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The Pinochet judgment...

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**THE PINOCHET JUDGMENT:
NEW ACCOUNTABILITY FOR OLD DICTATORS**

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CONTENTS

INTRODUCTION	5
I BACKGROUND	7
A Pinochet's Coup	7
B Crimes Committed	8
C Domestic Impunity	10
(1) <i>Amnesty</i>	10
(2) <i>Personal immunities</i>	11
D Spanish Indictment	12
E Initial Court Cases	14
II THE SECOND HOUSE OF LORDS DECISION	16
A Torture Convention and the Relevant Legal Concepts	17
(1) <i>Torture Convention</i>	18
(2) <i>Jus cogens</i>	18
(3) <i>Crimes against humanity</i>	19
(4) <i>Immunity ratione personae</i>	20
(5) <i>Immunity ratione materiae</i>	21
B Sovereign Immunity	21
(1) <i>Does the absence of immunity ratione materiae for torture extend to other crimes against humanity?</i>	23
(2) <i>The treatment of murder charges</i>	27
(3) <i>Liability of sitting Heads of State</i>	29
C Extradition	34
(1) <i>The decision on extradition</i>	35
(2) <i>The issue</i>	35
(3) <i>Pinochet's arguments</i>	38
(4) <i>The majority view</i>	39
(5) <i>International law on extradition for crimes against humanity</i>	40
(6) <i>Alternative approaches to the extradition question</i>	43
(a) <i>Resolution of ambiguity in favour of double criminality</i>	43
(b) <i>Retroactive application of the Criminal Justice Act</i>	45
(c) <i>Importation of customary international law</i>	47
III: THE NEW ZEALAND SITUATION	50
A Immunity	50
(1) <i>Sovereign immunity</i>	51
(2) <i>Head of State immunity</i>	51
(3) <i>Other immunities</i>	52
(4) <i>Conclusion on immunity</i>	54
B Extraterritorial Prosecution for Crimes Against Humanity	54
(1) <i>Statutory extraterritorial offences</i>	54
(2) <i>Non-statutory crimes against humanity</i>	55

(3)	<i>Retroactive operation of statutory crimes</i>	56
(4)	<i>Consent of the Attorney General required for prosecution of torture</i>	57
(5)	<i>Conclusion on extraterritorial prosecution</i>	62
C	<i>Extradition Laws</i>	62
(1)	<i>Double criminality</i>	62
(2)	<i>Extradition for crimes against humanity</i>	63
(3)	<i>Extradition for non-statutory crimes against humanity</i>	63
(4)	<i>Conclusion on extradition</i>	65
D	<i>Proposal for Reform of New Zealand Law</i>	65
IV	<i>THE FUTURE</i>	67

ABSTRACT

The purpose of this paper is to analyse the reasoning and effect of the March 1999 House of Lords Pinochet judgment. It argues that the decision that immunity is unavailable for former Heads of State who commit torture could be applied to other crimes against humanity and to sitting Heads of State. It suggests that the ruling that Pinochet could not be extradited for torture before 1988 failed to take into account the emerging international legal duty to prosecute or extradite perpetrators of crimes against humanity. It proposes three alternative ways that that duty could have been met, consistent with British law. The paper then reviews New Zealand laws on the prosecution and extradition of international crimes. It concludes that the legal situation in respect of torture is similar to the United Kingdom, but that there are considerable legislative hurdles to prosecuting other crimes against humanity which should be removed. The paper concludes that the judgment is already having a positive deterrent effect on international criminals, and that it may result in further prosecutions of former Heads of State and state agents who harm their citizens.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 11000 words.

"In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are properly to be protected. In this context, the exalted rank of the accused can afford no defence." Lord Millet.

INTRODUCTION

Late last year, an elderly foreign visitor was arrested in a hospital in London. The visitor was Chile's former Head of State, Senator Augusto Pinochet. Spain had asked for his extradition from Britain for crimes against humanity. The arrest marked the beginning of one of the century's most important and complex judicial processes.

This paper analyses the landmark second judgment of the House of Lords.¹ The decision was that Pinochet was not immune from the charges of torture, but could only be extradited for torture committed after 1988, when Britain introduced a statutory crime of extraterritorial torture.

The case represents graphically the collision between fundamentally incompatible concepts, the universal liability of individuals for fundamental human rights abuses and the sanctity of state and Head of State sovereignty. The decision will help to confirm the supremacy of

human rights for the new millenium, but it also demonstrates the need to ensure that the protection of international legal human rights norms is not impeded by statutory technicalities.

The two hundred and one page judgment of the House of Lords is of such complexity that even its authors concede that it is obscure.² This paper will endeavour to make sense of that obscurity, and analyse the likely effect of the judgment on the domestic prosecution of crimes against humanity.

Part I of the paper sets out the factual background to the case. It outlines the nature of the abuses that occurred under Pinochet's regime, and the failure of Chile to take serious steps to punish those injustices. This analysis provides context and basis for international intervention. Part II also briefly traverses the British and Spanish cases leading up to the decision.

Part II summarises the second House of Lords decision and examines its two main components: sovereign immunity and extradition. On the question of sovereign immunity, the paper argues that the Law Lords applied orthodox legal concepts, but reached a groundbreaking conclusion,

¹ *R v Bow Street Stipendiary Magistrate and ors ex p Pinochet Ugarte* (No 3) [1999] 2 WLR 827.

² Joshua Rosenberg "The Pinochet Case and Cameras in Court" [1999] PL 178, 183.

that could facilitate the prosecution of former Heads of State for any crime against humanity. It suggests that the same reasoning could be used to prosecute sitting Heads of State. On the extradition question, the paper suggests that there is a duty to punish crimes against humanity, and that the strict interpretation of the Extradition Act 1989 (UK) was not appropriate. It proposes three alternative approaches under which Pinochet could have been extradited to face charges on all counts of torture.

Part III asks what would happen if Pinochet arrived in New Zealand tomorrow and Spain sought his extradition for crimes against humanity. It reviews the New Zealand common law and statutory framework on sovereign immunity, crimes against humanity, and extradition, and concludes that legislative amendments are required if New Zealand is to meet the evolving obligation to prosecute or extradite international criminals.

I BACKGROUND

A Pinochet's Coup

General Pinochet led a bloody military takeover of the democratically elected socialist government of Salvador Allende on 11 September 1973.

The takeover was violent and quick.³ Power in the new regime was concentrated in Pinochet. Initially, he had the dual roles Commander in Chief of the Army and Supreme Commander of the Nation. He later became President. Upon seizing of power, he set up a high level military group, which became the National Intelligence Directorate (DINA). Their task was to eliminate the far left. That group operated under Pinochet's direct command, and was responsible for widespread human rights abuses.⁴

B Crimes Committed

The tactics alleged to have been used by the DINA are shocking, even in the context of the array of other human rights violations seen this century. The Spanish request graphically describes the nature of the torture alleged to have been committed:

The most usual method was "the grill" consisting of a metal table on which the victim was laid naked and his extremities tied and electrical shocks were applied to the lips, genitals, wounds or metal prosthesis; also two persons, relatives or friends, were placed in two metal

³ Robert Harris *A Tale of Two Chileans* (Pinochet Supporters Abroad, London, 1998), 28-29.

⁴ Robert J Quinn "Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of A Prior Regime: Chile's New Model" (1994) *Fordham L Rev* 905, 912.

drawers one on top of the other so that when the one above was tortured the psychological impact was felt by the other; on other occasions the victim was suspended from a bar by the wrists and/or the knees, and over a prolonged period while held in this situation electric current was applied to him, cutting wounds were inflicted or he was beaten; or the "dry submarine" method was applied, i.e. placing a bag on the head until close to suffocation, also drugs were used and boiling water was thrown on various detainees to punish them as a foretaste for the death which they would later suffer.⁵

The present Chilean Government has acknowledged that serious abuses were committed under Pinochet's regime to the United Nations Committee on Torture.⁶ In 1990, it told the Committee "[the] policy was characterised by very serious forms of human rights violations: executions without trial; executions following trials in which due process was not guaranteed; mass arrests of persons who were taken to concentration camps where they were subjected to very degrading conditions of detention and many of whom "disappeared"; widespread torture and ill treatment ... This is the context

⁵ *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Urgarte (No. 1)* [1998] 3 WLR, 1456.

⁶ Chile became a party to the Torture Convention in 1988.

in which the use of torture and other cruel, inhuman or degrading treatment or punishment was situated during the previous regime".⁷

A National Truth and Reconciliation Commission was set up by the new Government in April 1990. Its mandate was investigate murder and disappearances only. The Commission, together with its successor, the Reparation and Reconciliation Corporation, found that there had been 1,102 "disappearances", and 2,095 extrajudicial executions and deaths under torture during Pinochet's regime.⁸ Both reports said that the DINA played a central role in implementing the policies, and that the DINA reported directly to General Pinochet.⁹ Neither commission published the names of the perpetrators of crimes,¹⁰ and no prosecutions resulted.¹¹

C Domestic impunity

(1) Amnesty

In April 1978 the military junta issued Decree Law No 2191. This granted "amnesty to all persons who committed, as perpetrators, accomplices, or as

⁷Amnesty International "Chile: Torture: An International Crime" AI Index AMR 22 October 1999.

⁸Amnesty International "United Kingdom: The Pinochet Case. Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity" AI Index EUR 45/01/99, January 1999, 4.

⁹"United Kingdom: The Pinochet Case", above n 8, 4.

¹⁰Daan Bronkhorst *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (Amnesty International Dutch Section, Amsterdam, 1995) 20.

covering up, criminal offences during the period of the State of Siege, between 11 September 1973 and 10 March 1978, unless they are currently on trial or have been convicted". Common crimes were exempted from the amnesty. The exclusion of those already convicted ensured that political prisoners remained in prison.¹²

This amnesty has been a key feature in ensuring impunity for those involved in the offences, as the majority of the abuses occurred in the first four years of the regime.¹³ In the first year of the democratic Government the amnesty was declared legal by the Supreme Court¹⁴ so it is now effectively constitutionally entrenched.

(2) *Personal immunities*

Pinochet benefits from full personal immunity under the Chilean constitution in light of his position as Senator for life, which he has held since his retirement from the armed forces. Under the Chilean constitution, which he was instrumental in drafting, Senators for life cannot be tried under any charges. Although this immunity can be lifted in certain

¹¹ Quinn, above n 4, 918.

¹² Quinn, above n 4, 918.

¹³ "United Kingdom: The Pinochet Case", above n 8, 5.

¹⁴ "United Kingdom: The Pinochet case", above n 8, 4.

circumstances,¹⁵ prior to stepping down Pinochet secured the positions of sympathetic Supreme Court judges, creating a further hurdle to his prosecution.¹⁶

D Spanish Indictment

In light of the legislative bars against the prosecution of Pinochet in Chile, victims of his regime (some of whom are now citizens of other states), and human rights activists have been anxious to have him indicted under an alternative jurisdiction.

Prosecution by an international body has not to date been an option. No international criminal tribunal has been set up to look into crimes committed in Chile.¹⁷ The Rome Statute of the International Criminal Court 1998, although designed to create universal jurisdiction for crimes of the nature of those committed during the Pinochet regime, is not retrospective.¹⁸

¹⁵ Under art 58 of the Chilean Constitution and arts 611 to 618 of the Penal Procedure Code parliamentary immunity can be lifted. However this is unlikely to occur under the present regime. See "United Kingdom: The Pinochet case" above n. 8, 5.

¹⁶ Douglas Cassel "The Pinochet Case: Expanding International Accountability" to be published in *Northwestern Journal of International Affairs*, 4.

¹⁷ The only international criminal tribunals set up to date have been the Nuremberg Tribunal, International Criminal Tribunal for Rwanda, International Criminal Tribunal for the Former Yugoslavia, and the Tokyo Tribunal.

¹⁸ Article 24 Rome Statute of the International Criminal Court 1988.

The Spanish Courts began investigating Pinochet's alleged involvement of the murder of seven people in 1996, and the case expanded into charges of genocide, murder and torture. However, with Pinochet in Chile, Spain was unable to proceed substantively with the case.¹⁹

Pinochet's private visit late last year to the United Kingdom created the opportunity to fill the missing component in the Spanish proceedings. Pinochet was hospitalised for back problems and human rights activists learned of his presence. On 16 October 1998, Spain sought his provisional arrest for the murder of Spanish citizens pending a formal extradition request.²⁰ The British Crown Prosecution Service agreed. Later that day, Pinochet's hospital bed was surrounded by police and he was arrested.

So commenced the first step in a complex and controversial legal web.

¹⁹ Equipo Nizkor *Special Report on the Preparation and development of General Augusto Pinochet's detention and Spanish Judges's Ruling Recognising the Principle of Universal Criminal Jurisdiction for Domestic Courts*, (Madrid, 5 November 1998) 2
<<http://www.derechos.org/nizkor/chile/juicio/report.html>>

The proceedings had been launched in Spain prior to Pinochet's arrival in Britain, but a trial in absentia was not possible. See Peter Weiss "Punishing Pinochet" 8 August 1998, CAQ no 64 <<http://www.izquierda-unida.es/Derechos/Documentos/Art%20peter%20weis%201998.htm>>, 2; Human Rights Watch "Chile: When Tyrants Tremble: The Pinochet Case", 2 <<http://www.hrw.org/hrw/reports/1999/chile/>>.

²⁰ Initially the warrant was for murder. On 23 October, a second provisional warrant was executed following a second Spanish international warrant of arrest. It broadened the

E Initial Court Cases

The legal process for extraditing a person from the United Kingdom is not simple, even in the most pedestrian of cases. However Pinochet has to date pursued all legal avenues available to fight the charges.²¹

His first request was for habeus corpus. He also challenged the legality of the issue and execution of the provisional warrants for his arrest. Although his plea for habeus corpus was declined, on 28 October the High Court granted certiorari to quash the second provisional warrant, on the grounds that as a former Head of State, Pinochet enjoyed immunity from criminal prosecution.²² However, the Court held that its order would not take effect until the determination of any appeal, and granted immediate leave for the Crown Prosecution Service, on behalf of the Government of Spain, to appeal its decision to the House of Lords. Accordingly, Pinochet remained under arrest.

terms of the warrant from murder to torture, conspiracy to commit torture, hostage taking, conspiracy to commit hostage taking, and conspiracy to commit murder.

²¹ Most recently, on 22 October 1999 Pinochet's lawyers filed an appeal against the Metropolitan Magistrate's 8 October 1999 ruling that extradition could proceed. T R Reid "Pinochet Appeals Extradition from Britain" *Washington Post*, 23 October 99, A18.

The legal machinations continued abroad. In November Spain's highest criminal Court, the Spanish National Court, unanimously upheld the legality of Judge Garzon's proceedings, in the face of a challenge by the Government of Spain. The Court held that Spain was able to prosecute Pinochet on the basis that there is universal jurisdiction for genocide, state terrorism, and torture, and additionally because more than 50 Spanish nationals were among the victims. The result of this decision was a formal extradition request from Spain to the United Kingdom.²³

In Britain, the House of Lords met in the same month to consider the appeal against the High Court order quashing the second provisional warrant. With the assistance of arguments from Amnesty International, which a committee of Lords had granted leave to intervene in the appeal, the majority judges held that Pinochet's former position as Head of State in Chile did not render him immune from prosecution, and that the extradition proceedings could continue.²⁴

The decision, broadcast live,²⁵ was hailed as a victory for human rights. But the euphoria was short lived. A few days after the decision, Pinochet's lawyers learned for the first time that one of the majority judges, Lord

²² For a discussion of the judgment see Paul Simo "The Act of State Doctrine and "Public Acts" for the purpose of Sovereign Immunity: a commentary on the Pinochet decision of the High Court of England" <http://www.nd.edu/~psimo/pinochetnew.html>.

²³ Cassel, above n 16, 7-8.

²⁴ *Pinochet No 1*, above n 5.

Hoffman, was a Chair and director of Amnesty International Charity Limited, and his wife; a long serving employee of Amnesty International. Pinochet's lawyers petitioned the House of Lords for annulment of the decision on the ground that Lord Hoffman should have been disqualified from sitting on the grounds of possible bias, and in an almost unprecedented decision, an appeal committee of five Lords agreed.²⁶

II THE SECOND HOUSE OF LORDS DECISION

The second House of Lords case was heard before a panel of seven Law Lords, none of whom was involved in the first case. The decision to appoint seven judges to hear the case underlined the gravity of the case.

In the first House of Lords case the legal arguments had related almost exclusively to the question of whether or not Pinochet was immune from prosecution in light of his former position as Head of State. In this second case, however, the House of Lords were faced with a new angle: whether the crimes were in fact extradition crimes within the meaning of the Extradition Act 1989. This issue had not been contested by the defence in the earlier hearings.

²⁵ Rosenberg, above n 2, 183.

²⁶ *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Urdarte (No. 2)* [1999] 4 All ER, 897.

In short, the decision of the House of Lords was that:

1. Pinochet's status as the former Head of State of Chile afforded him immunity in respect of his "official functions" performed while in office.
2. The commission of torture is not an "official function" of a Head of State.
3. Pinochet could be extradited only in respect of torture committed after 1988, as the United Kingdom did not have extraterritorial jurisdiction for crimes of torture prior to 1988.

The decision that Pinochet could only be extradited for torture committed after 1988 drastically reduced the number for charges for which he could be extradited.²⁷

A Torture Convention and the Relevant Legal Concepts

²⁷ Spain has since submitted 34 more post 1988 charges. On 8 October 1999 the Bow St Magistrates Court ruled that it was entitled to receive and consider that further information, and committed Pinochet to await the decision of the Secretary of State on Extradition. "Pinowatch Extradition ruling", marga@derechos.org, 9 October 1999, 4.

In order to understand the judgment it is useful to first set it in context by outlining the relevant provisions of the Torture Convention and the international legal concepts underpinning it.

(1) *Torture Convention*

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ("The Torture Convention") sets up universal jurisdiction for crimes of torture in the domestic jurisdictions of the States Parties. Under Article 4 of the Torture Convention, States Parties are obliged to ensure that all acts of torture are offences under their domestic criminal law. Under Article 5, parties are required to set up jurisdiction over offences when the offender is present in its territory, so that they can be either prosecuted or extradited.²⁸ A fundamental purpose of the Convention is to ensure that there is no safe haven for torturers.²⁹

²⁸ See Matthew Lippman "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1994) 17 *2 B C Int'l & Comp L Rev* 275, 316.

²⁹ J Herman Burgers and Hans Danelius *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, The Netherlands, 1988) 72.

All parties to the Pinochet proceedings, namely Britain, Spain and Chile, ratified the Torture Convention in 1988.

(2) *Jus cogens*

A "*jus cogens*" rule is "a peremptory norm of general international law ... accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".³⁰ *Jus cogens* laws have the highest status of all international laws and override other laws.³¹

(3) *Crimes against humanity*

Crimes against humanity are crimes of such seriousness that they strike at the conscience of mankind. Their gravity is such that their commission is seen as an attack against the international order. Accordingly, they may be prosecuted under international law.³² The most up to date definition of

³⁰ Article 53 Vienna Convention on the Law of Treaties 1969.

³¹ Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law I* (9 ed, Longman Group UK Ltd, 1992)4, Karen Parker and Lyn Beth Neylon "*Jus cogens: Compelling the Law of Human Rights*" (1999) 12 *Hast Int'l & Comp L Rev* 411, 414-416; Andreas Zimmerman "Sovereign Immunity and Violations of International *Jus cogens* - Some Critical Remarks" (1995) 16 *Mich L Rev* 433, 437-438; M Cherif Bassiouni "International Crimes: *Jus cogens* and *Obligatio erga omnes*" 59:4 *Law & Contemp Probs* 63, 67.

³² Christopher C Joyner "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability" (1996) 59: 4 *Law & Contemp Probs*, 153,

crimes against humanity is contained in Article 7 of the Rome Statute of the International Criminal Court 1998. The crimes included are the following, when committed as part of a widespread or systematic attack³³ against a civilian population: murder, extermination, enslavement,³⁴ deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other grave sexual violence, persecution of a group in connection with another crime against humanity, disappearance, apartheid, or other inhumane acts causing great suffering or injury.

Genocide has similar legal characteristics to a crimes against humanity but is sometimes categorised separately.³⁵

The laws proscribing crimes against humanity and genocide are generally considered to be *jus cogens*.³⁶

167. Ian Brownlie *Principles of Public International Law* (5ed, Oxford, New York, 1998) 566-567. Article 6(c) of the Charter of the International Military Tribunal of Nuremberg conferred jurisdiction upon the Tribunal for "crimes against humanity, namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds ... whether or not in violation of the domestic law of the country where perpetrated."

³³ Article 7(2) of the Rome Statute of the International Criminal Court makes it clear that an "attack" is not necessary a military attack.

³⁴ Slavery is one of the oldest international crimes. For a discussion of the rules on the prosecution, extradition and punishment of slavery in the various Conventions outlawing slavery see M Cherif Bassiouni and Edward M Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, The Netherlands, 1995) 132-156.

³⁵ Genocide is criminalised under the Convention on the Prevention and Punishment of the Crime of Genocide 1948 "the Genocide Convention".

³⁶ *Jus cogens* and *Obligatio erga omnes*", above n31, 68.

(4) *Immunity ratione personae*

Sitting Heads of State and diplomatic heads of mission have traditionally benefited from immunity *ratione personae*. This is a blanket immunity, attaching to the person of the office holder. It renders the incumbent immune from the civil or criminal jurisdiction of other states. It is based on the notion that one sovereign monarch should not be subject to the jurisdiction of another sovereign monarch, as they are of equal status.³⁷ The immunity has existed for centuries, and historically existed to avoid offending the sovereign's dignity and mystique.³⁸

(5) *Immunity ratione materiae*

A former Head of State (and former head of a diplomatic mission) has traditionally benefited from immunity *ratione materiae*, a lesser immunity than that enjoyed during his or her tenure. The immunity is in respect of official functions performed while in office only. The immunity is the same as that of the State itself.³⁹

³⁷ Arthur Watts "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers" (1994) 11 *Recueil Des Cours*, 19, 52.

³⁸ Malcolm M Shaw *International Law* (4 ed, Cambridge University Press, Cambridge, 1997) 492. For a useful description of the early development of Head of State immunity

B Sovereign Immunity

The first key question that the Law Lords considered was whether Pinochet could benefit from immunity *ratione materiae*, in light of his position as the former Head of State in Chile. The Law Lords had the advantage of the earlier House of Lords judgment, which had carefully considered that point, and they did not depart substantially from their predecessors' conclusion.

The Law Lords started their consideration of the issues by looking at the relevant domestic statutes. Unlike the extradition question, however, which they decided turned on the domestic statutes, they considered that the statutes relevant to the immunity question reflected customary international law. They came to this view because under s20(1)(a) of the State Immunity Act 1978, the Diplomatic Privileges Act 1964 applies, subject to "any necessary modifications", to a Head of State as if s/he were the Head of a diplomatic mission. The Diplomatic Privileges Act 1964 imports into United Kingdom law the Vienna Convention on Diplomatic Relations 1961, which provides that a diplomatic agent has immunity from criminal and civil jurisdiction until s/he leaves the post, but that the

see William R Hartl "Sovereign Immunity: An outdated doctrine faces demise in a changing judicial arena." (1993) 64 Nth Dak L Rev 401, 402-4.

³⁹ Watts, above n 37, 88-89.

immunity subsists for acts performed "in the exercise of his functions".⁴⁰ At international law, too, a former Head of State has immunity in respect of official functions performed during his or her tenure.

The Law Lords held, in a compellingly simple conclusion, that the commission of torture could not be an "official function" of a Head of State, and that immunity *ratione materiae* was therefore unavailable to Pinochet. This is the first time that a domestic court has held that a former Head of State of a foreign country is not immune from its criminal jurisdiction. However all the majority Law Lords expressed obiter views that sitting Heads of State are inviolable.⁴¹

(1) *Does the absence of immunity ratione materiae for torture extend to other crimes against humanity?*

The question of whether immunity *ratione materiae* was unavailable because torture is a crime against humanity, or because torture is outlawed internationally by the Torture Convention, to which all parties were signatory, is pivotal when assessing the implications of the judgment. If it

⁴⁰ A less circuitous route to the same conclusion was in fact available to the Law Lords. Section 20(1)(a) of the State Immunity Act applies the Diplomatic Privileges Act 1964 to "a sovereign or other Head of State". The absence of a temporal element in the section would suggest that it refers only to *sitting* sovereigns and Heads of State. Thus, in the absence of a statutory provision codifying the immunity of to *former* Heads of State, the Law Lords could have immediately applied customary international law, on the basis that it forms part of British common law.

was the latter, the judgment will be narrow in its effect on international law. If, however, it was the former, then the case will have broad reaching ramifications, as it will provide authority for the prosecution of former Heads of State in domestic courts for *any* crimes against humanity.⁴²

A variety of reasons were advanced by the Law Lords when concluding that Pinochet was not immune for the charges of torture. The reasoning of the different judges on this important issue is somewhat complex, so it is analysed below in some detail.

It is not clear from Lord Browne Wilkinson's judgment exactly why he considered immunity was unavailable for torture. Initially, he seemed to suggest that immunity did not apply because torture is *jus cogens* and a crime against humanity.⁴³ Later, he indicated that the immunity existed prior to the Torture Convention, but simultaneously acknowledged that torture was an international crime of *jus cogens* character at that time.⁴⁴ His rationale for the conclusion that immunity subsisted up until the Torture Convention was that it was only after the Torture Convention that torture could be considered a "fully constituted international crime". He

⁴¹ *Pinochet no 3*, above n 1, per Lord Browne Wilkinson, 844; Lord Hope of Craighead, 886; Lord Saville of Newdigate, 903; Lord Millet: 905 and 913; Lord Phillips, 916.

⁴² The Genocide Convention applies to "constitutionally responsible rulers, public officials, or private individuals". However the Convention's absence of immunity does not necessarily extend to genocide tried in foreign domestic courts, as the Convention does not empower States Parties to prosecute genocide extraterritorially.

⁴³ *Pinochet no 3*, above n 1, 846.

⁴⁴ *Pinochet no 3*, above n 1, 848.

suggested that in order for an international crime to become “fully constituted” it needs “some form of universal jurisdiction” and said that the Torture Convention provided that missing mechanism. Notwithstanding his views on the need for “universal jurisdiction” Lord Browne-Wilkinson did not restrict the absence of immunity *ratione materiae* to acts of torture. When making his observations that torture was not a fully constituted international crime prior to the Torture Convention, Lord Browne Wilkinson said “at that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts”, thereby suggesting that the existence of an international criminal tribunal may create the requisite universal jurisdiction. The Rome Statute of the International Criminal Court 1998 sets up such a tribunal, to prosecute, inter alia, crimes against humanity. Accordingly, all crimes against humanity could be fully constituted international crimes under Lord Brown Wilkinson’s criteria. Immunity *ratione materiae* would not attach to crimes against humanity committed after the signing of the Rome Statute of the International Criminal Court in 1998.⁴⁵

⁴⁵ It is also arguable that immunity *ratione materiae* would subsist until the Rome Statute of the International Criminal Court came into force, which occurs following deposit of the 60th instrument of ratification. At 16 September 1999 there were 86 signatories and 4 ratifications. <<http://www.iccnw.org>>

Lord Hope of Craighead accepted the reasoning of Lord Slynn of Hadley⁴⁶ from the first House of Lords judgment, that in order for immunity *ratione materiae* to be unavailable to a person accused of a crime, the state asserting and the state being asked to refuse immunity must each be party to a Convention defining the act as a crime at international law and empowering the state to prevent or prosecute the crime extraterritorially. In countries such as the United Kingdom where conventions are not self executing, the Convention must also have been incorporated into domestic law.⁴⁷ He also considered that the crime must have been committed as part of a systematic policy.⁴⁸ The effect of this reasoning would be that immunity *ratione materiae* is only dislodged where the crime in question is systematic torture or apartheid, and the parties to the proceedings are signatories to and have implemented the terms of the relevant convention (ie. the Torture Convention or the Apartheid Convention). This is because those are the only Conventions that set up universal domestic jurisdiction for crimes against humanity.⁴⁹ Similarly, Lord Saville of Newdigate said that Chile, Spain and Britain, by becoming parties to the Torture

⁴⁶ The fact that Lord Hope of Craighead quoted Lord Slynn of Hadley is itself of interest in that it provides authority to the first House of Lords judgment.

⁴⁷ *Pinochet no 3*, above n 1, 882.

⁴⁸ *Pinochet no 3*, above n 1, 886.

⁴⁹ Article 4(b) of the Convention on the Suppression and Punishment of the Crime of Apartheid 1973 requires states to adopt legislation to bring to trial persons accused of apartheid, whether or not they reside the territory of the state in which the acts oare committed. Under art 5, persons who have committed apartheid may be tried by any state party which may acquire jurisdiction over the person. The Genocide Convention does not empower states parties to prosecute genocide extraterritorially (see Article 6 which says persons shall be tried in the territory where the act was committed or by an international penal tribunal accepted by the contracting parties). However article 4 of the Genocide Convention expressly applies the Convention to officials and rulers.

Convention, had agreed to an exception to the general rule of immunity *ratione materiae* - suggesting that immunity *ratione materiae* would continue to apply to other crimes against humanity.

Lords Millet and Phillips took the most expansive approach. Lord Millet considered that internationally criminal acts committed by a sovereign power by their very nature attract individual criminal responsibility.⁵⁰ He expressed the view that universal jurisdiction for crimes against humanity has existed since "well before 1984". He summed up his decision by saying "[i]n future, those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence". Lord Phillips concluded "if Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity for prosecution for any crime that formed part of that campaign."⁵¹ Both judgments are therefore clear authority for the proposition that immunity *ratione materiae* is not available for any crime against humanity. Lord

⁵⁰ *Pinochet no 3*, above n 1, 914.

⁵¹ *Pinochet no 3*, above n 1, 925. Lord Phillips' earlier statements, however, are not entirely consistent with this conclusion. For example at 924 he suggests that if the Genocide Convention had not expressly held responsible rulers and public officials liable, an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to immunity *ratione materiae*.

Hutton appears to favour a similar approach, implying that immunity is unavailable for any international crime.⁵²

Thus, the majority of the Law Lords were of the view that immunity *ratione materiae* cannot be invoked in respect of any crime against humanity. This may pave the way for the future indictment, in domestic jurisdictions, of state agents, and former Heads of State who have committed crimes against humanity.

(2) *The treatment of murder charges*

The Law Lords' views on whether Pinochet was immune to charges of murder are, however, also relevant to the question of whether the decision on the unavailability of immunity for torture is applicable to other crimes against humanity. The prosecution did not argue that immunity was unavailable to Pinochet for the charges of murder and conspiracy to murder.⁵³ Nevertheless Lord Phillips held that immunity did not exist for conspiracy to murder as the entirety of his conduct formed part of a campaign that violated international law.⁵⁴ Lord Millet reached the same conclusion, although not because conspiracy to murder on the scale alleged was a crime against humanity but because it took place in Spain, the forum

⁵² *Pinochet no 3*, above n 1, 900-901.

⁵³ *Pinochet no 3*, above n 1, 848.

⁵⁴ *Pinochet no 3*, above n 1, 925, 927.

country.⁵⁵ The other majority Law Lords held that Pinochet had immunity in respect of the murder charges.⁵⁶

There is considerable tension between the decision of Lords Browne Wilkinson and Hutton that immunity existed for murder, and their conclusion that immunity was unavailable for torture, given that the stated rationale for their conclusion on torture could be extended to all crimes against humanity. This is because systematic murder has been clearly categorised as a crime against humanity since the Nuremberg Tribunal.⁵⁷

The Law Lords should therefore have assessed whether the murder had been committed on such a scale as to constitute a crime against humanity. If the answer was in the affirmative, then applying their own reasoning, immunity should have been unavailable on these charges.

It is regrettable that the prosecution failed to argue that immunity was unavailable for murder. Such an argument would have required the Law Lords to address expressly the issue of whether immunity was available for any crime against humanity. Consideration of that question may have resulted in a more definitive ratio decidendi in favour of the proposition that former Heads of State are not immune from any crime against humanity. The weakness of the judgment on the murder issue may dilute

⁵⁵ *Pinochet no 3*, above n 1, 913.

⁵⁶ *Pinochet no 3*, above n 1, per Lord Browne Wilkinson, 848; Lord Hope, 887; Lord Hutton, 888; Lord Saville (by inference), 904.

the impact of the majority reasoning pointing to the absence of immunity for any crime against humanity.

(3) *Liability of sitting Heads of State*

The issue of the liability of sitting Heads of State was dealt with only briefly. Five of the six majority judges said that sitting Heads of State were immune from any form of civil or criminal suit. They were technically correct under United Kingdom domestic law. Section 20(1) of the State Immunity Act 1978 has the effect of rendering Heads of State “inviolable”, by importing and applying to Heads of State diplomatic immunities under article 29 of the Vienna Convention on Diplomatic Relations 1961. However at international law the situation is much less clear cut, and the Law Lords did not distinguish between domestic and international law when asserting the inviolability of an incumbent sovereign.

The Law Lords relied on the views of prominent commentator Sir Arthur Watts to assist them in their arguments that former Heads of State who commit international crimes are not subject to immunity.⁵⁸ However Sir Arthur does not distinguish between sitting and former Heads of State

⁵⁷ This was confirmed last year by the Rome Statute of the International Criminal Court.

⁵⁸ *Pinochet no 3*, above n 1, Lord Browne-Wilkinson 846, Lord Hope of Craighead, 881 and 886, Lord Hutton 888, Lord Phillips 919.

when concluding 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."⁵⁹ This was not acknowledged in the judgment.

History demonstrates that both sitting and former Heads of State have in practice been considered liable by the international community for international crimes committed. The first person to be held accountable for crimes against international peace was the former German Emperor, Kaiser Wilhelm II, who was indicted after the World War One.⁶⁰ In 1945, the allies were planning to bring Hitler to justice while he was still Head of State in Germany.⁶¹ Government officials in the United States and the United Kingdom have frequently stated that the current Iraqi President Saddam Hussein should be brought to justice. Likewise, a raft of international instruments, from the Nuremberg Charter 1946 to the Statute of the International Criminal Court 1998 extend criminal responsibility to Heads of State.⁶² The liability of sitting Heads of State for international

⁵⁹ Watts, above n 37, 84.

⁶⁰ Shigeru Oda "The Individual in International Law" in Max Sorensen (ed) *Manual of Public International Law* (Macmillan, New York, 1968) 469, 515.

⁶¹ United Kingdom: The Pinochet case, above n 8, 24.

⁶² Article 6 of the Charter of the International Military Tribunal for the Far East 1946, Article 7 of the Nuremberg Charter, art IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948), Principle III of the Principles of Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950); art 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954), art 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, art 6(2) of the Statute for the International Criminal Tribunal for Rwanda 1994, art 7 of the UN Draft Code of Crimes Against the Peace and Security of

crimes was forcefully confirmed two months after the Pinochet decision, when the International Criminal Tribunal for the Former Yugoslavia issued a warrant for the arrest of the President of the Federal Republic of Yugoslavia for war crimes.⁶³

All the cases and instruments above involve the punishment of sitting Heads of State by international tribunals rather than domestic courts. It is therefore important to establish whether there is a valid policy or legal basis for a distinction between the liability of a Head of State before a domestic court and an international tribunal.

Legal commentators do not appear to have addressed the specific question of whether there should be a distinction between domestic and international prosecution of Heads of State for international crimes. However the Nuremberg Tribunal, which had express jurisdiction over Heads of State⁶⁴ is described by legal commentators as having been a joint exercise, by the four states which established it, of a jurisdictional right which each was entitled to exercise separately in accordance with international law.⁶⁵ This suggests that the individual states each possessed

Mankind 1996, and most recently art 27 of the Statute for the International Criminal Court 1998.

⁶³ *The Prosecutor of the Tribunal v Slobodan Milosovic*. Warrant of Arrest/ Order for Surrender, 24 May 1999, Case No. IT-99-37-I.

⁶⁴ Article 7 of the Charter of the International Military Tribunal at Nuremberg.

⁶⁵ See for example *Oppenheim's International Law Vol II* (7 ed, Longman Group UK Ltd, Essex, 1952) 580-581.

the right to override the immunity of a Head of State who had committed war crimes or crimes against humanity.

From a policy perspective it may be argued that Head of State immunity before foreign courts is necessary to guard against political problems that might result in the state from which the leader originates if he or she were arrested overseas. However this argument is problematic. First, if the leader is committing crimes against humanity, the political void might have a stabilising rather than a destabilising effect on the regime. In the event, however, that the leadership vacuum did create instability, the jurisdiction in which the Head of State was being tried would be of marginal if any relevance.

A stronger basis for creating a distinction between the liability of a Head of State before a domestic court and an international tribunal is the possible political repercussions for the prosecuting state. This basis, however, is also not persuasive. The punishment of perpetrators of crimes against humanity is a fundamental concern of the international community. Thus, any political or diplomatic difficulties that might face a government who prosecutes a Head of State should not be used to justify impunity. The application of Head of State immunity in the context of a crime against humanity is wholly incompatible with the rationale behind Head of State immunity. As crimes against humanity are viewed as an attack on the

international order, the prosecuting state can be seen as operating on behalf of the international community rather than in its usual role as a municipal jurisdiction of equal status to other states. Furthermore, the "dignity" and "mystique" of a sovereign are irretrievably eroded when he or she commits crimes against humanity. Arguments that they need to be protected in that context cannot therefore reasonably be sustained.

Thus it is suggested that it is difficult to see a sound basis in policy or at international law for distinguishing between the liability of sitting Heads of State before domestic and international jurisdictions. In the context of crimes against humanity, international and domestic jurisdictions can be seen as an interlocking web, the purpose of which is to ensure that perpetrators find no safe haven. The need to prosecute crimes against humanity is the greatest where the accused is a sitting Head of State. To punish the person with ultimate control over the regime is the only effective means to end the crimes.

The Pinochet case would have been an ideal context in which to deal with the issue of sitting Heads of State. A strong obiter statement as to the liability of sitting Heads of State could have been made without the potential adverse political consequences associated with an actual case. Such a statement would have sent a warning to all sitting Heads of State that crimes against humanity will not go unpunished, thereby setting in

place a strong self executing accountability mechanism and deterrent against future abuses. It would also have avoided the main potential negative consequence of the judgment, ie. that criminal Heads of State might be reluctant to cede power and give up their absolute immunity.

The pronouncements on the inviolability of sitting Head of State, however, should not be afforded significant precedential value, as Pinochet was not a sitting Head of State, and the British statutory scheme underlay the conclusion. They do not detract from the groundbreaking decision that immunity is unavailable for former Heads of State who commit torture and other crimes against humanity.

C Extradition

If Senator Pinochet could not rely on Head of State immunity to prevent his extradition, the question still remained as to whether he was liable to be extradited for the crimes he was alleged to have committed. In the view of the majority, he was only liable to be extradited for torture after 1988, when extraterritorial torture was made a statutory offence in the United Kingdom.

This section of the paper argues that the Law Lords:⁶⁶

⁶⁶ Other than Lord Millet.

1. Took an unduly restrictive interpretation of s2 of the Extradition Act 1989 (UK) in deciding that the date that the offence needed to have been criminal in Britain was the date of the act rather than the date of the extradition request; and
2. Failed to consider underlying international legal norms that could have permeated the domestic statutory scheme, thereby facilitating his extradition on all counts of torture.

(1) *The decision on extradition*

The point that the lawyers for Pinochet argued at the new hearing, that was considered to be the pivot upon which the case turned, was the absence of the requisite “double criminality” in respect of the torture charges. Under the generally accepted international principles of extradition law, the state with the alleged criminal in its territory will not extradite unless the crime alleged to have been committed is a crime within its own jurisdiction. The laws of the United Kingdom reflect this principle. A primary purpose behind that rule is encapsulated in the concept “nulla poena sine lege” or “no punishment without law”.⁶⁷ In other words, it is contrary to justice for

⁶⁷ Sharon A Williams, “The Double Criminality Rule and Extradition: A Comparative Analysis” (1991) 15 Nov L Rev, 581, 582.

State A to agree to extradite a person to State B if the person concerned was going to be punished for an act that State A did not consider illegal.

(2) *The issue*

It is necessary to explain in some detail the provisions of the Extradition Act 1989 (UK), since the minute construction of its terms resulted in the decision that extradition could not be effected for the majority of the charges.

The Extradition Act 1989 defines "extradition crimes" in section 2. Section 2(1)(b) has a specific definition relating to extraterritorial extradition crimes, ie crimes committed outside the territory of the United Kingdom. Accordingly, under the Act, both the criminal act in question, as well as the jurisdictional basis for the criminality of that act are relevant to the question of double criminality.

The acts at issue were torture committed outside Spain, and Spain was asserting an extraterritorial right to try the torture. Thus, the criminal offence that needed to exist in the United Kingdom law was extraterritorial torture.

Section 2(1)(b) of the Extradition Act 1989 defines extraterritorial extradition crimes as follows:

(b) an extra-territorial offence against the law of a foreign state ... which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies –

(i) the condition specified in subsection (2) below;

The issue lay in the “condition” referred to in s2(1)(b)(ii) that needs to be satisfied in order for the offence in question to be an “extraterritorial crime”. Section 2(2) defines the “condition” as follows:

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

³² Sharon A. Williams, “The Double Criminality Rule and Extradition: A Comparative Analysis” (1991) 15 *Nov L. Rev.* 361, 362.

(3) *Pinochet's arguments*

Pinochet's lawyers argued that the words "would constitute an extraterritorial offence" (which are also used in s2(1)(a) in respect of intraterritorial offences) should be read as requiring the relevant date for considering whether the offence was criminal in Britain to be *the date of the offence itself*, rather than the date of the extradition request.

The relevance of that argument is that torture was not a statutory extraterritorial offence in Britain until the passage of the Criminal Justice Act 1988. After Britain had acceded to the Torture Convention, torture was expressly criminalised under s134 of the Criminal Justice Act 1988. To create the requisite universal jurisdiction for torture, the section encompassed torture committed outside Britain as well as domestic torture. However the crimes to which the extradition request related almost exclusively to events prior to 1988. The question of whether the Extradition Act required the offence to be criminal in Britain at the date of the extradition request or the crime was therefore considered a central issue.

(4) *The majority view*

In considering this issue, Lord Browne-Wilkinson, who delivered the main judgment on the extradition question, observed that the words “would constitute an offence...” in the Extradition Act “read more easily” as relating to a hypothetical occurrence in the United Kingdom at the time of the extradition request than at the time of the criminal act. He nevertheless chose to go beyond the section, and looked to the broader scheme of the Act. The factor that he considered most persuasive, in leading him to the conclusion that the relevant date was the date of conduct of the offence, was that the Act which preceded the Extradition Act 1989, the Extradition Act 1870, contained a list of extradition crimes to be construed according to “the law existing in England...at the date of the alleged crime”. Lord Browne-Wilkinson concluded that the lack of reference in the travaux preparatoires of the 1989 Act to the need to change the date demonstrated that Parliament must have intended that the date (ie. the time of commission of the offence) remain the same in the new Act. He suggested it was “impossible” that Parliament could have intended to change the date “by side wind and without investigation”.

This restrictive construction of the Extradition Act meant that Pinochet could only be extradited for torture occurring after 1988.

(5) *International law on extradition for crimes against humanity*

The decision not to extradite Pinochet for torture prior to 1988 did not breach the Torture Convention as interpreted by the United Nations Committee Against Torture.⁶⁸ The Committee decided in 1989 in the context of three communications by the relatives of Argentinians torture victims seeking to overturn an Act that predated the Convention, that the Convention does not have retroactive effect. They held that "torture for the purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention".⁶⁹

In spite of the apparent consistency of the decision with the Torture Convention, there are arguably international legal principles that underlie the Torture Convention that support an application of extradition laws to facilitate Pinochet's prosecution for all counts of torture. In that regard it is important to note that the Torture Committee, in the context of the 1988 decision stated that prior to the entry into force of the Convention international law already obliged "all states to take effective measures to prevent torture and to punish acts of torture."⁷⁰ The Committee considered

⁶⁸ If the Convention was been retroactive art 7 would have been breached. The Law Lords did not discuss the Torture Convention in the context of the extradition question.

⁶⁹ Communications Nos 1/1988, 2/1988 and 3/1988, Report of the Committee Against Torture, United Nations, New York 1990, 112.

⁷⁰ Report of the Committee Against Torture, above n 69, 112. A distinction between preexisting international law and the Torture Convention was acknowledged in the preamble to the Torture Convention, which refers to international laws banning torture that predated the Convention, (Article 5 of the Universal Declaration on Human Rights,

that the law in question (guaranteeing impunity for certain military) was incompatible with the spirit and purpose of the Convention, and that the Argentinean government had a "moral obligation" to compensate relatives of the victims.

There is naissant support at international law for the notion that states have a duty to facilitate prosecution of all crimes against humanity. The orthodox view has been that States have a *right* to prosecute crimes against humanity.⁷¹ Some commentators, however, consider the need to punish the perpetrators of *jus cogens* crimes is so fundamental that States are subject to an *obligatio erga omnes* or non derogable duty to prosecute or extradite them.⁷² There is strong argument to suggest that the recent adoption of the

and Article 7 of the International Covenant on Civil and Political rights), and states as a purpose of the Convention the "[desire] to make more effective the struggle against torture and other cruel, inhuman or degrading punishment throughout the world." The Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reinforces this point as follows:

"Many people assume that the Convention's principal aim is to outlaw torture and other cruel, inhuman, or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based on the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition by a number of supportive measures." Above n 29, 1.

⁷¹ Christopher C Joyner "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability" (1994) 59: 4 Law & Contemp Probs, 169. Robert Jennings and Arthur Watts (eds) *Oppenheim's International law* (9 ed, Longman Group UK Ltd, Essex, 1992) 998.

⁷² For Example "*Jus cogens* and *Obligatio erga omnes*", above n 31, 65-66, "United Kingdom, The Pinochet Case", above n 8, 9; Bassiouni and Wise, above n34, 112-131. The "erga omnes" principle has been referred to by the International Court of Justice in the following cases: *Barcelona Traction, Light and Power Co Ltd (Belg v Spain)* 1970 ICJ 3 (Feb 5), *Reservations to the Convention on the Prevention and Punishment of*

Rome Statute of the International Criminal Court 1998 has significantly increased momentum towards the existence of such an obligation.⁷³ There has also been very recent judicial endorsement of the principle. In September, the Federal Court of Australia unreservedly accepted the existence of an *obligatio erga omnes* in the context of genocide.⁷⁴

In 1985, the French Court of Cassation endorsed a firm statement by the French Court of Appeal which provides guidance as to how the *obligatio erga omnes* principle might impact on municipal extradition laws. The Court of Appeal stated, in the context of an appeal by a former Gestapo agent against his detention by French agents that "crimes against humanity ... are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign."⁷⁵ That case should not be seen as authority for the proposition that the state being asked to extradite is entitled to ignore extradition laws, not least because it related to the legality of a de facto extradition that had already

Genocide 1951 ICJ Rep 15 (May 28); *South West Africa Cases (Preliminary Objections) Ethiopia v South Africa; Liberia v South Africa* 1963 ICJ Rep 319 (Dec 21).

⁷³ In 1997 M Cherif Bassiouni wrote "it is still uncertain in ICL [international criminal law] whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties erga omnes. The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations erga omnes to prosecute or extradite flow from them." "*Jus cogens and Obligatio Erga Omnes*" above n 31, 74.

⁷⁴ *Nulyarimma v Thompson* [1999] FCA 1192, 21

<http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html> 21 per Merkel J.

⁷⁵ *Federation Nationale Des Deportés et Internes Résistants et Patriotes and Others v Barbie* Court of Cassation Criminal Chamber (1985) 87 ILC Lauterpacht, 125, 130.

been effected by the French Government.⁷⁶ However it underlines, in a general sense, the fundamental concern that the prosecution of crimes against humanity is to the international community, and suggests that municipal extradition laws should not operate to obstruct that goal.

(6) *Alternative approaches to the extradition question*

There were three approaches that the Law Lords could have adopted, consistent with domestic and international extradition laws and the *obligatio erga omnes* principle, that would have ensured that Pinochet was extradited for all counts of torture. These were:

1. Resolution of the ambiguity in the Extradition Act in favour of double criminality.
2. Retroactive application of the Criminal Justice Act 1988.
3. Importation of customary international law.

(a) *Resolution of ambiguity in favour of double criminality*

Lord Browne Wilkinson's interpretation of s2(2) of the Extradition Act 1989, adopted by all the Law Lords, is open to question. Lord Browne-

⁷⁶ For other examples of de facto extraditions (including Adolf Eichmann) see I A Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971, 73.

Wilkinson considered that Parliament could not have intended to change the date at which the act needed to be criminal (viz the date of the act itself) because the travaux préparatoires did not mention an intention to make such a change. However it is equally arguable that the removal of a reference in the 1989 Act of a reference to a requirement for extradition crimes to be criminal in English law "at the date of the alleged crime" removed the requirement for the crime to be criminal in Britain at the time of its commission. This interpretation seems logical when viewed in the context of Lord Browne Wilkinson's comment that the words of s2(2) "read more easily" as the date of the *extradition request*. Such an interpretation would be consistent the "nulla poena sine lege" purpose of the double criminality rule. Extraterritorial torture is currently unlawful in Britain, and therefore to extradite for such a crime to a country which criminalised it earlier would not therefore appear to be contrary to British notions of justice.⁷⁷ The *obligatio erga omnes* principle would suggest that the ambiguity ought to have been resolved in favour of extradition, given that legislative ambiguities are to be construed where possible in accordance with international law.⁷⁸

⁷⁷ An alternative rule of interpretation might also have been invoked. Under that rule, if a statute is ambiguous, regard might be had to the *consequences* of the alternative construction. The general rule is that where statutes are clear, the particular consequences in the case before the judges may not be considered. Where a statute is ambiguous, the consequences of the alternative construction may be regarded. *Halsburys Laws of England*, (4 ed, Butterworths, London) 548-549.

⁷⁸ *Halsburys Laws of England* (4 ed, Butterworths, London) 559. For a general discussion of British interpretation of international laws see Tom Rensen "British Statutory Interpretation in Light of Community and Other International Obligations" (1993) 14 Stat Law Rev, 186. For the American situation see Ralph G Steinhardt "The

(b) Retroactive application of the Criminal Justice Act

The judges presupposed the prospectivity of the Criminal Justice Act 1988, thereby overlooking a potential basis for securing Pinochet's extradition on all counts of torture: to apply retrospectively s134 of the Criminal Justice Act 1988.

Numerous international treaties prima facie prohibit retroactive criminal laws. Article 11(2) of the Universal Declaration on Human Rights states "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed". Articles 15 of the International Covenant on Civil and Political Rights, and 7(1) of the European Convention of Human Rights mirror that provision. The rule derives from the notion that people should be able to determine the boundaries of legality and adapt their actions in accordance with those boundaries.⁷⁹ It is intended to protect people from punishment for acts which they believed to be lawful. However acts that are offences at international law are not covered by the prohibition. Thus, a person may be held guilty under domestic law for a preexisting offence at international

role of International Law As a Canon of Domestic Statutory Construction" (1990) 43:4 Vand LR 1103.

⁷⁹ Rupert Ticehurst "Retroactive Criminal Law" (1998-99) 9 Kings College LJ, 89.

law, even if it was not a penal offence under domestic law at the time of commission.

United Kingdom law operates on the principle that penal statutes are not to be applied retrospectively. This principle derives from common law.⁸⁰ However the principle is a presumption only, and has occasionally been dislodged.⁸¹ The Law Lords were therefore neither constrained by statute, precedent, nor international law from holding that s134 of the Criminal Justice Act applied retroactively to criminalise extraterritorial torture prior to 1988.

It is strongly arguable that if an individual's act constitutes an offence that is subject to universal jurisdiction as a matter of international law, and that jurisdiction has been incorporated in domestic law after committal of the offence, the presumption against retroactivity ought to be dislodged.⁸²

This is because the statute is merely codifying an existing international

⁸⁰ The Interpretation Act 1978 (UK) is silent on the issue.

⁸¹ An example is the 1992 case of *R v R* [1992] 1 AC 599 in which the common law defence of marital relations to statutory rape was removed. This was challenged before the European Court of Human Rights, as being contrary to Article 7 of the European Convention on Human Rights, which proscribes retroactive criminalisation of offences. In its decision upholding the judgment, the Court was influenced significantly by the severity of the offence of rape, saying "the essentially debasing character of rape is so manifest" *CR v United Kingdom, No 20190/92* (1995) 21 EHRR, 363, 402. In *Shaw v DPP* [1962] AC 220, the common law offence of "conspiracy to corrupt public morals" was created.

The War Crimes Act 1991 (UK) is Britain's only retroactive criminal statute. This extends to United Kingdom Courts jurisdiction over murder, manslaughter, and culpable homicide committed in German territory during the Second World War.

⁸² See Kevin J Liss "The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes" (1987) 87 *Columb L R* 1515, 1528.

crime and not creating a new offence.⁸³ Given that the crimes to which universal jurisdiction applies, namely war crimes and crimes against humanity, are generally considered to be of such severity as to constitute an attack on the international legal order, the rationale underlying the rule against retroactivity has little relevance. The person who commits such acts cannot reasonably believe them to be legal at the time of commission.⁸⁴

In countries where customary international law forms part of the common law, that approach is even more compelling, as a common law crime preexisted the statutory crime.

Thus, it is suggested that the Law Lords could legitimately have held that s134 of the Criminal Justice Act had retroactive effect, on the basis that there was at international law, and arguably domestic law, universal jurisdiction for torture prior to 1988, and that s134 of the Criminal Justice Act simply codified that law.

(c) Importation of customary international law

⁸³ Compare Justice Robert Jackson "Report of June 7 1945" 39 Am J Int'l L 178,187 (Supp 1945), in which the retroactive application of the Nuremberg statute was justified by the Chief of Council for the United States on the basis that international law is not capable of legislative development so could not grow unless new principles were adopted and applied.

An alternative approach, which also involved invoking the principle of universal jurisdiction, was taken by Lord Millet. His view was that torture was an extraterritorial crime in Britain prior to 1988 under the common law.

There were two limbs to his reasoning:

1. That universal jurisdiction existed at customary international law for torture prior to 1988.
2. That customary international law automatically forms part of the common law of the United Kingdom.

Lord Millet reasoned that the crime of torture was an extraterritorial crime in Britain well before 1973, in spite of the absence of a legislative provision to that effect. He was of the view that universal jurisdiction existed for all crimes against humanity at the time of the Nuremberg Tribunal, and it was only the language of the Nuremberg Charter, that restricted the scope of its jurisdiction in respect of crimes against humanity to those committed in connection with war crimes.⁸⁵ The finding that universal jurisdiction existed for torture and other crimes against humanity

⁸⁴ Liss, above n 82, 1529.

⁸⁵ *Pinochet No 3*, above n 1, 909.

at the time of Nuremberg is a progressive interpretation of customary international laws at that time.⁸⁶

In drawing his conclusion, Lord Millet invoked the "incorporationist" doctrine of international law, under which customary international law is imported directly into the common law without need for an implementing domestic statute. This doctrine facilitates domestic consistency with human rights as it enables ongoing and direct implementation of evolving international norms in national jurisprudence without the need for law changes. His Lordship did not see the need to traverse the authorities in drawing the conclusion, in spite of some inroads into the doctrine in United Kingdom case law.⁸⁷ His definitive statement that "[c]ustomary international law is part of the common law" may well assist in settling the doctrine, and will be a strong precedent for future direct incorporation of international human rights and other laws into common law jurisdictions.

⁸⁶ Joyner, above n 71, 160 has similar views. Compare Brownlie, above n31, 566-567, Tristan Gilbertson "Legal Implications of the Presence of Nazi War Criminals in New Zealand" (1988-91) 6 Auck L R, 552, 556-557.

Lord Millet consolidated his reasoning on which crimes attract universal jurisdiction into a useful formula. He held that all international crimes attracts universal jurisdiction if the crime is *jus cogens* and has been committed on a serious scale. He said torture and genocide are the most serious crimes against humanity, and that torture has been expressly prohibited at least since 1948, when the Universal Declaration of Human Rights came into effect. Lord Millet's formulation of crimes that attract universal jurisdiction is likely to become an important tenet of international law, and has already been referred to by Merkel J in the Australian Federal Court genocide case of *Nulyarimma v Thompson*, above n74 at 28.

⁸⁷ See Brownlie, above n 32, 42-47.

III THE NEW ZEALAND SITUATION

What, then, is the position in New Zealand. If Pinochet arrived tomorrow in New Zealand, could he be prosecuted in New Zealand or extradited to Spain for crimes against humanity?

This part of the paper analyses the New Zealand statutory framework and common law on sovereign immunity, crimes against humanity, and extradition.

A Immunity

(1) Sovereign immunity

In contrast with the United Kingdom, New Zealand does not have legislation governing state or Head of State immunity. Sovereign immunity is part of the common law. The leading case on sovereign immunity is *Governor of Pitcairn v Sutton*.⁸⁸ In that case Cooke P expressed the paramouncy of international law in respect of matters such as sovereign immunity, going so far as to state that "a general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity. Some

⁸⁸ *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426.

sufficiently plain positive indication is required to produce such a result.”⁸⁹ Sovereign immunity was held in that case to form part of New Zealand law, thereby precluding a New Zealand based employee of the British Government from seeking relief under the Employment Contracts Act 1991.

(2) *Head of State immunity*

There is no specific case law in New Zealand on the immunity of Heads of State. In *Governor of Pitcairn v Sutton* Richardson J indicated that New Zealand would apply British common law on sovereign immunity unless local factors or policy considerations weighed against its application.⁹⁰ This suggests that New Zealand would be likely to follow the Pinochet decision on the liability of former Heads of State for crimes against humanity.

Unlike in the United Kingdom, New Zealand courts would not be constrained by domestic legislation from holding a sitting Head of State accountable for a crime against humanity. In *Governor of Pitcairn v Sutton* Richardson J endorses international law as a source of New Zealand common law,⁹¹ and states “the Courts of New Zealand will always seek to

⁸⁹ *Governor of Pitcairn v Sutton*, above n 88, 30.

⁹⁰ *Governor of Pitcairn v Sutton*, above n 88, 436.

⁹¹ *Governor General v Sutton*, above n 88, 436.

develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations."⁹² It would thus be open to the courts to hold that sitting Heads of State are liable for international crimes under customary international law, and that this should be incorporated into New Zealand law through the common law.⁹³

(3) *Other immunities*

If the New Zealand courts were to hold that a sitting Head of State was not immune from prosecution for a crime against humanity under customary international laws, the situation as between sitting Heads of State and diplomatic agents in office would be anomalous. A Diplomatic agent in New Zealand is subject to full legislative immunity. Similarly to the United Kingdom's Diplomatic Privileges Act, the Diplomatic Privileges and Immunities Act 1968 directly imports into New Zealand's laws the Vienna Convention on Diplomatic Relations.⁹⁴ Under Article 29 of the Convention,⁹⁵ the person of the diplomatic agent shall be "inviolable"⁹⁶

⁹² *Governor of Pitcairn v Sutton*, above n 88, 433.

⁹³ See Part III(B)(3).

⁹⁴ Section 5(1) of the Diplomatic Privileges and Immunities Act 1968.

⁹⁵ Imported into NZ law by s5(1) of the Diplomatic Privileges and Immunities Act 1968.

⁹⁶ Compare s4(7)(d) of the Consular Privileges and Immunities Act 1971, in which immunity is only afforded to consular officers for crimes punishable with imprisonment for less than three years. This is more restrictive than the immunities afforded under the Vienna Convention on Consular Relations. Article 41(1) of that Convention provides that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime..."

and under Article 31 of the Convention, a diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving state.⁹⁷ At international law, this immunity could arguably be overridden by the *jus cogens* laws against torture or other crimes against humanity. The Convention's direct statutory effect in New Zealand would, however, render an application of that argument to the New Zealand legal framework problematic. It would require considerable judicial creativity to allow international norms to permeate a domestic legal term as categorical as "inviolable". An argument could be made that the Diplomatic Privileges Act is intended to incorporate New Zealand's international obligations in their entirety on diplomatic privileges, (ie. the Vienna Convention on Diplomatic Relations together with any applicable customary international law), therefore that New Zealand should interpret its terms in accordance

⁹⁷ The Diplomatic Privileges and Immunities Act 1968 contains a variety of situations in which immunities can be extended to international visitors. Under s11 of the Act, if a Minister has doubts as to the extent to which immunities apply to representatives of Governments attending an international conference, the Minister of Foreign Affairs and Trade can direct that the privileges and immunities of a diplomatic agent under the Vienna Convention on Diplomatic Relations, via Gazette notice. This discretion could be used for foreign conference attendees at any level, including a Head of State. The person concerned would therefore be, *prima facie*, inviolable (see arts 29 and 31). Such a notice was gazetted for the September 1999 APEC Heads of Government conference in Auckland. The Governor-General may also make orders providing that members of international organisations are immune from suit. These orders can either extend the same immunities from suit and legal process as a diplomatic agent (third Schedule) or immunity in respect of official functions only (fourth schedule). See e.g. (United Nations) Order 1959/51, (ILO) order 1959/54, (South Pacific Commission) Order 1959/56.

Under s 5(3) the Governor-General may declare that persons connected with a mission of a particular state have immunity from jurisdiction to give effect to a custom or agreement. See for example the Privileges and Immunities (Taipei Economic and Cultural Office) Order 1998 (SR 1998/339).

with the relevant international laws.⁹⁸ This would involve an expansive application of the interpretative rule that domestic legislation should be construed consistently with international law.

(4) *Conclusion on immunity*

Accordingly, if Pinochet were to arrive in New Zealand tomorrow he would not be immune from torture charges. He would also be unlikely to be immune for any other crimes against humanity for which the New Zealand courts have jurisdiction (see below).

B Extraterritorial Prosecution for Crimes Against Humanity

(1) *Statutory extraterritorial offences*

New Zealand ratified the Torture Convention in 1986 and has fully implemented its obligations under the Crimes of Torture Act 1989. Section 3 of the Crimes of Torture Act 1989 gives the New Zealand courts

⁹⁸ Lord Cooke's principle in *Governor of Pitcairn v Sutton*, above n 88, 30, that a general statute should not be interpreted as being contrary to international law on an area such as sovereign immunity could be a starting point, but the principle would need to be considerably expanded. In that case the statute was of general effect. In contrast, in the situation outlined, the statutory provision is specific. Furthermore, the international legal principle that sitting Heads of State are liable is less solid than the general rule of sovereign immunity.

universal jurisdiction for crimes of torture. Thus torturers present in New Zealand territory can be prosecuted⁹⁹ or extradited.¹⁰⁰

Section 3 of the Geneva Conventions Act 1958 extends universal jurisdiction to the New Zealand courts for war crimes and crimes against humanity committed during armed conflict.¹⁰¹

Dealing in slaves is the only other statutory crime against humanity for which the New Zealand courts have universal jurisdiction.¹⁰²

(2) *Non statutory crimes against humanity*

⁹⁹ Section 4(b) Crimes of Torture Act 1989.

¹⁰⁰ Section 8(1) Crimes of Torture Act 1989.

¹⁰¹ These encompass crimes committed in the course of war in the form of unlawful and wanton wilful killing, torture or inhuman treatment including biological experiments, causing serious suffering or injury, extensive destruction and appropriation of property, compelling a prisoner of war or protected person to serve in the armed forces of the hostile power, depriving a prisoner of war the right to a fair trial, unlawful deportation transfer or confinement of a protected person, taking of hostages, endangering the physical or mental health of a party. See also Gilbertson, above n86, 553.

¹⁰² Section 98 Crimes Act 1961. There is no statutory offence of genocide in New Zealand. New Zealand ratified the Genocide Convention in 1978. However the Genocide Convention does not require states parties to set up universal domestic jurisdiction for genocide. Under the International War Crimes Tribunal's Act 1995, New Zealand can, in response to a request for assistance from the International Criminal Tribunal for the Former Yugoslavia, or the International Criminal Tribunal for Rwanda, arrest and surrender persons suspect of committing genocide in Rwanda or the former Yugoslavia. Section 13 of the Act makes provision for the Tribunal to sit in New Zealand, so extraterritorial acts of genocide can in fact be tried within New Zealand's territory, albeit under international jurisdiction. Other international crimes for which the New Zealand courts have universal jurisdiction are hostage taking (Section 8 of the Crimes (Internationally Protected Persons, United Nations and Associated Personnel and Hostages) Act 1980, hijacking (s3 Aviation Crimes Act 1972), endangering the safety of an international airport (s5A Aviation Crimes Act 1972) and piracy (section 92 Crimes Act 1961).

New Zealand legislation on the face of it precludes the Courts from exercising universal jurisdiction for crimes against humanity through the common law. New Zealand criminal law has been fully codified since 1893,¹⁰³ and common law offences, including offences under customary international law, have been "abolished".¹⁰⁴ The current manifestation of this rule is section 9 of the Crimes Act, which says "no one shall be convicted of any offence at common law...". Furthermore section 6 of the Crimes Act 1961 rules out extraterritorial prosecutions for statutory offences, unless such jurisdiction is expressly provided for. It says "...no act done or committed outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or any other enactment."

The effect of these provisions is to exclude all extraterritorial crimes against humanity committed during peacetime, other than torture and slavery, from the jurisdiction of the New Zealand courts. The crimes concerned are widespread and systematic: murder, extermination, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, grave sexual crimes, persecution on the grounds of political, racial, national, ethnic, cultural, religious, or gender grounds, enforced disappearance, and apartheid.

¹⁰³ Maxwell and Bates *Luxford's Police Law in New Zealand* (4ed, Butterworths, Wellington, 1991) 2.

¹⁰⁴ Section 6 of the Criminal Code Act 1893 was the first provision precluding conviction under the common law. This was replaced by s5 of the Crimes Act 1908. An explanatory note to s5 stated its purpose was "to abolish common law offences".

(3) *Retroactive operation of statutory crimes*

The statutory extraterritorial crimes against humanity in New Zealand are prima facie precluded from having retroactive effect. The provisions concerned are neither expressly prospective or retrospective. However several legislative provisions preclude the retroactive operation of criminal legislation.¹⁰⁵ Section 10A of the Crimes Act 1961 precludes liability in criminal proceedings if the act in question did not constitute an "offence" at the time of commission.¹⁰⁶ "Offence" is defined as a statutory offence.¹⁰⁷ Similarly, section 26(1) of the Bill of Rights Act 1990 provides that "no-one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred."¹⁰⁸

The 1893 abolition of the common law as a source of New Zealand criminal law precludes the argument available in the United Kingdom that

¹⁰⁵ See Simester and Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998), 23-24.

General legislation is also generally precluded from retroactive application under s 7 of the Interpretation Act 1999.

¹⁰⁶ Section 10A says "notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of an act or omission by him, if, at the time of the act or omission, the act or omission by him did not constitute an offence."

¹⁰⁷ Section 2 defines offence as "any act or omission punishable under this Act or any other enactment".

¹⁰⁸ For an application of s26(1) see *R v King* (1995) 3 HRNZ 425, 426, HC (Hammond J).

the statutory crimes against humanity codified pre-existing common law offences, as all the New Zealand provisions came into operation after 1893.

(4) *Consent of the Attorney General required for prosecution of torture*

Under s12(1) of the Crimes of Torture Act 1989, and s3(5) of the Geneva Conventions Act 1958 no proceedings for the trial and punishment of any person can proceed in the absence of the consent of the Attorney-General.¹⁰⁹ Such a provision is unusual but not unique¹¹⁰. The Attorney General generally, "as a matter of convention and sound politics, keeps entirely out of [prosecution] decisions".¹¹¹ In the unusual cases whether the Attorney General is required to consent to proceedings, in deciding whether to prosecute, the Attorney General must exercise independent

¹⁰⁹ It is unclear whether the requirement for the Attorney-General's consent under the Crimes of Torture Act is intended to apply just to prosecution, or whether it extends to extradition. The wording of section 12(1) is general, in that it refers to the requirement for consent in "proceedings for the trial and punishment of any person charged with a crime described in ... section 3" and therefore might encompass extradition proceedings. However section 12(2) (providing that a person may be arrested and remanded in custody pending the consent of the Attorney-General) refers to the consent being for "institution of prosecution" which might suggest that the consent of the Attorney General is required for domestic prosecution only, as proceedings for extradition do not necessarily amount to an "institution of prosecution". If the latter were intended, then the legislature did not anticipate that the political ramifications of an extradition can equal that of a domestic prosecution.

¹¹⁰ Other examples are ss132 and 135 of the Human Rights Act 1993 (inciting racial disharmony and discriminatory denial of access to public places), and s10A of the Crimes Act (prosecution after 10 years of the date of the offence).

¹¹¹ GDS Taylor *Judicial Review: a New Zealand Perspective* (Butterworths, Wellington, 1991) 22; Grant Huscroft "The Attorney-General, the Bill of Rights, and the Public Interest" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 136.

judgment in the public interest, and not consult with his or her Cabinet colleagues.¹¹² The Attorney General's position as a member of Cabinet nevertheless creates the potential for the perception that political considerations might weigh into a decision on whether to prosecute or extradite a suspected torturer or war criminal.¹¹³

In the absence to date of any prosecutions under the Crimes of Torture Act, it is not possible to predict the criteria the Attorney-General would apply in exercising the discretion to provide or withhold consent in respect of a particular prosecution.¹¹⁴ There is, however, case law which could suggest that a decision by the Attorney-General not to proceed with a prosecution could be subject to judicial review if matters extraneous to the alleged offences weighed into the decision.

The case of *Tavita v Minister of Immigration*¹¹⁵ considered the issue of whether the then Associate Minister of Immigration was required to consider the terms of the International Covenant on Civil and Political

¹¹² Philip A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Limited, Sydney, 1993) 260.

¹¹³ Section 134 of the Criminal Justice Act (UK) also requires the AG's consent in the prosecution for torture. In the UK, the AG is not a member of cabinet. The British Attorney General was asked twice by Amnesty International to authorise Pinochet's in the early 1990's, but Pinochet left the country before the decision had been made. Since Pinochet's arrest in 1999, he has been asked on several occasions by Amnesty International to prosecute domestically, but declined. Geoffrey Bindman *Lessons of Pinochet* (1999) July 9 New Law Journal, 1050.

¹¹⁴ For a discussion of the role of the AG in prosecutions, see Huscroft and Rishworth, above n111, 133-136.

¹¹⁵ *Tavita v Minister of Immigration* (1993) 1 HRNZ, 30.

Rights and the Optional Protocol thereto, and the Convention on the Rights of the Child, in making decisions as to the immigration status of the applicant. Although no final decision was taken by the Court, Counsel for the Minister of Immigration's argument that the Minister and the New Zealand Immigration Service were entitled to ignore the international instruments was described by Cooke P as "unattractive".¹¹⁶ Later he said that "a failure to give practical effect to international instruments to which New Zealand is a part [sic] may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms, or obligations, the Executive is necessarily free to ignore them".¹¹⁷ He then went on to describe the judgment as "a case of possibly far reaching ramifications."¹¹⁸

The subsequent cases of *Puli'uvea v Removal Review Authority*¹¹⁹ and *Lawson v Housing New Zealand*¹²⁰ have confirmed that relevant international instruments (in both cases the ICCPR and the Convention on the Rights of the Child) must be taken into account when a statutory

¹¹⁶ *Tavita*, above n 115, 40.

¹¹⁷ *Tavita*, above n 115, 41.

¹¹⁸ *Tavita*, above n 115, p41.

¹¹⁹ *Puli'uvea v Removal Review Authority* (1996) 2 NZHR 510.

¹²⁰ *Lawson v Housing New Zealand* (1996) 3 HRNZ 285.

discretion is exercised. Those cases suggest, though, that consideration of the international principles may be sufficient discharge of the duty.¹²¹

The combined effect of these precedents is nevertheless, at a minimum, to render a decision by the Attorney-General to refuse consent of a prosecution under the Torture Convention susceptible to judicial review on the basis that insufficient regard was had to the provisions of the Torture Convention. It is arguable that the Torture Convention, being of a different nature to the conventions to which the Minister was to have regard in the cases to date, puts a higher onus of consideration on the Minister. Three reasons support such an approach. First, unlike in the precedents cited, the preamble to the Crimes of Torture Act makes it clear that the Act is specifically designed to implement the provisions of the Torture Convention, so the Convention is of fundamental relevance to the statutory discretion. Secondly, the Torture Convention, unlike the Conventions relevant to the decisions to date, places concrete practical obligations on States Parties thereto, to either prosecute or extradite suspected torturers. Thus failure to agree to prosecute such a person would be a direct breach of these obligations. Thirdly, and perhaps most importantly, the Convention implements international norms of *jus cogens* nature, thus the subject matter of the Convention has the highest status at international law.

¹²¹ *Puli'uvea*, above n 119, 522 per Keith J). The case of *Lawson v Housing New Zealand* indicates that an attempt to balance relevant international instruments with competing considerations is sufficient discharge of the *Tavita* obligations.

(5) *Conclusion on extraterritorial prosecution*

In light of the inability of the New Zealand courts to prosecute most crimes against humanity committed during peacetime, the only crime for which Pinochet could be prosecuted in New Zealand is torture, and then only for post 1989 charges. It would, however, be difficult for the Attorney General to withhold consent to the prosecution.

C *Extradition Laws*

(1) *Double criminality*

Section 4 of the Extradition Act 1999, which came into force on 1 September 1999, defines "extradition offence" as "an offence punishable under the law of an extradition country for which the maximum penalty is imprisonment for not less than 12 months." In order to meet double criminality requirements, the conduct needs to have amounted to an offence "punishable under the law of New Zealand" ... "if it had occurred within the jurisdiction of New Zealand".¹²²

¹²² Section 4(2) Extradition Act 1999.

discretion is exercised. These cases suggest, though, that consideration of

Unlike in the United Kingdom there is no ambiguity as to when the offence needs to have been criminal domestically: under s4(3) the offence must be an offence at New Zealand law at the date of the offence, and not the date of the extradition request.¹²³

(2) *Extradition for statutory crimes against humanity*

Clearly, statutory crimes against humanity committed after the extraterritorial statutory offences came into force would meet the definition of extradition crimes under the Extradition Act 1999.¹²⁴ Thus persons suspected of such crimes could be extradited to third states endeavouring to exercise universal jurisdiction against a non-national.

Extradition for crimes that predated the statutory extraterritorial jurisdiction would not be possible, in light of the statutory scheme

¹²³ Under s4(3) extradition offences must meet the following condition. "...if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty."

¹²⁴ The maximum penalty for torture, slavery, and war crimes or crimes against humanity in armed conflict is 14 years. (Section 3 Crimes of Torture Act 1989 (torture), section 98 of the Crimes Act 1961 (slavery), s4(a) and 4(b) Geneva Conventions Act 1958 (war crimes).

discussed above which precludes the retroactive operation of criminal statutes.

(3) *Extradition for non statutory crimes against humanity*

The requirement under s4(1)(b) of the Extradition Act 1999 for the offence subject to the extradition request to be punishable "under the law of New Zealand" creates problems for the extradition of non statutory crimes against humanity when universal jurisdiction is being exercised. This is because under the law of New Zealand, only statutory extraterritorial crimes against humanity are punishable. Thus double criminality would not exist for extradition requests relating to extraterritorial crimes against humanity not codified under New Zealand legislation.

There is, however, some basis for arguing, consistent with the *obligatio erga omnes* principle, that the New Zealand courts having the power to extradite for all crimes against humanity, including where the requesting state was seeking to prosecute extraterritorially. This relates to the s4(2) requirement for the "conduct of the person" or "equivalent conduct" to have constituted an offence if it "had occurred within the *jurisdiction of New Zealand*" (emphasis added), and applies the principle that legislative ambiguities are to be resolved in favour of international principles. It is arguable that in s4(2), "jurisdiction of New Zealand" means the territory of

New Zealand, as opposed to the scope of jurisdictional reach of New Zealand courts.¹²⁵ Under that approach, the jurisdictional basis for the crime would be irrelevant.¹²⁶ The only question would be whether the acts are an offence against New Zealand law with a maximum penalty of at least 12 months. Thus, New Zealand could potentially extradite an alleged offender when the requesting state was exercising universal jurisdiction for a crime against humanity, as there are legislative provisions under which crimes against humanity, committed intraterritorially, could be prosecuted.¹²⁷

(4) *Conclusion on extradition*

There is therefore more scope under New Zealand laws for extradition for extraterritorial crimes against humanity than there is for their prosecution

¹²⁵ See Oxford Dictionary of Law (Oxford University Press, Oxford, 1997) 253 which has three definitions of Jurisdiction "1. The power of a court to hear and decide a case or make a certain order. 2. The territorial limits within which the jurisdiction of a court may be exercised. In the case of English courts this comprises England, Wales, Berwick upon Tweed, and those parts of the sea claimed as territorial waters. Everywhere else is said to be outside the jurisdiction. 3. The territorial scope of the legislative competence of Parliament.

¹²⁶ See Grainne Mullan "The Concept of Double Criminality in the Context of Extraterritorial Crimes" [1997] Crim L R 17, 21.

¹²⁷ Thus if, for example a request was received from the Netherlands for New Zealand to extradite to its courts a Cambodian national present in New Zealand who was suspected of widespread and systematic murder of Khmers, and the offence against Dutch law was one of extraterritorial extermination, the territorial basis of the Dutch request would be irrelevant. The only matter that would need to be considered was whether the acts, if committed within New Zealand had the requisite criminality. It would not be necessary to prove that the New Zealand courts could have the jurisdictional reach to try the offence extraterritorially. Murder is a crime in New Zealand with a mandatory life penalty (s167 Crimes Act 1961). Other crimes against humanity could be caught by multiple charges under provisions such as assault (s188-204 Crimes Act 1961), homicide (sections 158-166), sexual crimes (sections 127-144), or conspiring to commit such offences (s310).

domestically. An expansive interpretation of the Extradition Act 1999 could see Pinochet extradited for systematic murder, genocide, and disappearances, as well as torture committed after 1989.

D Proposal for Reform of New Zealand Law

The abolition of the common law as a source of New Zealand criminal law means that there are significant impediments to the prosecution and extradition for non-statutory extraterritorial crimes committed during peace.

In order for New Zealand to be in a position to meet its evolving international responsibilities to prosecute and extradite perpetrators of crimes against humanity within its territory, a legislative review is therefore urgently required. The following law changes are suggested.

1. The replacement of the Crimes of Torture Act with a "Crimes Against Humanity Act", creating, with express retroactive effect, universal jurisdiction for all crimes against humanity.¹²⁸

¹²⁸ Crimes against humanity could be defined as an inclusive list to enable international advances in the definition of the offence to be reflected domestically without the need for subsequent law change.

2. An amendment to the Diplomatic Privileges and Immunities Act 1968 rendering the immunities of diplomats subject to customary international laws on international criminal responsibility, to bring their immunities in line with New Zealand common law on Head of State immunity.

In light of s26(1) of the New Zealand Bill of Rights Act 1990 precluding convictions for acts not illegal under New Zealand law at the time of commission, the passage of retroactive legislation may not be straightforward. The Crown Law Office would need ascertain whether the crime was retroactive under New Zealand laws, and if so, whether such retroactivity was "demonstrably justified in a free and democratic society" in terms of s5 of the New Zealand Bill of Rights Act.¹²⁹ While a prima facie breach of s26(1) would probably be identified, there would be compelling arguments favouring a conclusion that retrospective legislation providing universal jurisdiction for a crime against humanity is demonstrably justified.¹³⁰

¹²⁹ If the law was assessed as being retroactive in terms of s26(1), and not demonstrably justified in terms of s5, the Attorney-General would have to report the inconsistency to Parliament under s7. There is some debate as to whether the Attorney-General should report whenever a protected right would be breached, or only if such a breach is not considered demonstrably justified. See Huscroft, above n111, 138-140.

¹³⁰ See Part III(6)(b). A retroactive provision would need to expressly override s10A of the Crimes Act, in light of that precedence that section takes over contrary legislation. See also Gilbertson, above n 86, 567-568.

IV THE FUTURE

A perusal through a human rights yearbook illustrates the global scale of human rights abuses. Numerous countries, every year, are documented as being complicit in systematic atrocities that could amount to crimes against humanity. These include torture, imprisonment of political opponents, enforced disappearance, rape, and forcible transfer of population.¹³¹

The effect of the Pinochet judgment should therefore not be understated. It is clear authority for the proposition that former Heads of State cannot claim immunity in municipal courts for acts of torture performed while in office. The judgment also suggests that immunity would be unavailable for other crimes against humanity. The same reasoning could potentially be applied to sitting Heads of State.

Lord Millet's judgment in particular could have profound ramifications. He asserts that there has been universal jurisdiction for crimes against humanity since the time of the Nuremberg Tribunal, and that all *jus cogens* crimes would be punishable by municipal courts. On that basis, any former Heads of State who have committed crimes against humanity in the

¹³¹ For example *The Amnesty International Report 1999* (Amnesty International Publications, London, 1999) reports widespread torture and detention of political opponents in China (127), Iraq (202), Myanmar (256), India (191) widespread torture in Pakistan resulting in at least 50 deaths (256), systematic killings of thousands in

second half of this century could find themselves facing proceedings before domestic courts of foreign states.

The judgment appears already to have dramatically altered the political landscape for human rights abusers. Former Indonesian President Suharto has reportedly been advised by his lawyers not to travel overseas.¹³² Likewise, the motives for the then President Habibie's cancellation of his planned trip to the September APEC Heads of Government meeting in Auckland at the height of atrocities following the East Timorese elections can be speculated upon. In August, Saddam Hussein's former deputy departed suddenly from Austria after a politician sought his arrest for torture and genocide.¹³³ Chile has been forced to reconsider its approach to immunities. In September, the Chilean Foreign Minister told a Spanish newspaper that "if [Pinochet] returns to Chile, he will have to respond before the Courts."¹³⁴

Three key messages therefore emerge from an assessment of the Pinochet decision.

Afghanistan (70); widespread killings in Algeria (73); widespread torture including rape in custody in Bangladesh (90) and so on.

¹³² "Suharto Fears the Pinochet Effect" *The Independent*, London, United Kingdom, 22 August 1999

¹³³ "Iraqi Official Flees Austria: Alleged Role in Kurd Slayings Spurs Criminal Complaint" *The Washington Post*, United States, 19 August 1999, A18; "How to Get Away With Murder, *Independent*, London, 22 August 1999.

¹³⁴ Nearly 50 lawsuits against Pinochet have been accepted by the Chilean courts since the proceedings commenced. "Rights: Extradition to Chile Shortest Route Home for Pinochet" *IPS*, Madrid, 19 October 1999.

The first is for law makers. It is critical to create a robust domestic legal regime that allows for the prosecution and extradition of international criminals. An urgent legislative review is required to enable New Zealand to fulfil its international responsibilities in this regard.

The second is for judges and practitioners. In cases of ambiguity, or legislative gap, a number of international legal principles should be invoked to ensure international criminals do not go unpunished.

The third and most important message is to Heads of State who brutalise their citizens. The international community will no longer tolerate these crimes.

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Afghanistan (70); widespread killings in Algeria (73); widespread torture including rape
in custody in Bangladesh (90) and so on.

¹³² "Suharto Fears the Pinochet Effect" *The Independent*, London, United Kingdom, 22
August 1999

¹³³ "Iraq Official Blames Austria: Alleged Role in Kurd Slayings Spurs Criminal
Complaint" *The Washington Post*, United States, 19 August 1999, A18; "How to Get
Away With Murder" *Independent*, London, 22 August 1999

¹³⁴ "Nearly 30 lawsuits against Pinochet have been accepted by the Chilean courts since
the proceedings commenced." "Rights: Extradition to Chile Shorted Route Home for
Pinochet" *IPS*, Madrid, 19 October 1999.



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