THE PINOCHET CASE: EXPOUNDING OR EXPANDING INTERNATIONAL LAW?

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Abstract
The immunity of Heads of States in international law remains a topical issue. With the establishment of human rights as one of the greatest achievements of the current international legal order and the tenacious assertion of Head of state immunity even for international crimes and violations of human rights, the concept remains controversial. The decision of the House of Lords of the United Kingdom in R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte against the former Chilean Head of State propelled the issue of Head of State immunity to limelight in international discourse. In view of the arrest warrant of President Omar Hassan Al-Bashir of Sudan by the International Criminal Court and the refusal of some African States to cooperate with the Court in executing the warrant, most recently during Al-Bashir’s visit to South Africa for the African Union Summit in June 2015 has re-ignited interest in this area. It is against this background that this article derives impetus to re-evaluate the House of Lord’s decision in the Pinochet Case with a view to ascertaining the extent to which the case changed the scope of immunities enjoyed by Heads of state in international law.

Key words: International Law, State Immunity, Heads of State Immunity

1. INTRODUCTION
The most prominent feature of the international order is its decentralized nature, with no central and compulsory law-making or adjudicatory organ. The adjudicatory mechanisms of the two permanent international courts (the International Court of Justice and the International Criminal Court) are limited with regard to Head of state immunity. The International Court of Justice has no criminal jurisdiction and by the express provision of Article 34 of the Statute of the International Court of Justice, only states can be parties to proceedings before the Court.1 Although the issue of legal proceedings against Heads of states does not arise before the International Court of Justice, the decisions of the Court are useful in the analysis of Head of state immunity. The jurisdiction of the International Criminal Court, ratione temporis, is not retrospective and takes effect from the date the Statute of the Court entered into force which was on 1 July 2002.2 The jurisdiction of the

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1 59 Stat. 1055. However, in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), criminal responsibility was indirectly in issue before the ICJ, (2007) I.C.J. Reports 1
2 Rome Statute of the International Criminal Court, 2187 U.N.T.S 90, Article 11
International Criminal Court is subject to that of national systems and comes into effect where the national courts are unwilling or unable to carry out the investigations and prosecutions.³

Thus, the national courts of states have become very important not just in domestic proceedings but also in international proceedings. The International Court of Justice in *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* recognized the role of national courts while enumerating the circumstances under which the immunities of state officials, including Heads of states, may not operate as a bar to criminal proceedings against such persons.⁴ The Court enumerated the circumstances under which the immunities of state officials may not bar criminal proceedings to include courts of their countries under their domestic law, foreign courts where the state has waived the immunity, courts of another state after expiration of office and “provided that it has jurisdiction under international law” in respect of acts done in a private capacity, certain international criminal courts.⁵

This article will analyse the jurisprudence of English courts in the House of Lords decisions in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* with a view to ascertaining the state of international law on Head of State immunity and whether the decision in that case merely expounded on international law or whether it went beyond the scope of international law on the subject.

International immunities arise before foreign jurisdictions where the sovereignty and sovereign equality of states are implicated. The concept of Head of State immunity in international law is determined by an analysis of customary international law. This is because there is no international agreement dealing with Head of State Immunity, unlike State Immunity and Diplomatic Immunity. States like the United States, United Kingdom, Australia, Canada, South Africa, Singapore and Pakistan have State Immunity Legislations and there is the European Convention of State Immunity 1972 (Basle Convention)⁶ as well as the United Nations Convention on the Jurisdictional Immunities of States and Their

³ *Ibid.*, Article 17
⁵ *Ibid*.
⁶ (1972) 11 *I.L.M.* 470

1.1 HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

The traditional absoluteness of the personal sovereign fuels the modern idea of complete inviolability of Heads of state, *ratione personae*. The sovereign was absolutely immune from legal proceedings before his own courts since the courts acted in the name of the sovereign and on his behalf. The sovereign was also immune before the courts of foreign states.

The absolute immunity of the personal sovereign was recognized by the Privy Council in *Chung Chi Cheung v. The King*, that neither the sovereign nor his envoy, properties including public armed ship are to be subject to legal process. This decision follows from earlier decisions in the nineteenth century in *De Haber v. Queen of Portugal*, and *King of Hanover v. Duke of Brunswick*, that personal sovereigns were immune from any claim brought against them in the courts of other states.

Though the nature of the office as chief executive and the nature of government had changed, at least towards the end of the 18th century, the idea of the absoluteness of the powers of the personal sovereign subsisted. This meant that Heads of states enjoyed absolute immunity, like personal sovereigns, and resulted in the prevailing international custom that Heads of states enjoy complete immunity even for private acts. In *Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L.* the French Regional Court of Appeal found that had the King been a sitting one that he would have enjoyed immunity in the action for the cost of the clothes for his wife. In *Lafontant v. Aristide*, proceedings were instituted against President Jean-Bertrand Aristide while in exile in the US for the political assassination of the plaintiff’s husband.

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7 Adopted by the UN General Assembly in Resolution 59/38 of 16 December 2004, yet to enter into force
8 *Ibid.*, Article 3(2)
9 [1939] AC 160, p.175, *per* Lord Atkins
10 (1851) 17 QB 171, p.206-207
11 (1844) 6 Beav. 1; (1848) 2 HLC 1
12 By the American Revolution (1775-1783) and the French Revolution (1789-1799)
14 24 ILR 228
despite the overthrow of Aristide’s government, the US recognized him as the Head of Haiti and so he was held to be immune.

In *Estate of Domingo v. Republic of Phillipines*,\(^\text{16}\) the US courts recognised the absolute immunity of President Ferdinand Marcos, and his wife, for the political assassination of opposition leaders. In *Tachiona v. Mugabe*,\(^\text{17}\) a class action was brought by the plaintiffs for themselves and on behalf of some deceased victims alleging torture and other acts of terror against President Robert Mugabe. The Court in dismissing the action upheld Mugabe’s immunity, even for private acts.

Even for international crimes, Heads of states are absolutely immune from the courts of other states. Colonel Gaddafi, as the Libyan Head of state and other persons were tried *in absentia* by the Special Court of Assizes of Paris for the destruction of an aircraft and the murder of the 170 passengers and crew aboard.\(^\text{18}\) Upon appeal, the Court of Cassation in terminating the proceedings held that,

> International custom precluded Heads of state in office from being the subject of proceedings before the criminal courts of a foreign state…In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of state in office.\(^\text{19}\)

The absolute nature of the immunity of Heads of states was clearly established in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.\(^\text{20}\) Here, the Republic of Djibouti requested the ICJ to adjudge and declare that France, by sending witness summonses to the Head of state of Djibouti and to senior Djiboutian officials has violated its obligations under general and customary international law not to attack, and to prevent attacks on, the immunity, honour and dignity of the Djiboutian President. The Ministry of Foreign Affairs of France had stated, in relation to the summons, that “all incumbent Heads of states enjoy immunity from jurisdiction when travelling internationally” and that “this is an established principle of international law and France

\(^{16}\) 808 F.2d 1349 (9th Cir. 1987)  
\(^{17}\) 169 F.Supp. 2d 259, p.287 (S.D.N.Y. 2001)  
\(^{18}\) The Gaddafi case, 125 ILR 490  
\(^{19}\) Ibid., p.493  
\(^{20}\) (2008) I.C.J. Reports 177
intends to ensure that it is respected.”\textsuperscript{21} France, while arguing that the summons was not an attack on the Djiboutian President acknowledged the absoluteness of Head of State immunity in international law when it recalled that it,\textquoteleft\textquoteleft[f]ully recognises, without restriction, the absolute nature of the immunity from jurisdiction and even more so, from enforcement that is enjoyed by foreign Heads of state.\textquoteright\textsuperscript{22}

In its judgment, the International Court of Justice stated thus,

\begin{quote}
A Head of state enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her “against any act of authority of another state which would hinder him or her in the performance of his or her official duties.\textsuperscript{23}
\end{quote}

International law distinguishes between serving and former Heads of states for the purpose of applicability of immunities. The immunity of former Heads of states is applicable to official acts only, or acts performed in a sovereign capacity. Such acts are attributable to the state.\textsuperscript{24} As such, former leaders are vulnerable to the institution of proceedings of accountability against them.\textsuperscript{25} This is because despite the clout, privileges and prestige they may have even after office, they revert back to being “private citizens” and there is no reason not to institute proceedings against them like other private citizens once grounds exist for exercising jurisdiction over acts which cannot be attributed to the state.\textsuperscript{26}

The immunity of former Heads of states is restricted to acts performed in an official capacity, i.e. \textit{ratione materiae}. Persons acting \textit{qua} officials of the state are not to be held responsible for acts done in that capacity.\textsuperscript{27} A pre-requisite, therefore, for the applicability of this immunity is that the act in question has to be official in nature. An act is official “if it is

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\textsuperscript{21} \textit{Ibid.}, Paragraph 31 \\
\textsuperscript{22} \textit{Ibid.}, Paragraph 166 \\
\textsuperscript{23} \textit{Ibid.}, Paragraph 170 \\
\textsuperscript{25} Jimenez v Aristegueta, 33 ILR 353 \\
\end{flushright}
performed by an organ of a state in his official capacity, so that it can be imputed to the state…”

Immunity *ratione materiae* or functional immunity is substantive in nature, i.e. it does not attach to the individual but attaches to the act in question, and so it does not come to an end when the official ceases to hold office. It endures as the official acts of the state and this serves to prevent the circumvention of the sovereign right of a state of freedom from interference in its internal affairs and structures.

Against the backdrop of the legal position of Heads of State in international law, it is apposite to analyse the Pinochet case.

1.2 THE PINOCHET CASE

*R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Pinochet case)* launched Head of State immunity into the limelight of academic and judicial discourse. Proceedings were instituted against Augustus Pinochet Ugarte in the Spanish national court alleging genocide, murder, torture and hostage-taking between 1973 and 1990, during Pinochet’s tenure as the President of Chile. While on a medical check-up to the United Kingdom in 1998, after expiration of Pinochet’s incumbency as Head of State of Chile, an extradition request was issued from Spain to the United Kingdom so that Pinochet could stand trial in Spain. Proceedings for determination of whether Pinochet was entitled to immunity from arrest and extradition were instituted and Pinochet claimed immunity from any criminal process including extradition. He argued that he was entitled to state immunity under Section 1 of the State Immunity Act of the United Kingdom and personal immunity as a Head of state under Section 20 of the Act.

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28 Dinstein, Yoram Dinstein, ‘Diplomatic Immunity from Jurisdiction *Ratione Materiae*, *International and Comparative Law Quarterly* Vol. 15, (1966), 76 at p.82
31 *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 1)*, [1998] 4 All ER 897.
32 Ibid.
The Divisional Court upheld Pinochet’s claim and held that as a former Head of state, Pinochet was entitled to immunity even for international crimes committed in the course of his official functions as Head of state. An appeal before the House of Lords was lodged by the Commissioner of Police and the Government of Spain and this led to an interesting chain of decisions.

1.2.1 PINOCHET 1

The Lords held that,

A claim to immunity by a Head of state or a former Head of state applied only to acts performed by him in the exercise of his functions as Head of state. Although that referred to any of his functions as a Head of state and not just those acts which had an international character, acts of torture and hostage-taking could not be regarded in any circumstances as a function of a Head of state. It was a principle of international law, as shown by the Conventions against the Taking of Hostages and Torture, that hostage-taking and torture were not acceptable conduct on the part of anyone, including a Head of state. It followed that since the acts of torture and hostage-taking with which the applicant was charged were offences under United Kingdom statute law, in respect of which the United Kingdom had taken extra-territorial jurisdiction, the applicant could not claim immunity from the criminal processes, including extradition, of the United Kingdom.

The House of Lords rightly stated that torture is an internationally unacceptable act, even for Heads of states. However, there is a variance between what is unacceptable and the legal definition of torture under the Convention against Torture. The argument that torture cannot be part of the official functions of a Head of state is one that is fraught with inherent problems. Article 1 of the Convention provides that for an act of torture to fall within the remit of the Convention against Torture that it must have been committed under an official capacity.

33 Ibid, p.898
34 Ibid
35 The article shall address the argument that torture cannot be part of the official functions of a Head of state in a subsequent section because this argument also came up in Pinochet 3.
36 1465 U.N.T.S 85, stating,

“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”
Lord Slynn dismissed the appeal and in his dissenting opinion argued that despite the clear indication of a movement towards the recognition of certain crimes with respect to which Head of State immunity would be inapplicable before international tribunals, that,

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

Further to this, Lord Slynn interpreted the Convention against Torture to exclude Heads (or former Heads) of state from the term ‘public officials’ under the Convention, either because states did not wish to provide for the prosecution of Heads (or former Heads) of state or because they were not able to agree that a plea in bar to the proceedings based on immunity should be removed.  

His Lordship attributes this omission to political and diplomatic difficulties but maintains that if states wanted to exclude immunity of former Heads of states, specifically as regards certain crimes or generally, then they must do so in clear terms and not relegate the matter to national courts.

While also dissenting from the majority Lord Lloyd argued that in view of the “special international tribunals” that had been established over the years with jurisdiction over genocide, crimes against humanity and torture, such crimes when committed by Heads of states cannot be tried in the national courts of foreign states because, “if they could, there would be little need for the international tribunal”. Going further, he enumerated instances, similar to that of the International Court of Justice in the *Arrest Warrant* case, in which jurisdiction may be exercised over Heads of states including national courts of own state, courts of foreign states where immunity has been waived by own state, the International Criminal Court or a “specially constituted international court”.

The existence of international tribunals does not remove the valid jurisdiction of national courts. In fact, the jurisdiction of the International Criminal Courts is complementary to the
jurisdiction of national courts and comes into effect where national courts are unwilling or able to exercise jurisdiction. The implication of Lord Lloyd’s decision would have meant that Pinochet was outside the law because proceedings were not brought against Pinochet in Chile and Chile did not waive immunity; rather Chile asserted immunity. Furthermore, the International Criminal Court was yet to be established by the time of the decision and in any case the temporal framework of the acts alleged fell outside the jurisdiction of the Court, and no “specially constituted international court” like the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda had been established to exercise jurisdiction over the alleged acts.

The Lords, by a majority decision, upheld the appeal and effectively reversed the decision of the Divisional Court. The decision allowing the appeal on the ground that there could be no immunity in international law for crimes under international law and that Pinochet was not entitled to immunity because torture is not part of the official functions of a Head of state was wrong.\textsuperscript{42} The Convention against Torture is explicit in its provision that torture for the purposes of the Convention involves a public official or other person acting in an official capacity.\textsuperscript{43} Heads of states or former Heads of states cannot be reasonably excluded from the provision of the Convention against Torture. This is because a Head of state is the chief representative of a state, a ‘public official’ \textit{par excellence} and more importantly, the \textit{travaux preparatoire} of the Convention does not support such a restrictive interpretation of the term ‘public official’.\textsuperscript{44}

The Convention against Torture must be distinguished from the Charter of the International Military Tribunal at Nuremberg, the Statutes of the Yugoslavian and Rwandan Tribunals as well as the Rome Statute of the International Criminal Court which are constitutive instruments establishing the Nuremberg Tribunal, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court. The Convention against Torture proscribes the act of torture while these constitutive instruments establish special courts with jurisdiction over certain international crimes including torture and expressly provide against immunities of Heads of states before the special courts.

\textsuperscript{42} \textit{Ibid}, see decisions of Lord Nicholls of Birkenhead and Lord Steyn at p.939 and p.945, respectively
\textsuperscript{43} \textit{Supra} note 36, Article 1
\textsuperscript{44} \textit{Pinochet} (No.3), [1999] 2 \textit{All E.R.} 97, p.164
1.2.2 PINOCHET 2 & 3

After the decision of the House of Lords in *Pinochet 1*, the defence discovered that Lord Hoffmann, one of the presiding judges during the appeal, was involved as an unpaid director and chairman of Amnesty International Charity Limited, and Amnesty International had been granted leave to intervene in the appeal. Pinochet applied to have the decision set aside because of Lord Hoffmann’s involvement with the charity organisation on grounds of bias.\(^{45}\) As such the decision in *Pinochet 1* was overturned in *Pinochet 2*.

In *Pinochet 3*,\(^{46}\) a reconstituted House of Lords on rehearing the appeal allowed the appeal in part and reversed, in part, the decision of the Divisional Court. The Lords held that by virtue of Section 20 of the State Immunity Act and Article 39(2) of the Vienna Convention on Diplomatic Relations (made effective in the United Kingdom by the Diplomatic Privileges Act 1964) that a former Head of state had immunity from the criminal proceedings in the United Kingdom for acts done in his official capacity as Head of state. The Lords went on to hold that the coming into effect of the Convention against Torture which provides for an obligation of *aut dedere, aut judicare* on state parties nullified immunity *ratione materiae* for acts of torture.\(^{47}\)

The Lords were of the opinion that the application of the express terms of the Convention against Torture was such that the state parties could not uphold the immunity *ratione materiae* of public officials including former Heads of state. To do otherwise would be inconsistent with obligations of the parties under the Convention.\(^{48}\)

Lords Millett and Phillips of Matravers were of the opinion that prior to the Convention torture was an international crime for which there was no immunity in customary international law. While the judges were right in stating that the prohibition against torture existed under customary international law prior to the Convention, there is no supporting


\(^{46}\) *Supra* note 44


state practice or *opinio juris* to corroborate the opinion that there was no immunity under customary international law for acts of torture by Heads of states.\(^{49}\)

The immunities of Heads of states and the prohibition against torture are rules of international custom and for the customary rule of immunity not to apply to the customary rule against torture there must be shown to be a later custom to the contrary or that a new rule is to be found in conventional or treaty law. Where a conventional rule departs from a pre-existing customary rule, the conventional rule will take precedence over the customary rule because it is later in time and also because of the express provision to that effect. However, the conventional rule is necessarily restricted to contracting parties, as expressed in the *pacta tertiis nec nocent nec prosunt* principle which is given expression in Article 34 of the Vienna Convention on the Law of Treaties that a treaty cannot create legal obligations or rights for third states without their consent.\(^{50}\)

The prohibition against torture under customary international law did not override the existing customary rule of immunity *ratione materiae*. Rather this was achieved under the regime of Convention against Torture. Spain, United Kingdom and Chile were parties to the Convention and so were bound by the Convention under which the English courts exercised jurisdiction. In essence, the United Kingdom courts were national courts before which there could be no immunity of Heads of state because the courts were vested with jurisdiction under international law over acts of torture.

1.3 TORTURE AS PART OF OFFICIAL FUNCTIONS OF HEADS OF STATE

Heads of states are entitled to absolute immunity *ratione personae* by Section 20 of the State Immunity Act of the United Kingdom. However upon vacation of office, Heads of states have a continuing but limited immunity *ratione materiae* with respect to acts done in the exercise of functions in that capacity. This statement of the principle in customary international law is not problematic and indeed is reflected in the opinions of all the judges, both at the Divisional Court and House of Lords.

\(^{49}\) See *ibid.*, p.114 where Lord Browne-Wilkinson doubts that the existence of torture prior to the Convention could justify the conclusion that there could be no immunity *ratione materiae* for torture.\(^{50}\)

\(^{50}\) 1155 *U.N.T.S.* 331
However, in their various decisions Lords Nicholls and Steyn obfuscated matters by arguing that certain crimes like torture, which are egregious violations of international law, are so heinous that they could not be regarded as part of the functions of Heads of states. Lord Steyn argued that certain acts like torture fall outside the scope of functions of a Head of state; and Lord Nicholls of Birkenhead argued that while international law provides the test for judging the legality of the functions of Heads of states that torture could not be regarded as a function of Heads of states. This line of reasoning is found in Lord Browne-Wilkinson’s decision in *Pinochet*; however he restricted this reasoning with regards to its applicability after the Convention against Torture.

It is difficult to take the view that the functions of Heads of states exclude the commission of crimes without proper analysis. The issue must be given the close analysis that it merits. The issue of whether acts of torture were committed in an official capacity and the issue of whether there can be immunity for the acts of torture must be considered independently of each other. This is because two separate aspects of international law are involved namely, the law of responsibility and the law of immunity.

In the performance of the functions of Heads of states, illegal acts may be committed and the official nature of the functions of Heads of states cannot be removed simply because of the criminal nature of the act involved. The issue is best approached from the perspective of whether a criminal act, either under domestic or international law, was committed in the course of the performance of lawful official functions as Head of state. Adopting a “critical test”, which was considerably relied on in *Pinochet*, Watts stated that,

> A Head of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head

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51 *Supra* note 31, p.945  
53 *Supra* note 44, p.114-115  
54 *Ibid.*, p.126 with Lord Goff of Chieveley stating thus,

> “The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is as true of a serious crime, such as murder or torture, as it is of a lesser crime.”

55 *See ibid.*, Judgments of Lord Goff, p.119 and Lord Hope, p.146
of state’s public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other states whether or not it was wrongful or illegal under the law of his own state.\(^\text{56}\)

It is not enough to say that it cannot be part of the functions of a Head of state to commit a crime. After all, actions which are criminal under local law can still have been done officially and therefore give rise to immunity *ratione materiae*.

It is a general principle of law that immunity may arise, *ratione materiae*, for criminal acts which were done in the course of performance of official functions. This proposition is supported by the principle enunciated in *I Congreso del Partido*\(^\text{57}\) and *Kuwait Airways Corporation v. Iraqi Airways (No.1)*\(^\text{58}\) that the violation of norms of domestic or international law does not remove the immunities to which a state is entitled. The fact that a state official has acted *ultra vires* does not justify the qualification of the act in issue as not an official act. According to Lord Goff in *Pinochet 3*,

> [The] mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character.\(^\text{59}\)

Lord Lloyd had argued that the difficulty in seeing the acts of torture with which Pinochet was charged as part of his official functions as Head of state is resolved by the substitution of the word “official” with “governmental” thereby clarifying the distinction between official and private acts.\(^\text{60}\) Following from this reasoning, if the acts of torture were in the interests of the government and the state they would not qualify as the private acts of the individual. For instance, the example given by Lord Steyn of a Head of state who kills his gardener out of rage or who tortures people for his own personal gratification clearly falls outside the scope of official or governmental acts.\(^\text{61}\)

However, the substitution of words is superfluous because for an act to qualify as ‘official’ or ‘governmental’ it would have to have been done on behalf of the state. In *Ex-King Farouk of

\(^{56}\) Supra note 26, p.56-57  
\(^{57}\) [1983] AC 244  
\(^{58}\) [1995] 1 WLR 1147  
\(^{59}\) Supra note 44, Judgment of Lord Goff, p.119  
\(^{60}\) Supra note 31, Judgment of Lord Lloyd, p.928  
\(^{61}\) Ibid., Judgment of Lord Steyn, p.945
Egypt v. Christian Dior, it was held that the purchase of clothes for the wife of the King were clearly private acts for which there could be no immunity *ratione materiae*.

The reasoning that torture as a norm of *jus cogens* is such a heinous act that it cannot be part of the official functions of Heads of states for which there can be no immunity *ratione materiae* is fraught with difficulty, the implications of which are manifold. Firstly, this reasoning is reflective of a normative hierarchy and thus, fosters obscurity, rather than clarity, of issues. Secondly, the reasoning is contrary to the definition of torture under Article 1 of the Convention against Torture. This is because for an act to qualify as torture under the Convention, the act has to be committed by a public official or person acting in an official capacity. Acts committed by private individuals or in a private capacity cannot be legally described as torture under the Convention. The practical effect of this would mean that the acts alleged against Pinochet would fall outside the scope of the Convention against Torture, an instrument which gave basis to the case.

There is the further problem of the stand-off between the principles of individual criminal responsibility and state responsibility which this reasoning engenders. If torture is argued to be removed from the domain of official acts this would have serious implications for the law of state responsibility and, as such, would fly in the face of international legal developments. Developments post World War II established the state responsibility of Germany and Japan for acts of their officials. The law of state responsibility forms a considerable and important part of the international legal order under the auspices of the United Nations, its organs and agencies including the International Court of Justice and the International Law Commission.

By holding that torture was not part of the official functions of Pinochet, as President of Chile, this meant that there would be no basis for finding that Chile was in breach of its international obligations under the Convention. In other words, there would be no question of attribution of the acts of Pinochet to Chile. Acts of torture implicate both individuals (state officials) and states. States being abstract entities, the question of attribution is important for

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62 Supra note 14
the engagement of the responsibility of states. In the *Massey* claim, between the United States and Mexico, the Claims Commissioner opined that,

I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of [persons in state service], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.64

Similarly, in the *Caire* claim, a case which arose before the Franco-Mexican Claims Commission in 1929 and involved the successful claim by France against Mexico for the arrest, torture and death of its national by Mexican officials, the President of the Commission stated that,

[The] state also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits…65

In this case, it was also decided by the Commission that,

[In] order to justify the admission of objective responsibility of the state for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, they should have used powers or measures appropriate to their official character…66

Fourthly, the argument that acts tainted with illegality cannot be considered to be part of the official functions of state officials was presented and rejected as not being part of international law as far back as the nineteenth century in *Hatch v. Baez*.67 Lord Lloyd stated that, in *Hatch v. Baez*,

[The] plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the defendant must be regarded as having been committed in his private capacity...But the court rejected the plaintiff's argument. Gilbert J. said…:

‘The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo…They

65 (1929) *U.N.R.I.A.A.* v. 516, p.529-531
67 (1876) 7 *Hun.* 596, cited by Lord Lloyd in *Pinochet 1*, supra note 31, p.926
consist of acts done by the defendant in his official capacity of President of that Republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts.’ The court concluded [that] ‘the fact that the defendant has ceased to be President of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them...’

Fifthly, the reasoning is besieged by the problem of boundaries. According to Lord Bingham of Cornhill, C.J,

A former Head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity. If the former sovereign is immune from process in respect of some crimes, where does one draw the line?

It was argued that the nature of torture was such that an exception must be made to the customary international rule on Head of state immunity and also that being a crime against international law that it would be illogical for international law to outlaw a conduct and also grant immunity from prosecution for the outlawed conduct. The requirements for the formation of a rule of customary international law are state practice and opinio juris, therefore for an exception to a customary rule to arise, the same requirements for the formation of a customary rule are necessary. From an examination of state practice, it can be stated that no such rule of exception has become law.

The argument that international law cannot outlaw a conduct like torture and at the same time grant immunity from prosecution is misplaced. This is because immunity is a jurisdictional and procedural matter and does not go to the substance of the act; and the House of Lords in a later decision in Jones v. Saudi Arabia made this clear. Likewise the International Court of Justice in the Arrest Warrant case stated that immunity from jurisdiction and individual criminal responsibility are separate issues.

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68 Ibid., p.926-927
69 See Judgment of Lord Goff, supra 44, p.125-126; and also Judgment of Lord Steyn, Pinochet 1, supra note 31, p.945
70 Quoted by Lord Goff, ibid
71 See Pinochet 1, supra note 31, Lord Nicholls, p.940-942
72 Ibid., Judgment of Lord Hoffmann, Paragraph 45
73 Supra note 4, Paragraph 60
Moreover, the Convention against Torture expressly provides that state parties, who have ratified the Convention, are under an obligation under the Convention to exercise jurisdiction over torture.\(^{74}\) This obligation under the Convention prevails over the customary rule of immunities (\textit{ratione materiae}). Since Spain, United Kingdom and Chile are parties to the Convention against Torture, Pinochet was not entitled to immunity before United Kingdom courts for acts of torture. The Pinochet case falls neatly into the categorisation in the \textit{Arrest Warrant} case of instances where immunities of senior state officials would be inapplicable, i.e. the United Kingdom courts were national courts vested with jurisdiction under international law.

1.4 CONCLUSION

While this article agrees that Pinochet was not entitled to Head of state immunity in this case, it was not for the reasons advanced in \textit{Pinochet 1}. It was not until \textit{Pinochet 3} that the matter was properly analysed and decided.

Contrary to the opinion of some of judges in the \textit{Pinochet} case, the illegality of torture under the regime of customary international law does not remove the immunity of a Head of state. However, the illegality of torture under the regime of the Convention against Torture could remove Head of state immunity \textit{ratione materiae}. The inapplicability of immunity \textit{ratione materiae} to the \textit{Pinochet} case was not as a result that torture not being part of official functions of Heads of state. The commission of acts of torture in an official capacity and the applicability of immunity \textit{ratione materiae} are separate considerations.

Despite the ambiguous and variegated nature of the decision of the House of Lords in the \textit{Pinochet} case, the decision goes beyond expounding international law on Head of State immunity and actually expands international law on the subject. This is because under customary international law, Heads of State are entitled to immunity \textit{ratione personae} and immunity \textit{ratione materiae}. The immunity of Pinochet, \textit{rationae materiae}, which was limited to official acts, which clearly torture was, was held to have been removed by the contractual obligations of Chile, Spain and the United Kingdom as parties to the Convention against Torture.

\(^{74}\) \textit{Supra} note 36, Articles 5 and 7