



To: Minister of State
Lord Chancellor

cc. Mr Burns
Mr Percival
Mr Wickstead
Mr Hart Mr Jenkins
Mr Wallace

From: Oliver Parker
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Date: 30 November 1998

THE PINOCHET CASE: THE LAW OF STATE IMMUNITY

Purpose

1. To report on the decision of the House of Lords in this case (transcript: flag A). To offer a preliminary analysis of it and to draw your attention to some potential problems which it has thrown up.

Timing

Routine.

Background

2. You will recall that your Private Secretary recently wrote to No 10 to warn your ministerial colleagues that it would be unwise to raise hopes that the law of state immunity might be changed if the House of Lords were to uphold the decision of the Divisional Court in this case (minute and letter: Flag B).
3. In the event the House of Lords has overturned the decision of the Divisional Court. It has held that a former Head of State is entitled to immunity from arrest and extradition proceedings in the United Kingdom only in respect of official acts performed in the exercise of his function as Head of State and that the crimes of torture and hostage taking could not be regarded as part of the functions of a Head of State. It is a landmark decision with Lords Nicholls, Steyn and Hoffman in favour, and Lords Slynn and Lloyd against; all of their Lordships except Lord Hoffman

delivered speeches and these were well reasoned with much common ground between them.

4. It is clear from the judgment that current Heads of State are entitled under section 20 of the State Immunity Act 1978 to complete immunity from criminal jurisdiction. This accords with what had previously been thought to be the position.
5. With regard to the immunity of former Heads of State Lord Nicholls held (at p. 51) that section 20 of the 1978 Act, when taken together with Article 39 (2) of the Vienna Convention on Diplomatic Relations, should be read as follows:

“A former Head of State shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him in the exercise of his functions as Head of State”

On the central issue as to whether the alleged acts fell within Pinochet's functions as Head of State, the majority held that section 20 confers immunity only in respect of acts performed in the exercise of functions which international law recognises as functions of a Head of State. Lord Nicholls argued the issue in this way (at p. 52):

“International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a Head of State. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a Head of State may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other States. But international law has made clear that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to Heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.”

6. Lord Steyn added to this type of conduct the crime of genocide and the uncertain category of crimes against humanity. A potential problem with this interpretation of section 20 is that, apart from the crimes specifically mentioned by Lords Nicholls and Steyn, there may be uncertainty as to precisely which other crimes have been stigmatised under international law and therefore fall outside the scope of the immunity enjoyed by former Heads of State. This increases the possibility that when individuals in this position visit this country legal proceedings of a criminal nature may be brought against them in respect of activities alleged to have been carried out by their governments during their time in office. This has obvious diplomatic implications.
7. Brief consideration was also given to the issue of the immunity of officials under customary international law. Lord Nicholls said that there was “no authority on whether [that] law grants such immunity to a former Head of State or other State official on the ground that he was acting under colour of domestic authority”. He suggested that immunity of this kind should have the same scope as that available

under section 20. These are strictly *obiter dicta*, but they indicate that the same degree of uncertainty as now exists in relation to the immunity attached to former Heads of State under that provision also exists in relation to that to be enjoyed by former officials. This creates corresponding potential diplomatic difficulty in relation to criminal proceedings which may in future be brought against such officials when they visit this country.

8. Finally, there is uncertainty as to the effect which this decision will have on the equivalent law on state immunity in other countries. There must be some likelihood that a similar limitation on such immunity may be developed. This could open up a danger that if, for example, Lady Thatcher were in future to visit a South American country she might face proceedings for her extradition to Argentina on the basis of a charge of genocide brought in that country and perhaps relating to the sinking of *the Belgrano* during the Falklands war.

9. **Next Steps**

Under the Extradition Act 1989 the Home Office Secretary has to take a decision on whether to grant authority for the extradition process to proceed. This decision, which is for him alone, must be taken by 11 December. There is every likelihood that this decision will be subject to judicial review.

OLIVER PARKER