CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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THE FIRST *PINOCHET* CASE: IMMUNITY OF A FORMER HEAD OF STATE

THE case of Pinochet has aroused enormous interest, both political and legal. The spectacle of the General, whose regime sent so many to their deaths, himself under arrest and standing trial has stirred the hopes of the oppressed. His reversal of fortune, loss of liberty with a policeman, on the door, has been heralded by organisations for the protection of human rights as one small step on the long road to justice. For lawyers generally, the House of Lords' majority decision of 1998 that General Pinochet enjoyed no immunity signalled a shift from a State-centred order of things.[1] It suggested that the process of restriction of State immunity, so effectively begun with the removal of commercial transactions from its protection, might now extend some way into the field of criminal proceedings. And it further posed the intriguing question whether an act categorised as within the exercise of sovereign power, so as to relieve the individual official of liability in civil proceedings, may at the same time, as well as subsequent to his retirement, attract parallel personal criminal liability.

This note, prepared at short notice to appear in this issue of the I.C.L.Q., endeavours to set out the scope of the 1998 decision of the House of Lords on immunity. A rehearing of the issue of immunity has now been ordered by reason of one member of the court's disqualification.[2] It seems that the court's eventual decisions as to the validity of the provisional warrants and immunity will be but the first steps in a long series of legal proceedings.

Whilst receiving medical treatment in the London Clinic, General Pinochet was placed under arrest on the execution of two warrants dated 16 and 22 October 1998 issued by Bow Street Magistrates at the instance of a Spanish judge, Baltasar Garzon. Judge Garzon, over a period of two years, had conducted an extensive investigation, which established that General Pinochet, while head of the government of the Republic of Chile, in concert with the Republic of Argentina, and to achieve political and financial aims and to exterminate opposition, had co-ordinated

* This section deals with recent developments in British practice, making some attempt to set the practice against the international and domestic context in which it takes place.

1. *R. v. Bow Street Stipendiary Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening)* (1998) 4 All E.R. 897.

2. See addendum. Lord Hoffmann gave no separate judgment. After the hearing it was reported that he was a Director of Amnesty (Charity) International Ltd: *The Times*, 8 December 1998.

repressive action, under the code-name "Operativo Condor", against the citizens of Chile and Argentina and of other countries, including Spanish and British nationals, to effect the elimination, disappearance and kidnapping of thousands of persons who were also systematically tortured. General Pinochet's arrest in the United Kingdom was made with a view to extradition proceedings at the request of the Spanish government for his surrender to stand trial in Spain in respect of a number of acts of terrorism, genocide and torture committed during the General's tenure of office.

Application was immediately made on the General's behalf to the Divisional Court for judicial review in respect of the two warrants, the second ground being that the warrants were unlawful as the UK courts had no jurisdiction over a former Head of State.

The Divisional Court (Lord Bingham CJ, sitting with Collins and Richards JJ) held that the applicant was immune from criminal and extradition proceedings in respect of the offences alleged in the provisional warrants. Accordingly, the Divisional Court allowed judicial review, by way of *certiorari*, rather than *habeas corpus* and quashed both writs on the ground of no jurisdiction by reason of immunity; the quashing of the second warrant was stayed pending an appeal to the House of Lords. General Pinochet was subsequently released from custody, on bail. Leave was refused to move for *mandamus* against the Home Secretary.[3] The Court certified as a point of law of general public importance, "the proper interpretation and scope of the immunity enjoyed by a former Head of State for arrest and extradition proceedings in the UK in respect of acts committed while he was Head of State".

The Commissioner of Police and the Spanish Government appealed to the House of Lords.[4] Judgment was given on 25 November, the House of Lords ruling by three to two (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann concurring with Lords Nicholls and Steyn, with Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) that a former head of State had no immunity in respect of acts of official torture made crimes by section 134(1) of the Criminal Justice Act 1988 (being the first two counts of the second warrant) or of acts of hostage-taking made a UK criminal offence by the Taking of Hostages Act 1982 (counts 3 and 4 of the second warrant).

The 1998 ruling of the Lords that there was no immunity was surprising. Diplomatic law recognises that personal immunity is withdrawn when a public official vacates his post, but that immunity *ratione materiae* for acts performed in the course of official duties continues; the rationale being that the current holder of the office must not be impeded in the performance of those duties by fear of proceedings in foreign courts, whether brought during or after his term of office.

3. The Court held that it was not the duty of the Home Secretary to review the legal validity of a provisional warrant and that he was entitled to take no action and await developments.

4. The Court heard 6 days of argument; 16 barristers appeared; Amnesty International and representatives of victims were given leave to intervene and Ian Brownlie QC made oral submissions on their behalf. At the request of the Court, the Attorney General appointed an *amicus curiae* to assist with submissions. Judgment was reserved.

A. Jurisdiction

To appreciate the nature of the offences alleged for which the protection of State immunity was sought, some account of the Divisional Court's decision relating to the UK jurisdiction over the alleged offences is required. The first ground advanced for judicial review was that the warrants disclosed no "extradition crimes" as required by the Extradition Act 1989 and the relevant international agreement, the European Convention on Extradition 1989 (brought into force by the Extradition Order, S.I. 1507 of 1990 as amended). Section 2(1)(b) of the 1989 Act requires that, to be an "extradition crime", conduct equivalent to that which constitutes the offence in the law of the requesting State would constitute an offence in English law; "equivalent" conduct to cover extraterritorial crime in each jurisdiction. The Divisional Court held the first warrant to be bad;[5] the offence described therein related to the murder of Spanish nationals in Chile; to come within the definition of an "extradition crime" within the meaning of section 2(1)(b), it had to be one for which the United Kingdom claims extraterritorial jurisdiction. By section 9 of the Offences Against the Person Act 1861, UK courts have jurisdiction to try a defendant when he has committed murder outside the United Kingdom only if he is a British citizen, the nationality of the victim not being a basis for jurisdiction. The murder of a British citizen by a non-British citizen outside the United Kingdom does not, therefore, constitute an offence for which the United Kingdom claims jurisdiction.

The Divisional Court was, however, prepared to hold the first four counts of the second warrant to be "extradition crimes". These counts related to charges of torture and taking of hostages and conspiracy to commit such offences. The UK legislation relevant to these offences is the Criminal Justice Act 1988, section 134, and the Taking of Hostages Act 1982 and an offence under these provisions is committed if the act is carried out in the United Kingdom or elsewhere. Thus, the United Kingdom is entitled to claim jurisdiction over these offences when committed abroad, and, accordingly, the requirements of section 2(1)(b) of the Extradition Act were met. These, then, were the offences which came before the Lords for which immunity was sought—torture and hostage-taking and conspiracy to commit these offences. By the time of the Lords hearing, the Spanish government had presented a formal request for extradition relating to a large number of alleged murders, disappearances and cases of torture said to be in breach of Spanish law relating to genocide, torture and terrorism.[6] Although the court admitted further evidence setting out the up-to-date position since the Divisional Court proceedings, it would seem that its first, 1998, decision was given in respect of the offences set out in the four counts of the second warrant and on no wider grounds. The Lords did not specifically address the jurisdiction issue, though all noted the obli-

5. The Court also held bad the fifth count of the second warrant which alleged murder contrary to the Suppression of Terrorism Act. At the time of the alleged commission of the offence neither Spain nor Chile was party to the Convention, and consequently no murder was committed in a convention country.

6. By order of 5 Nov. 1998 the Spanish Court, Criminal Division sitting in plenary, held that Spain had jurisdiction to try crimes of terrorism, genocide where committed abroad, including crimes of torture as an aspect of genocide and in respect of victims of non-Spanish nationality.

gation to prosecute or extradite in respect of the alleged offences. Lord Steyn expressly stated that he was expressing no view on universality of jurisdiction over crimes against international law.[7]

Before arriving at the core issue which divided them, the Law Lords, both the majority and the dissenting members of the Court, acknowledged the existence of considerable common ground. All five Law Lords reached their decision on the basis that General Pinochet was head of State throughout the whole period in respect of which the charges were laid. There was no certificate from the Foreign and Commonwealth Office as provided by section 21 of the State Immunity Act 1978. The Divisional Court referred to uncontradicted sworn evidence from the Chilean Ambassador in London referring to various Decree Laws that the applicant was head of State of the Republic of Chile between September 1973 and March 1990. In the 1998 hearing in the Lords the constitutional validity of these Decrees was challenged,[8] but the generally accepted position was stated by Lord Nicholls of Birkenhead as follows: "the evidence shows that he was the ruler of Chile from 11 September 1973 when a military junta of which he was leader overthrew the previous government of President Allende until 11 March 1990 when he retired from office as president".[9]

On the law, immunity of a former head of State was argued as arising under the State Immunity Act 1978, and as a residual immunity at common law.[10] It is of particular note that the majority, as well as those members who dissented, gave their decision on the basis that a current head of State was immune in respect of the alleged offences. Lord Nicholls of Birkenhead stated: "I have no doubt that a current Head of State is immune from criminal process under customary international law. This is reflected in section 20 of the State Immunity Act 1978",[11] and Lord Steyn spelt it out: "It is common ground that a head of state while in office has absolute immunity against civil or criminal proceedings in the English courts. If General Pinochet had still been head of state of Chile, he would be immune from the present extradition proceedings."[12]

B. Act of State[13]

Both Lords Nicholls and Steyn held that act of State had no application to the case. They agreed that the judicial restraint which the act of State doctrine required "must yield before" or "be displaced by" a contrary intention of Parliament.

7. *Pinochet*, *supra* n.1, at p.947f.

8. On the basis that on 26 Oct. 1973 General Pinochet signed the letters of credential presented to the Queen by the Chilean Ambassador to the UK, and the Spanish government's reference to him as head of State in its request for extradition, Lord Slynn of Hadley was prepared to find that the General had acted as the head of State: *idem*, p.904a–e.

9. *Idem*, p.936e.

10. US cases cited included *Hatch* v. *Baez* (1976) 7 Hun. 596; *USA* v. *Noriega* (1990) 746 F.Supp. 1506; *Jimenez* v. *Aristeguieta* (1962) 311 F.2d 547; *Hilao* v. *Marcos* (1994) 25 F.3d 1467.

11. *Pinochet*, *supra* n.1, at p.940h.

12. *Idem*, p.943f.

13. Cases cited included *Duke of Brunswick* v. *The King of Hanover* (1848) 2 H.L.Cas. 1; *Underhill* v. *Fernandez* (1897) 169 U.S. 456; *Buttes Gas and Oil Co.* v. *Hammer* (1982) A.C. 888; *W.S. Kirkpatrick & Co. Inc.* v. *Environmental Tectonics Corp. Int.* (1990) 493 U.S. 4000; *Kuwait Airways Corp.* v. *Iraqi Airways Co.* (Mance J, unrep. 29 July 1998).

"When Parliament has shown that a particular issue is justiciable in the English courts, there can be no place for the courts to apply the self-denying principle."[14] Such intent was express, so far as torture was concerned, in the Criminal Justice Act 1988, which made it clear that prosecution would require investigation into the conduct of officials acting in an official capacity in foreign countries. It could be inferred in respect of the Taking of Hostages Act 1982 by reference to the incidents of international terrorism involving hostage-taking prior to the convention which was designed to suppress such acts.[15]

Lords Lloyd and Slynn held the opposite. The former considered issues relating to the effect on the country's diplomatic relations with Chile or Spain, the amnesty in Chile and its progress to restore democracy, and the possible acquiescence of the United Kingdom in the visits of the respondent all to be matters which rendered the extradition proceedings non-justiciable in an English court.[16] Lord Slynn applied the act of State doctrine, but as a corollary to his ruling that General Pinochet retained immunity.[17] He,[18] along with the judges in the majority, considered the factors referred to by Lord Lloyd not to be matters for the court, being political considerations for the Home Secretary in the exercise of his discretion under section 12 of the Extradition Act.[19]

C. The State Immunity Act 1978, Part I

All the Law Lords were agreed that Part I of the State Immunity Act 1978 was irrelevant to the question in hand: it related to civil proceedings only. In doing so they rejected the submissions on behalf of the General and the Intervenor, Amnesty International, that the exclusion in section 16(4) relating to criminal proceedings applied only to the exceptions in Part I and not to the principle of State immunity set out in section 1(1). Lord Lloyd of Berwick saw no reason to distinguish the exclusion in Section 16(4) from the other exclusions in section 16(2), (3) and (5), which all apply to Part I, including section 1.[20]

D. Part III, section 20

All the Law Lords accepted that the core issue was the proper interpretation of section 20 of the State Immunity Act and in particular Article 39(2) of the Vienna Convention on Diplomatic Relations 1961 incorporated thereby.[21] Section 20 of

14. *Pinochet, supra* n.1, at 938h.
15. Lord Nicholls referred to hostage-taking at the US embassy in Teheran in 1979, in aircraft hijackings in the 1970s, and the holding hostage of passengers of an El Al aircraft at Entebbe in June 1979; *idem*, p.938d.
16. *Idem*, p.934e–g.
17. *Idem*, p.919e.
18. *Idem*, p.918a–b.
19. *Idem*, pp.941h (Nicholls), 906h (Steyn).
20. *Idem*, p.931h. A further argument that the exclusion in s.16(4) means that the immunity in respect of criminal proceedings which exists at common law is abolished was dismissed by Lord Lloyd; Stuart-Smith LJ's reference to the State Immunity Act as "a comprehensive code" in *Al Adsani* v. *Government of Kuwait* and others 107 I.L.R. 536, 542, did not provide a code in respect of matters which it did not purport to cover.
21. In the Divisional Court Lord Bingham CJ concluded that Part II of the State Immunity Act, which contains s.20, applies to proceedings in respect of matters before the coming into force of the Act; the retrospectivity of s.20 was accepted without argument in the Lords.

the 1978 Act confers immunity upon a head of State, his family and servants by reference ("with necessary modifications") to the privileges and immunities enjoyed by the head of a diplomatic mission under the 1961 Vienna Convention, which was enacted as a Schedule to the Diplomatic Privileges Act 1964. These immunities include, under Article 31, "immunity from the criminal jurisdiction of the receiving state". Article 39(2) deals with "when the functions of the person enjoying privileges and immunities have come to an end" and provides that immunities shall normally cease; it then reads: "However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

Lord Steyn stated that "the technique of applying article 39(2) to a former Head of State is somewhat confusing"[22] and Lord Nicholls criticised the process of making the "necessary modifications" as "not an altogether neat exercise as the functions are dissimilar".[23] Nonetheless, there was unanimity among the Law Lords that the functions of a head of State to be read into the provision could not contain a geographical limitation, they could not be limited to his visits abroad, or merely to acts done by heads of State "in the exercise of their external functions, that is to say in the conduct of international relations and foreign affairs generally".[24] In Lord Slynn of Hadley's view, "the principal functions of a Head of State are performed in his own country and it is in respect of those functions that if he is to have immunity it is most needed".[25]

Their Lordships agreed that the effect of the provisions could be expressed as: "a former Head of State shall continue to enjoy immunity with respect to criminal jurisdiction of the UK with respect to official acts performed in the exercise of his functions as Head of State". This proposition was not questioned by counsel for the respondent or for the Spanish government.

All unanimity broke down, however, on the manner of determining the core issue. Two extreme positions were postulated. The first treated immunity from criminal proceedings of a former head of State for official acts performed in exercise of his functions as head of State as absolute; there was no line which an English court could draw to distinguish "between acts whose criminality or moral obloquy is more or less great".[26] The second asserted that the functions of a head of State were only those which international law recognised and that international law does not recognise as a function of a head of State the commission of international crimes contrary to international law.

The first position was taken by Lord Bingham in the Divisional Court, and adopted by Lord Lloyd in the Lords. Both distinguished between acts of "personally torturing or murdering" from "using the power of the State of which he was Head to that end". Lord Lloyd reached a decision by reference first to the common law rule, from an examination of the authorities and case law he concluded that the only line to be drawn was that between "personal or private acts" and "public or official acts done in the execution or under colour of sovereign authority".[27] On the

22. *Pinochet*, *supra* n.1, at p.944d.
23. *Idem*, p.939b.
24. *Idem*, p.932j.
25. *Idem*, p.907f.
26. *Idem*, p.908f.
27. *Idem*, p.926j.

evidence, he, with Lord Bingham in the court below, concluded that General Pinochet was acting in a sovereign capacity; his acts were governmental in nature:[28]

> Where a person is accused of organising the commission of crimes as the head of the government, in co-operation with other governments, and carrying out those crimes through the agency of the police and the secret service, the inevitable conclusion must be he was acting in a sovereign capacity and not in a personal or private capacity.

Both Bingham CJ and Lord Lloyd rejected any exception to the immunity from criminal proceedings for official acts on the ground of the horrific nature of the offences alleged. In Lord Bingham's view, it was not possible to draw a line so as to hold "any deviation from democratic practice is outside the pale of immunity"; and Lord Lloyd agreed, with Collins J in the Divisional Court that such a drawing of the line was unjustifiable in theory and unworkable in practice, and would produce the situation where crimes are to be attributed to the State so long as they are not too serious.

Both these judges, in upholding the absolute rule, also rejected an exception that crimes made the subject of international conventions such as genocide, torture and hostage-taking should be an exception to the general rule of immunity of former heads of State for governmental acts. Lord Lloyd found nothing in these conventions nor in the Acts making the crimes they covered offences under English law to affect the rule of international law allowing a head of State procedural immunity in respect of crimes covered by the conventions. Both relied on the omission from the incorporating UK Act of Article 4 of the Genocide Convention, which made punishable acts of genocide committed by "constitutionally responsible rulers or public officials" as well as private individuals; Lord Lloyd stated that it was reasonable to suppose that, with regard to other international crimes, if they had contained equivalent provisions (which in the case of torture and hostage-taking they did not) such provisions would have been omitted when Parliament incorporated the conventions into English law.[29]

Lord Nicholls rejected Lord Bingham's reasoning. In ruling in favour of absolute immunity, Lord Bingham had referred to "the underlying rationale of the rule, which is a rule of international comity restraining one sovereign from sitting in judgment on the sovereign behaviour of another".[30] This led Lord Nicholls respectfully to suggest that the Lord Chief Justice had "elided the domestic law doctrine of act of state, which has often been stated in the broad terms he used, with the international obligations of this country towards foreign heads of state, which section 20 of the 1978 Act intended to codify".[31]

What then was the position taken in the judgments of the majority?

On a first reading of Lords Nicholls and Steyn, it might be thought that they adopted the second extreme position, namely that as soon as international crimes were recognised by customary international law the immunity from municipal criminal proceedings of a former head of State was lost in respect of such offences. Both referred to 1973, the date when General Pinochet first became head of State, and asserted that the offences alleged were international crimes before that date:

28. *Idem*, p.927j.
29. *Idem*, p.929a.
30. At p.28 of the Divisional Court's judgment.
31. *Pinochet*, *supra* n.1, at p.939g.

> international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable types of conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law. This was made clear long before 1973 and the events which took place in Chile then and thereafter.[32]

> the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage-taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving punishment. Given this state of international law, it seems to me difficult to maintain the commission of such high crimes may amount to acts performed in the exercise of the functions of Head of State.[33]

Yet an earlier part of Lord Steyn's judgment qualifies this line of argument. He there maintained that the commission of torture or hostage-taking by General Pinochet while head of State was outside his official acts performed in exercise of his functions as head of State and constituted "private crimes".[34] They were as much private acts as a head of State killing his gardener in a fit of rage or torturing for pleasure. Although he accepted that a ruler might be entitled to immunity from process in respect of some crimes, he reached his decision on the footing that General Pinochet participated in the crimes alleged in a manner sufficient to satisfy the rules of direct criminal complicity in the crimes alleged. He explicitly stated:[35]

> it is not alleged that General Pinochet personally committed any of these acts by his own hand. The case is, however, that agents of DINA committed acts of torture and that DINA was directly answerable to General Pinochet, rather than the military junta. And the case is that DINA undertook and arranged the killings ... on the orders of General Pinochet. In other words, what is alleged against General Pinochet is not constructive criminal responsibility.

This finding on the facts considerably narrows the *ratio decidendi* of the case. Lord Steyn removes immunity, not for a former head of State performing official acts in exercise of his functions as head of State, but for some monster, who placed in a position of authority, has gone on a rampage of atrocities for his own purposes. This conclusion follows also when he rejects the impossibility of drawing a line between crimes for which immunity subsists and those for which it does not. In an emotive passage criticising the contrary view Lord Steyn said: "It is inherent in this stark conclusion that there is no or virtually no line to be drawn. It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as Head of State."[36]

Can it also be said that Lord Nicholls narrows the ambit of his ruling? In his discussion of residual immunity under customary international law he concludes, as he did earlier in discarding the application of the act of State doctrine, that it is not consistent with parliamentary intent in enacting the offences of torture committed by public officials in section 134 of the Criminal Justice Act 1988 and of

32. *Idem*, p.940a (Nicholls).
33. *Idem*, p.945h.
34. *Idem*, p.946d.
35. *Idem*, p.943d.
36. *Idem*, p.945b.

taking of hostages in the 1982 Act that "former officials, however senior, should be immune from prosecution outside their own jurisdictions".[37]

In many respects this seems an approximation to the approach of Lord Slynn of Hadley, who gave the other dissenting judgment. He mounted a four-stage argument by which, having adopted the Bingham/Lloyd position that a head of State's official acts include all crimes,[38] he distinguished immunity *ratione personae* which, as set out in Article 39(2) of the Vienna Convention on Diplomatic Relations 1961, is lost when he ceases to hold office from immunity *ratione materiae*, which continues. That immunity subsists because it relates to official, not private acts; in the words of Watts, "such acts are acts of the State rather than the Head of State's personal acts and he cannot be sued for them even after he has ceased to be Head of State".[39] However, in the third stage of his argument, Lord Slynn considers whether the developing law defining international crime has cut down this immunity *ratione materiae*. He concludes it may, but only under certain conditions. Put shortly, these conditions require the definition of the crime and the conferral of jurisdiction on the national court in the international convention, the enactment as a criminal offence by UK legislation and the express or implicit exclusion thereby of head of State immunity as a bar to the proceedings.[40]

It is here that he comes close to Lord Nicholls's reliance on parliamentary intent as the determinative factor in any retention of immunity. They disagree on the construction of the two statutes relating to torture and hostage-taking as to the parliamentary intention to remove immunity. Lord Nicholls finds the reference to torture by public officials and the legislative history of the 1982 Act compelling in favour of its implied removal. Lord Slynn demonstrates that both international convention and UK legislation has treated "head of State" as a category distinct from that of "public officials", and finds in favour of the continued immunity.

The reasoning in the 1998 decision of the Lords will be subject to close scrutiny on the rehearing in January 1999. If the new panel of the Lords reaches the same conclusion as the majority their decision will have extensive impact on existing law, both international and municipal. To remove immunity previously regarded as an aid to international co-operation will seriously affect the structure of the international community. Placing reliance on *Trendtex*,[41] the majority in the 1998 case showed a surprising willingness to apply, with municipal law effect, customary international law, with little regard to its source, status or date of coming into force. Lord Slynn alone urged caution and signalled the problem of inter-temporal law; a problem likely to be particularly acute when an alleged offence is lawful under one legal regime which overlaps in time another legal regime under which it is unlawful. The ranking of customary international law over constitutions of States, the effect of amnesty on rights of third States' nationals, and of the inter-

37. *Idem*, p.941e.

38. "the fact that in carrying out other functions, a Head of State commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content": *idem*, p.908a.

39. *Idem*, p.910h, referring to Sir Arthur Watts, "Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers" (1994) 247 Hag.Rec. 88–89.

40. *Pinochet*, *idem*, p.915c–e.

41. *Trendtex Trading Corp.* v. *Central Bank of Nigeria* [1977] Q.B. 529.

national obligation to prosecute or extradite on waiver of immunity, the disparagement of act of State as a substantive defence, and the "knock-on" consequences on the immunities of current heads and of their States: all these are issues inviting study.[42]

E. Addendum

On 10 December 1998 the Home Secretary authorised extradition proceedings to go ahead on the request of the Spanish government under section 7(4) of the Extradition Act 1989,[43] and set out his reasons which included that the United Kingdom had jurisdiction for offences equivalent to those set out in the Spanish request, the Lords' decision that there was no immunity, and that the offences charged were not of a political character. No authority to proceed, however, was given in respect of the charges of genocide. In exercising his discretion the Home Secretary said he had had regard, *inter alia*, to passage of time. humanitarian considerations ("it would not be unjust or oppressive for him to stand trial"), the stability of Chile and pending proceedings in that country. On 17 December 1998 the House of Lords (Lords Goff of Chieveley, Nolan, Hope of Craighead and Hutton with Lord Browne-Wilkinson presiding) allowed an application on behalf of General Pinochet for the case to be reheard. Lord Browne-Wilkinson ruled: "In the special circumstances of this case, including the fact that Amnesty International was joined as an intervener and appeared by counsel before the Appellate Committee, Lord Hoffmann, who did not disclose his links with Amnesty International was disqualified from sitting".[44]

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42. The Court of Appeal, Amsterdam, dismissed a claim brought against the Public Prosecutor for failure to prosecute Pinochet when on a visit to Amsterdam in 1995 stating that "It was evident that prosecution of Pinochet ... could encounter so many legal and practical problems that the Public Prosecutor was perfectly within his rights not to prosecute". (*Chili Komitee Nederland* v. *Public Prosecutor* 28 (1997) N.Y.I.L. 363–365).

43. *Parliamentary Written Answers*, 9 Dec. 1998, Vol.322, cols.213–217.

44. *The Times*, 18 December 1998.