took place had ratified it. In the case of a tyrant who commits crimes at home, these two governments would be the same. But the territorial 'hook' could catch, for example, Saddam Hussein for committing war crimes during a new invasion of Kuwait. . . .The United States, however, feared that the territorial hook might catch American troops, or their commanders, for alleged crimes committed while they were abroad. If the country where US troops are present has ratified the treaty, the ICC could pursue a case against them even though the United States had not joined the court.

. . .

Can the ICC survive without US participation? The Clinton administration is betting that it cannot. Already Jesse Helms, having declared the ICC treaty 'dead on arrival' in the Senate, has vowed to sponsor legislation forbidding the US government to fund the court or do anything to give it legitimacy. The State Department said publicly it might put pressure on governments not to join the court; and it is considering renegotiating the bilateral treaties that govern the stationing of US forces overseas in order to protect them from the ICC.

The Clinton administration . . . also contends that, small as the risk is of an American being brought before the court, the ICC will undermine humanitarian goals by making the United States reluctant to deploy troops in times of need.

ADDITIONAL READING

David Scheffer, 'The United States and the International Criminal Court', 93 AJIL 12 (1999); Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court', 93 AJIL 22 (1999); Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 AJIL 43 (1999).

D. THE PINOCHET LITIGATION

Until the International Criminal Court becomes operational, no international tribunal exists to try individuals for alleged international crimes that do not fall within the jurisdiction of the ICTY and ICTR. There is always, of course, the possibility of criminal trial in the country where the acts took place, particularly if the perpetrators are citizens and residents of that country. Such trials have taken place in numbers of European countries, particularly Germany with respect to Nazi war criminals. In very few instances, they have also taken place with respect to post-Second World War events, such as the trials in Argentina in the 1970s of members of the military junta who were in charge during that country's 'dirty war'.

But these have been rare phenomena. Often the terms of transfer from a government in charge during a period of massive violations to a successor elected civilian government have precluded trial of those responsible for the violations. Such was the case in Chile. Other ways of dealing with the prior period have been utilized in a growing number of countries, such as the truth commissions in Chile,

Guatemala, South Africa and elsewhere that are examined in Section E of this chapter.

What then of trying such alleged criminals in the courts of other states in which they may be present at the time of arrest? The *Eichmann* trial, p. 1138, *supra*, offers an early precedent—although in that case the defendant was abducted from Argentina and brought to Israel. What are the advantages in such an approach, what are the risks or dangers? What legal and political barriers are there to such trials of, say, X, a former leader or high official of Y during the period in which gross human rights violations occurred there, who is temporarily in Z when arrested and charged with the commission of international crimes? Does the Alien Tort Statute in the United States (see pp. 1049–1068, *supra*), which permits a civil action for damages by one alien against another alien based on a tort constituting a violation of the law of nations that took place in a foreign state, provide a helpful analogy?

The path-breaking Pincohet case in the United Kingdom explores this topic.

REGINA v. BARTLE

House of Lords, 24 March 1999
[1999] 2 All ER 97, [1999] 2 WLR 827

[General Pinochet resigned as head of state of Chile in 1990 and became a Senator for life. In 1998, he travelled to the United Kingdom for medical treatment. Judicial authorities in Spain sought to extradite him to stand criminal trial in Spain on several charges, including torture, during his period as head of state that were related to the military, right-wing overthrow of President Allende and the subsequent extreme political repression that included several thousand murders, systematic use of torture, and disappearances. An international warrant for his arrest was issued in Spain, and a magistrate in London issued a provisional warrant under the UK Extradition Act of 1989. He was arrested and detained in England. None of the conduct alleged by the Spanish authorities was committed against UK citizens or in the UK.

Seeking to return to Chile, Pinochet started proceedings for habeas corpus and for judicial review of the warrant. The Divisional Court quashed the warrant on the ground that Pinochet, as a former head of state, was entitled to state immunity in respect of the acts with which he was charged. The Crown Prosecution Service, acting on behalf of the Government of Spain, appealed to the House of Lords. The Divisional Court certified as the relevant point of law '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'.

The appeal, heard by a five-member Appellate Committee of the House of Lords, was allowed by a vote of three to two on the ground that Pinochet was not entitled to immunity in relation to crimes under international law. However, this judgment of the House of Lords was set aside because of a conflict of interest of a member of the Appellate Committee, such that the Committee was held not to

have been properly constituted. A differently constituted seven-member Appellate Committee reheard the appeal in 1999. In the meantime, the British Home Secretary had authorized the magistrate to proceed with the extradition request under a 1989 Act on all charges except genocide. In this rehearing, Chile was granted leave to intervene as a party. Amnesty International also argued as an intervener, and Human Rights Watch made a written submission.

Throughout this process, the Spanish government several times revised and clarified the charges underlying the extradition request. The Crown Prosecution Service prepared for the rehearing a schedule of 32 UK criminal charges which corresponded to the allegations against Senator Pinochet under Spanish law (excluding the allegation of genocide). In the rehearing, the opinion of Lord Hope of Craighead summarized the charges to include principally conspiracy to torture between 1972 and 1990; conspiracy to take hostages between 1973 and 1990; conspiracy to torture in furtherance of which murder was committed between 1972 and 1990 in countries including Italy, France, Spain and Portugal; and conspiracy to murder in Spain and Italy in 1975–76.

The excerpts below from four of the seven individual opinions of the members of the Appellate Committee examine the principal charge of torture. Six of the seven Lords of Appeal allowed the appeal, but (in the majority of their opinions) only with respect to a small number of the charges. The effect of the judgment of the House of Lords was that extradition proceedings could continue with respect to such charges. In proposing a range of outcomes, the seven opinions not only differed on the particular issues to be resolved, but presented a range of perspectives on the broader development of international law and human rights since Nuremberg.]

LORD BROWNE-WILKINSON

Outline of the law

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

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed

the United Kingdom by that Convention . . . were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention all torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*. If, on the other hand, the double criminality rule only requires the conduct to be criminal under UK law *at the date of extradition* the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

". . . [I]n my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case—is a former head of state entitled to sovereign immunity from arrest or prosecution in the UK for acts of torture—applies to far fewer charges. But the question of state immunity remains a point of crucial importance since . . . [certain conduct of Senator Pinochet, 'albeit a small amount'] does constitute an extradition crime. . . .

". . . The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasise too strongly that that is no concern of your Lordships. Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not

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entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.

. . .

[The opinion quoted Section 2 of the 1989 Act, defining an 'extradition crime' for which an accused person could be arrested and sent to the state requesting extradition. Section 2(1)(a) referred to conduct in a foreign state 'which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment' for at least 12 months, and which is so punishable under the foreign law.]

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

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

[The opinion construed particular provisions in the 1989 Act and the predecessor Extradition Act 1870, and concluded that the double criminality rule referred to the time of conduct rather than request. Hence the charges of torture and conspiracy to torture covering conduct that occurred before Section 134 became effective on September 29, 1988 did not provide a basis for extradition. Only those charges related to conspiracy to torture and to torture that covered the later period (post September 29, 1988) could lead to extradition. Moreover, the charge relating to hostage-taking did not disclose any offence under UK law. The opinion then turned to consideration of the 'modern law of torture.']

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. . . . At least from that date onwards the concept of personal liability for a crime in inter-

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national law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own. . . . Ever since 1945, torture on a large scale has featured as one of the crimes against humanity. . . . Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm. . . .

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'. . . .

. . . In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Attorney-General of Israel v. Eichmann* (1962) 36 I.L.R.S. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power. . . . Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. . . . The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal—the torturer—could find no safe haven. . . .

Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and Article 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under Article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under Article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to

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detain him, inquire into the position and notify the states referred to in Article 5(1) and to indicate whether it intends to exercise jurisdiction. Under Article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in Article 5(1), submit him to its authorities for the purpose of prosecution. Under Article 8(1) torture is to be treated as an extraditable offence and under Article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in Article 5(1).

. . .

. . . The crucial question is not whether Senator Pinochet falls within the definition in Article 1: he plainly does. The question is whether, even so, he is procedurally immune from process. . . .

. . .

. . . The purpose of the Convention was to introduce the principle aut dedere aut punire—either you extradite or you punish . . . . :

I gather the following important points from the Torture Convention:

. . .

(4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials.

(5) Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

. . .

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

What then when the ambassador leaves his post or the head of state is deposed? The position of the ambassador is covered by the Vienna Convention on Diplomatic Relations, 1961. . . .

The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed ratione personae while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is

necessary to provide that immunity is afforded to his *official* acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. . . . This limited immunity, ratione materiae, is to be contrasted with the former immunity ratione personae which gave complete immunity to all activities whether public or private.

In my judgment at common law a former head of state enjoys similar immunities, ratione materiae, once he ceases to be head of state. He too loses immunity ratione personae on ceasing to be head of state. . . . As ex head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity. . . .

. . . Senator Pinochet as former head of state enjoys immunity ratione materiae in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function. This is the view taken by Sir Arthur Watts ['The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers'] who said (at p. 82):

> While generally international law . . . does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community. States are artificial legal persons: they can only act through the institutions and agencies of the state, which means, ultimately through its officials and other individuals acting on behalf of the state. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice.
>
> . . .
>
> It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.

It can be objected that Sir Arthur was looking at those cases where the international community has established an international tribunal in relation to which

the regulating document *expressly* makes the head of state subject to the tribunal's jurisdiction: see, for example, the Nuremberg Charter Article 7; the Statute of the International Tribunal for former Yugoslavia; the Statute of the International Tribunal for Rwanda and the Statute of the International Criminal Court. It is true that in these cases it is expressly said that the head of state or former head of state is subject to the court's jurisdiction. But those are cases in which a new court with no existing jurisdiction is being established. The jurisdiction being established by the Torture Convention and the Hostages Convention is one where existing domestic courts of all the countries are being authorised and required to take jurisdiction internationally. The question is whether, in this new type of jurisdiction, the only possible view is that those made subject to the jurisdiction of each of the state courts of the world in relation to torture are not entitled to claim immunity.

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

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. . . . They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive. . . .

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

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have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile.

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

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

. . .

LORD GOFF OF CHIEVELEY

. . .

Before the Divisional Court, and again before the first Appellate Committee, it was argued on behalf of the Government of Spain that Senator Pinochet was not entitled to the benefit of state immunity basically on two grounds, viz. first, that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the international law principle of state immunity; and second, that the crimes with which he is charged are crimes against international law, in respect of which state immunity is not available. . . . [A] majority of the first Appellate Committee [sitting in the earlier first hearing before the House of Lords] accepted the second argument. The leading opinion was delivered by Lord Nicholls of Birkenhead, whose reasoning was of great simplicity. . . .

. . .

Lord Slynn of Hadley and Lord Lloyd of Berwick, however, delivered substantial dissenting opinions. In particular, Lord Slynn (see [1998] 3 W.L.R. 1456 at pp. 1471F–1475G) considered in detail 'the developments in international law relating to what are called international crimes.' . . .

> It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts ~~on~~ the basis of the universality of jurisdiction. Nor is there any jus cogens in respect of such breaches of international law which requires that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden.

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

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

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He then proceeded to examine the Torture Convention of 1984, the Genocide Convention of 1948 and the Taking of Hostages Convention of 1983, and concluded that none of them had removed the long established immunity of former heads of state.

I wish to record my respectful agreement with the analysis and conclusions of Lord Slynn set out in the passages from his opinion to which I have referred. . . .

. . . There can be no doubt that the immunity of a head of state, whether ratione personae or ratione materiae, applies to both civil and criminal proceedings. . . .

However, a question arises whether any limit is placed on the immunity in respect of criminal offences. Obviously the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character. It follows, in my opinion, that the mere fact that the crime in question is torture does not exclude state immunity. It has however been stated by Sir Arthur Watts [p. 1205, *supra*] that a head of state may be personally responsible:

. . .

. . . [I]t is evident from this passage that Sir Arthur is referring not just to a specific crime as such, but to a crime which offends against the public order of the international community, for which a head of state may be *internationally* (his emphasis) accountable. The instruments cited by him show that he is concerned here with crimes against peace, war crimes and crimes against humanity. Originally these were limited to crimes committed in the context of armed conflict, as in the case of the Nuremberg and Tokyo Charters, and still in the case of the Yugoslavia Statute. . . . Subsequently, the context has been widened to include (inter alia) torture 'when committed as part of a widespread or systematic attack against a civilian population' on specified grounds. A provision to this effect appeared in the International Law Commission's Draft Code of Crimes of 1996 . . . and also appeared in the Statute of the International Tribunal for Rwanda (1994), and in the Rome Statute of the International Court (adopted in 1998). . . . [T]hese instruments are all concerned with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts. . . .

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

[The opinion, noting that the Convention does not mention state immunity, states that the argument for concluding that nonetheless no immunity is available turns on an 'implied term', which Lord Goff argues against. He develops several reasons for refusing to find in the Convention any such implied term, including:]

Furthermore, if immunity ratione materiae was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of

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different political persuasion. In this connection, it is a mistake to assume that state parties to the Convention would only wish to preserve state immunity in cases of torture in order to shield public officials guilty of torture from prosecution elsewhere in the world. . . . State immunity ratione materiae . . . can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious—a matter which can be of great significance where, for example, a former head of state is concerned and political passions are aroused. Preservation of state immunity is therefore a matter of particular importance to powerful countries whose heads of state perform an executive role, and who may therefore be regarded as possible targets by governments of states which, for deeply felt political reasons, deplore their actions while in office. But, to bring the matter nearer home, we must not overlook the fact that it is not only in the United States of America that a substantial body of opinion supports the campaign of the I.R.A. to overthrow the democratic government of Northern Ireland. It is not beyond the bounds of possibility that a state whose government is imbued with this opinion might seek to extradite from a third country, where he or she happens to be, a responsible Minister of the Crown, or even a more humble public official such as a police inspector, on the ground that he or she has acquiesced in a single act of physical or mental torture in Northern Ireland. . . .

. . .

For the above reasons, I am of the opinion that by far the greater part of the charges against Senator Pinochet must be excluded as offending against the double criminality rule; and that, in respect of the surviving charges—charge 9, charge 30 and charges 2 and 4 (insofar as they can be said to survive the double criminality rule)—Senator Pinochet is entitled to the benefit of state immunity ratione materiae as a former head of state. I would therefore dismiss the appeal. . . .

LORD HOPE OF CRAIGHEAD

. . .

The Torture Convention is an international instrument. As such, it must be construed in accordance with customary international law and against the background of the subsisting residual former head of state immunity. Article 32.2 of the Vienna Convention, which forms part of the provisions in the Diplomatic Privileges Act 1964 which are extended to heads of state by section 20(1) of the Sovereign Immunity Act 1978, subject to 'any necessary modifications', states that waiver of the immunity accorded to diplomatic agents must be express. . . . The Torture Convention does not contain any provision which deals expressly with the question whether heads of state or former heads of state are or are not to have immunity from allegations that they have committed torture.

. . .

. . . There is no requirement [in the Convention's definition of torture that torture] should have been perpetrated on such a scale as to constitute an international crime in the sense described by Sir Arthur Watts . . . that is to say a crime which offends against the public order of the international community. A single act of

torture by an official against a national of his state within that state's borders will do. The risks to which former heads of state would be exposed on leaving office of being detained in foreign states upon an allegation that they had acquiesced in an act of official torture would have been so obvious to governments that it is hard to believe that they would ever have agreed to this. . . .

Nevertheless there remains the question whether the immunity can survive Chile's agreement to the Torture Convention if the torture which is alleged was of such a kind or on such a scale as to amount to an international crime. . . .

The allegations which the Spanish judicial authorities have made against Senator Pinochet fall into that category. . . . We are dealing with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an *international* crime. . . . This is because he is said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic torture within Chile and elsewhere as an instrument of government. . . .

Despite the difficulties which I have mentioned, I think that there are sufficient signs that the necessary developments in international law were in place by [September 29 1998].

. . .

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

. . .

LORD MILLETT

. . .

The charges brought against Senator Pinochet are concerned with his public and official acts, first as Commander-in-Chief of the Chilean army and later as head of state. . . . As international law stood on the eve of the Second World War, his conduct as head of state after he seized power would probably have attracted immunity ratione materiae. . . .

. . . Even before the end of the Second World War, however, it was questionable whether the doctrine of state immunity accorded protection in respect of conduct which was prohibited by international law. As early as 1841, according to Quincy Wright (see (1947) 41 A.J.I.L at p. 71), many commentators held the view that 'the Government's authority could not confer immunity upon its agents for acts beyond its powers under international law'.

Thus state immunity did not provide a defence to a crime against the rules of war [citations to scholarly writing omitted].

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Article 7 of the Charter of the Nuremberg Tribunal provided:

> The official position of defendants, *whether as heads of state or responsible officials in government departments*, shall not be considered as freeing them from responsibility or mitigating punishment. (my emphasis)

. . .

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War. . . .

The principles of the Charter of the International Military Tribunal and the Judgment of the Tribunal were unanimously affirmed by Resolution 95 of the General Assembly of the United Nations in 1946. Thereafter it was no longer possible to deny that individuals could be held criminally responsibility for war crimes and crimes against peace and were not protected by state immunity from the jurisdiction of national courts. Moreover, while it was assumed that the trial would normally take place in the territory where the crimes were committed, it was not suggested that this was the only place where the trial could take place.

. .

The opinion considered the 'landmark decision' of the Supreme Court of Israel n *Attorney General of Israel v. Eichmann*, p. 1138, *supra*.]

The case is authority for three propositions:

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

.

In my opinion, crimes prohibited by international law attract universal jurisdic-)n under customary international law if two criteria are satisfied. First, they must contrary to a peremptory norm of international law so as to infringe a jus gens. Secondly, they must be so serious and on such a scale that they can justly regarded as an attack on the international legal order. Isolated offences, even if mmitted by public officials, would not satisfy these criteria. . . .

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In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. . . .

. . .

For my own part, I would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture wherever and whenever carried out. . . .

NOTE

Note several aspects of the Pinochet decision: (1) The Appellate Committee was bound to apply the UK Immunity Act to resolve the issue. But it drew broadly on international law to interpret that statute. (2) The basis for the extradition proceedings was the European Convention on Extradition, to which the UK and Spain were parties. The UK had incorporated its terms into domestic law in the Extradition Act 1989 and the European Convention on Extradition Order 1990.

After the decision, the extradition case continued while Pinochet remained under house arrest. France, Belgium and Switzerland also made extradition requests. A decision of the Metropolitan Magistrate in the Bow Street Magistrates' Court in 1999, reproduced in 38 ILM 135 (2000), concluded that the conduct alleged against Pinochet would be extraditable offences under English law. The Magistrate further concluded that he was bound by the Spanish representation in the request for extradition that the offences alleged would also be punishable under Spanish law. Hence the double criminality rule was satisfied. He stressed that he was not concerned in these proceedings with proof of facts or any possible defence, for these were matters for the trial court (in Spain). He then committed Pinochet to await decision about extradition.

In January 2000, the British Home Secretary stated that results of a medical examination of Pinochet by four specialists were leading him to conclude that the 84-year-old general was incapable of standing trial and should be released to return to Chile. In March, Pinochet was allowed to fly home, to a radically different political context in which he was an isolated, far less influential and potent figure. Judicial steps were underway toward intense investigation into Pinochet's connection with the killings and torture. But as of that date, the parliamentary immunity that accompanied his position as senator for life precluded prosecution.

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QUESTIONS

1. 'The disagreeement among the Law Lords . . . attests to the fact that the current state of evolution of international law is the object of divergent evaluations. This discrepancy 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. The understandable [resistance] of states to accepting a moving away from a strictly "State-centered 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. . . . 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. . . . 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.'[8] In what respects do you agree or disagree with this analysis?

2. Assuming the conclusion that there is no immunity for Pinochet with respect to some of the charges, was the UK then *permitted* to extradite him or *required* to extradite? What were its obligations, if any?

3. What links exist among several categories or concepts: international law crimes, obligations *erga omnes* or *jus cogens*, and universal jurisdiction? Are they necessary links, in the sense that each category or concept implies the other two? Would you distinguish among international law crimes (that range from hijacking or drug trafficking to crimes against humanity)?

4. 'The outcome was essential, inevitable. It would be the deepest contradiction to allow an immunity based on international law to shield one from a crime defined under that same body of law.' Comment.

5. Article 27 of the Rome Statute of the International Criminal Court, p. 1192, *supra*, is entitled the 'irrelevance of official capacity'.

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Would such a provision be appropriate for legislation by a state?

[8] Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 EJIL 237 (1999), at 271.

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COMMENT ON IMPLICATIONS OF PINOCHET DECISION

The decision of the House of Lords brought cheer to many, surely including the victims of the Pinochet regime and human rights advocates. It brought concern to others about the possibilities that it opened to broader use by a state judiciary of criminal trials based on international law for crimes allegedly committed by former leaders or high officials of other states who, for one or another reason (tourism, official mission, business, kidnapping), were in that state's territory. Different governments had different worries. Among Western governments, for example, this concern addressed the possibility that a high military or government official, present or former, involved in the planning of military actions like the Gulf War or in Kosovo might be placed on trial in states like Iraq or Yugoslavia on charges of having committed crimes under international law such as those defined in the Statutes of the ICTY and ICTR and the proposed ICC.

Consider the following events that followed soon after the denial of immunity to Pinochet.

(1) Iraqui and Indonesian leaders

Barbara Crosette, 'Dictators Face the Pinochet Syndrome', *New York Times*, August 22, 1999, p. WK 3

The Austrian case involved Izzat Ibrahim al-Duri, regarded as the No. 2 man in Iraq after Saddam Hussein. A Vienna city councilman, Peter Pilz, discovered that Mr. Ibrahim, who is accused of directing the mass murder of Kurds in 1988 and torturing and killing other Iraqi citizens, was in a Vienna hospital for treatment. . . . Mr. Pilz filed a criminal complaint with Austrian authorities on Monday. Less than 48 hours later, Mr. Ibrahim made a hasty exit and Austria, to the consternation of human rights groups, let him go. So did Jordan, since Mr. Ibrahim had to pass through Amman. . . .

In Jakarta, a leading newspaper said the Pinochet Syndrome also haunts President Suharto of Indonesia, who was forced from office last year after three decades of autocratic rule. Mr. Suharto, who is under investigation by the new Indonesian Government, . . . is 78 years old and seriously ill. . . .

Like other strongmen who tolerate inferior health care for everyone but themselves, Mr. Suharto had been expected to seek medical treatment in Germany, as he has done in the past. Not likely, people close to his family told The Jakarta Post. A host of people would be waiting with warrants.

Human Rights Watch has compiled a list of ex-tyrants who have fled their battered countries for what they thought were safer addresses. Idi Amin of Uganda is still in Saudi Arabia; Jean-Claude Duvalier of Haiti is in France and one of his successors, Raul Cedras, is in Panama; Paraguay's Alfredo Stroessner is in Brazil, and Hissan Habre of Chad is in Senegal.

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(2) Chad leader

Norimitsu Onishi, 'An African Dictator Faces Trial in His Place of Refuge', *New York Times*, March 1, 2000, p. A3

. . . [T]he former president of Chad is expected to stand trial later this year on charges of torture. The case against the former president, Hissene Habre, is being watched closely in Africa, where brutal rulers have engaged in widespread human rights violations with impunity. . . .

. . .

'This is a message to other African leaders that nothing will be the same any longer,' said Delphine Djiraibe, president of a human rights group working on the case. 'It shows that Africa can also play a role in the fight for human rights and can fight on its own soil.'

. . . Mr. Habre, 57, . . . has lived in exile in Dakar since being toppled from power in 1990. . . . [S]everal human rights organizations have worked quietly for months to collect evidence against Mr. Habre, drawing on the legal precedent established in the Pinochet case. . . .

In the case of Mr. Habre, the human rights groups say they have documented 97 cases of political killings, 142 cases of torture and 100 cases of people who have disappeared in Chad, an impoverished, desert nation in central Africa.

. . . [Habre] has been in Dakar under house arrest since being indicted on torture charges by the court.

. . .

Senegal is regarded as having one of the few independent judiciaries in Africa, and that is one of the main reasons that international human rights organizations, including Human Rights Watch and the International Federation of Human Rights, have joined in the case against Mr. Habre.

. . . Reed Brody, advocacy director of the New York-based Human Rights Watch, [said]: 'The case has profound implications in a way that it would not if it were being held in a European country, particularly a colonial country. That's one of the things that Latin Americans were saying about the Pinochet case—that it was Europe imposing its laws'. . . .

. . . In 1982, Mr Habre, a rebel chieftain, seized power and ingratiated himself with France and the United States for being a staunch opponent of Col. Muammar el-Qaddafi of Libya.

During Mr. Habre's eight-year reign, his American and French backers often portrayed him positively, describing him as a charismatic leader and intellectual who genuinely cared about issues facing the developing world. But the French eventually tired of Mr. Habre. . . . [I]n December 1990, after a French-supported invasion from Sudan, Idriss Deby—who had been Mr. Habre's military commander and the country's No. 2 leader—overthrew Mr. Habre and sent him into exile.

In Dakar, several Senegalese intellectuals said it was hypocritical of Western human rights organizations to pursue Mr. Habre now, given their governments' previous support. 'Hissene Habre was received and honored in Paris as a head of

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state and ally,' said Babacar Sine, one of Senegal's most famous intellectuals. 'France never regarded him as a dictator'.

Mr. Sine, who has known Mr. Habre for 40 years, added: 'This case is much more complex than the role of Habre. There is the role of France that supported him. There is the role of the United States that supported him. If we are to judge Hissene Habre, we have to also judge those who supported him'.

. . .

. . . Human rights organizations behind the case are pushing for the trial to take place in Senegal. If Mr. Habre were extradited to Chad, they say, a fair trial would be unlikely because his testimony would implicate members of the current government, including President Deby.

. . .

QUESTIONS

1. The concern that universal jurisdiction could be abused by states against leaders of their current or former enemies (and military opponents) was expressed in the *Pinochet* opinions. How serious a problem do you take this to be? What steps could be taken to control the problem? What significance do you attach to the fact that acts that are alleged to constitute an international law crime may have taken place in the framework of UN-authorized action under Chapter VII of the Charter, or in the framework of direction by a regional organization like NATO?

2. The article on Rwanda by Alvarez at p. 1190, *supra*, also refers to the responsibility of other states, particularly Western powers, for serious and systemic violations of human rights by leaders of third-world states. Based on the definitions of international law crimes in the Statutes for the ICTY, ICTR and ICC, what charges could be brought—and realistically, in what states?

ADDITIONAL READING

Andrea Bianchi, 'Immunity *versus* Human Rights: The Pinochet Case', 10 EJIL 1 (1999); Richard Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law', 21 Hum. Rts. Q. 927 (1999); Curtis Bradley and Jack Goldsmith, 'Pinochet and International Human Rights Litigation', 97 Mich. L. Rev. 2129 (1999).

E. TRUTH COMMISSIONS

Sections B–D examined the role of international and national courts in the prosecution of individuals accused of committing international crimes (whether defined by customary international law, by Statutes of tribunals that were adopted by the Security Council or were parts of a treaty to be ratified by states, or by state statutes incorporating the international definitions of the crime). The issues to be

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