French, and Swiss magistrates.

2 On the Crown's appeal to the House of Lords, a panel formed by five Law Lords decided on 25 November 1998 (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 1)*; '*Pinochet No 1*'), by a majority of three (Lord Nicholls of Birkenhead, Lord Steyn, and Lord Hoffmann concurring, Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) that the immunity *ratione materiae* of a former Head of State was confined to acts performed in the legitimate exercise of his official functions, and that these did not include torturing political opponents. However, the decision was set aside by a House of Lords Committee on 17 December 1998 (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)*; '*Pinochet No 2*') because of the disqualification of one of the majority judges, Lord Hoffmann, who had failed to disclose the fact that he had served as a director of Amnesty International Charity Ltd, the research and educational branch of → *Amnesty International (AI)*, an intervener in the case.

3 On 24 March 1999 a new panel composed of the seven most senior Law Lords again rejected Pinochet's claim to immunity in respect of charges of torture by a majority of six to one (Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, Lord Phillips of Worth Matravers, with Lord Goff of Chieveley dissenting; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*; '*Pinochet No 3*'). However, a majority of five Law Lords found that English courts had no jurisdiction over torture offences committed by foreigners abroad before the enactment of Sec. 134 Criminal Justice Act 1988 (UK) ('CJA'), by which the UK had implemented the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'; see also → *Jurisdiction of States*). By a majority of five to two (Lords Millet and Phillips dissenting), the Law Lords found that Pinochet was entitled to immunity in respect of the charges of murder and conspiracy to murder, partly because they were not extradition crimes and partly because it had not been proved that States had agreed to remove immunity for those charges. In view of the substantial reduction of the extradition crimes, all the Law Lords made a plea to the Home Secretary to reconsider the exercise of his discretion in allowing extradition proceedings to continue. Nevertheless on 14 April 1999 the Home Secretary granted authority for the extradition to proceed.

4 On 8 October 1999 the Deputy Chief Metropolitan Stipendiary Magistrate ruled in *Kingdom of Spain v Augusto Pinochet Ugarte* that Pinochet could be extradited to Spain with regard to 34

charges of torture and one charge of conspiracy to commit torture. Thereupon the Chilean government, which had already intervened in the rehearing before the House of Lords in order to assert immunity on behalf of General Pinochet, requested on 14 October 1999 that the Home Secretary, Jack Straw, consider releasing Pinochet on medical grounds. The medical examination took place on January 2000 and established that Pinochet was unfit to stand trial (see also → *Fair Trial, Right to, International Protection*). Human rights organizations (see also → *Human Rights, Role of Non-Governmental Organizations*) and the Belgian government challenged Straw's decision not to make public the report. On 15 February 2000 the Divisional Court ruled in *R v Secretary of State for the Home Department, ex p the Kingdom of Belgium* that the report had to be shared, in confidence, with the judicial authorities in each of the requesting States. Thereupon, on 2 March 2000 the Home Secretary ordered the release of Pinochet. The reasons were set out in the letters which the Secretary of State sent to the four requesting States (reproduced in 119 ILR 317). Senator Pinochet immediately returned to Chile, apparently in good health.

2. The Proceedings in Chile

5 By the time of his return, dozens of cases had been lodged against Pinochet in Chilean courts. In February 1991 the Chilean National Commission for Truth and Reconciliation established by President Aylwin had released a report ('Rettig Report'), in which it was stated that 2279 of the circa 3000 persons who had disappeared during the regime had been killed by the police or the military (→ *Disappearances*; → *Truth and Reconciliation Commissions*). In July 1999 the Chilean Supreme Court had taken the unprecedented step of confirming a lower court decision that the 1978 Decree Law No 2191 ('Chilean Amnesty Law') was not applicable in cases of enforced disappearances, on the ground that such crimes must be considered 'continuous crimes' as long as the fate or whereabouts of the victim has not been determined, as stated in Art. 3 Inter-American Convention on Forced Disappearance of Persons.

6 In August 2000 the Chilean Supreme Court decided to lift Senator Pinochet's parliamentary immunity and allow prosecution for his direct involvement in the *Caravan of Death Case*, in which military officers had travelled to various locations in the country, tortured political opponents in jail, and killed at least 70 persons after mock processes. Pinochet escaped arrest in July 2002 only after having convinced the Supreme Court that his senile dementia made him unable to defend himself at trial. However, in May 2004 the Supreme Court reversed its prior finding and in August 2004 again denied Pinochet's parliamentary immunity, which he had retained even after having resigned from Senate in 2002, in the case of 'Operation Condor'. This case concerned a covert international programme of kidnapping, murder, and disappearances of political activists co-ordinated in the 1970s by the military regimes of Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay. In November 2004 and June 2005 the National Commission on Political Imprisonment and Torture established by President Lagos released its report ('Valech Report'), which documented 30,000 cases of torture and human rights abuses.

7 In November 2005 Pinochet was indicted on tax evasion charges and placed under house arrest for allegedly having held 27 million US dollars in secret accounts at the Riggs Bank and other US financial institutions. On 27 November 2006 a house arrest was again issued against Pinochet for the kidnapping and murder in 1973 of two bodyguards of former President Allende. Pinochet died of a heart attack on 10 December 2006 without ever having faced trial for his crimes.

B. Legal Appraisal

8 The Pinochet extradition proceedings in the UK have been welcomed as a major step for international human rights and → *international criminal law*. Their legacy is that for the first time the impunity of a former dictator was successfully challenged on grounds of → *international law* before the supreme court of a foreign State committed to the → *rule of law*. However, on a closer

look the case might be less significant than it first appears, and not only for the fact that in the end Pinochet was not extradited and did not stand a criminal trial in Spain or elsewhere. In fact the answers finally given by the House of Lords to the three main issues, namely double criminality as a condition for extradition, exercise of extraterritorial jurisdiction, and personal immunity of former Heads of State, are on the whole quite prudent and mainly based on the CAT.

9 With regard to the first aspect of double criminality, contrary to what the Divisional Court had held in *Re Augusto Pinochet Ugarte* (at 41), and the opinion of Lord Lloyd of Berwick, who had been the only one to consider this issue in *Pinochet No 1* (para. 88), the Law Lords in *Pinochet No 3* unanimously held that for an act to qualify as an 'extradition crime' within the meaning of Sec. 2 (1) (b) Extradition Act 1989 (UK) it is necessary that it constituted a crime under UK law at the time it was committed, and not merely at the time of the extradition request (*Pinochet No 3* para. 195). The majority (with only Lord Millett taking a different view, *Pinochet No 3* para. 276) subsequently concluded that prior to the implementation of the CAT through the CJA, torture committed outside UK territory was not a crime punishable under UK law, in the absence of statutory rules conferring jurisdiction on English criminal courts.

10 This leads to the second and correlated aspect of the jurisdictional basis of the criminal proceedings. The issue of the admissibility of universal jurisdiction is far from being settled in international law (cf the resolution of the Institut de Droit International *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*; see also → *Crimes against Humanity* ; → *War Crimes*). Furthermore, it has been noted in legal literature that it is not unusual for domestic courts, pursuant to the legality principle, to abstain from exercising universal jurisdiction over crimes against international law without national legislation to that effect. Therefore, Lord Millet's opinion, based on the incorporation of → *customary international law* in domestic common law, is not unobjectionable. The fact that torture is now prohibited in international law by a → *ius cogens* norm does not necessarily imply that a criminal or civil action shall always be possible before a domestic court, contrary to a dictum of the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* in *Prosecutor v Furundžija (Judgment)* at para. 155; but see the judgment of the → *European Court of Human Rights (ECtHR)* in the case of *Al-Adsani v United Kingdom*.

11 With regard to the third aspect, immunity of former heads of State, in order to understand better some of the key passages in the judgments of the Law Lords, it must be recalled that the issue of the immunities of a head of State in international law is to some extent still unsettled. If it is true that historically in international law the immunity of the State and that of the Head of State were considered indistinguishable and both absolute, subsequent developments in the 20th century led to the theory of restrictive immunity for the State and to the recognition of a form of diplomatic immunity *ratione personae* for the Head of State (→ *Immunity, Diplomatic*), in addition to that one *ratione materiae* applying to all public officials (see also → *Heads of Governments and Other Senior Officials*).

12 It is important to bear in mind that the first panel of the House of Lords focused its attention almost entirely on Sec. 20 (1) State Immunity Act 1978 (UK), which provides that the Diplomatic Privileges Act 1964 (UK), which gave effect to the Vienna Convention on Diplomatic Relations (→ *Vienna Convention on Diplomatic Relations [1961]*), applies also to a sovereign or other Head of State. Art. 39 (2) Vienna Convention on Diplomatic Relations provides for the maintenance of immunity *ratione materiae* when the functions of a person enjoying privileges and immunities have come to an end. The question turned on the point whether the acts of torture specified in the first four counts of the second Spanish warrant of arrest against Pinochet would qualify as 'acts performed in the exercise of the functions' of a Head of State.

13 It is remarkable that the two majority Lords in *Pinochet No 1*, who had expounded their arguments, had developed two partially different lines of reasoning. Lord Steyn had forcefully

made the argument that acts of torture along with other 'high crimes' such as genocide, hostage-taking, and crimes against humanity could never be regarded by international law as acts performed in the exercise of the function of a Head of State (*Pinochet No 1* para. 115). Lord Nicholls had nuanced his position, because he not only referred to the development of international law regarding international crimes, but also made the point that the retention of immunity under customary international law would be inconsistent with parliamentary intent in enacting Sec. 134 CJA (*Pinochet No 1* para. 110). Lord Steyn's opinion is not entirely persuasive. The fact that acts of torture cannot in any event be regarded by international law as belonging to the 'functions' of a Head of State does not mean that those same acts could not be 'official acts'. Indeed, the CAT itself takes into account only 'official' torture, as is made clear by Art. 1 CAT, for which torture means 'any act by which severe pain or suffering…is intentionally inflicted on a person…, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

14 As for the majority in *Pinochet No 3*, each member of the panel delivered an individual opinion, and it is difficult, if not impossible, to detect common ground in the majority for the dismissal of immunity. The disparity, and in some cases the opacity of the arguments inevitably reduce to some extent the persuasiveness of this part of the judgment and its significance for the development of customary international law. Only two of their Lordships (Lord Hutton para. 262, and Lord Phillips in a dictum at para. 290) seemed to endorse Lord Steyn's argument. The other four Lords of the majority gave decisive weight to Sec. 134 CJA or alternatively to the terms of the CAT, holding that it would be unreasonable that one and the same convention could simultaneously foresee extraterritorial jurisdiction over official torturers and maintain immunity from extradition or prosecution based on the official nature of that alleged crime (Lord Browne-Wilkinson para. 205; Lord Hope para. 247; Lord Saville para. 267; Lord Millet para. 277: 'no rational system of criminal justice can allow an immunity which is coextensive with the offence').

15 This argument, however, could prove too much, because, as was sharply remarked by the dissenting Lord Goff (*Pinochet No 3* para. 219), given the silence of the CAT on the matter of immunity, and by following the same logic of the majority, immunity *ratione personae*, such as that in favour of a serving Head of State, could also be held inconsistent with the CAT, a solution that all the Lords of the majority expressly excluded (Lord Browne-Wilkinson para. 201; Lord Hope para. 248; Lord Hutton para. 261; Lord Saville para. 266; Lord Millet para. 277; Lord Phillips para. 280). A possible, but admittedly not a conclusive answer to this criticism would be that the drafters of the CAT pursued the goal to provide for effective → *remedies* for victims of acts of torture committed at home and abroad by public officials by excluding that the latter could escape their criminal liability under the cloak of State function, but that they did not intend to encroach on the customary international law rules on immunity *ratione personae* specifically belonging to some senior State officials (see also → *Individual Criminal Responsibility*; → *Victims' Rights*). Any possible doubt about the persisting validity of such rules on personal immunity were dispelled some years later by the → *International Court of Justice (ICJ)* in the → *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)* (para. 58), in which it confirmed the unquestionable prevalence of the rule of immunity *ratione personae* of incumbent ministers of foreign affairs in foreign domestic criminal proceedings.

16 Finally, the decisive reliance of the majority in *Pinochet No 3* on the terms of the CAT was also the cause of some uncertainty among the Law Lords as to the date from which the removal of immunity took effect. Whereas three judges of the majority indicated 8 December 1998, being the date of the UK ratification of the CAT (Lord Browne-Wilkinson para. 206; Lord Saville para. 267), another chose 29 September 1988, being the date on which the CJA entered into force (Lord Hutton para. 265), and Lord Hope chose 30 October 1988, being the date when Chile's ratification of the CAT took effect, albeit not going so far as to couch the latter in terms of an implied waiver (Lord Hope para. 248).

17 The majority of the Law Lords in *Pinochet No 3* have sometimes been criticized for having relied too much on Sec. 20 State Immunity Act 1978 (UK), equating the immunities of a Head of State with those enjoyed by the → *heads of diplomatic missions*, without taking into account the 'necessary modifications' mentioned in that section, and for having assimilated a former Head of State with the general category of 'public officials' for the purpose of the CAT, without taking into account the peculiar role of a Head of State as the representative of that State. The criticism is unfounded to the extent that their Lordships made clear that in their opinion customary international law did not substantially differ from UK law and furthermore in view of the fact that it had been conceded in the course of the proceedings by the counsels for the government of Chile that the words 'public officials or other person acting in an official capacity' may include a Head of State.

18 Besides making safe the immunities *ratione personae* of serving Heads of State, some Lordships of the majority (Lord Hutton para. 264; Lord Millett para. 278; Lord Phillips para. 287) also expressly held that the grant of immunity in civil proceedings to the individual agent or to the State remained unaffected by their decisions. More recently, the same House of Lords had occasion to restate the principle of State and agent functional immunity from civil proceedings for torture in *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, clearly distinguishing the precedent of *Pinochet No 3*, 'since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention' (per Lord Bingham of Cornhill para. 19) and did not fall within Part I State Immunity Act 1978 (UK) dealing with State immunity from jurisdiction in civil matters.

C. Conclusion

19 In conclusion, if it is still to some extent difficult to assess fully the impact that the complex dimensions of the Pinochet extradition case have had and still may have on the development of customary international (criminal) law, its concededly modest but firm contribution seems to reside in the denial of immunity from criminal prosecutions of former Heads of State and other former senior officials for egregious violations of the prohibition of torture at least by States Parties to the CAT.

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