060 SCSL-2003-09-PT (691-745) 691

SPECIAL COURT FOR SIERRA LEONE
FREETOWN SIERRA LEONE
(SCSL – 2003-07/PT)

THE PROSECUTOR

Vs
MORRIS KALLON (Respondent)
AUGISTINE GBAO (Applicant)

Reply to prosecution response to request on behalf of Augustine Gbao to intervene for the purpose of requesting a stay of the Appeal Chamber proceedings on the issue of the lack of jurisdiction and amnesty and application for a stay of such proceedings.

AND

Alternative request for the reservation fo/judgment by the appeal Chamber until defence of Augistine Bao has been heard on the issue

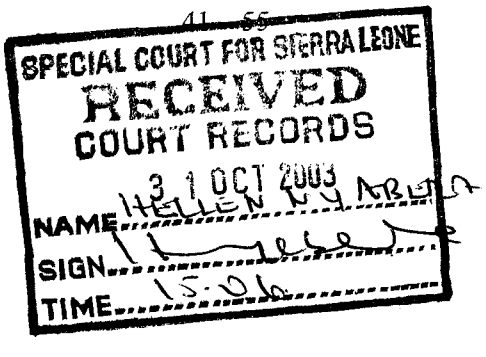
AND

Alternative request on behalf of Augustine Bao for leave to intervene in the proceedings before the Appeal chamber

BOOK OF AUTHORITIES / ANNEXES

1. R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and other intervening) (1998) 4 ALL ER 897 — 1 – 40

2. Jean Bosco Barayagwiza v The Prosecutor Case No. ICTR -97-19-AR 72 — 41 – 55



Digest of cases included in this part

The table of cases reported in parts 10 and 11 and the noter-up for this part appear

R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD LLOYD OF BERWICK, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN AND LORD HOFFMANN

4, 5, 9–11, 25 NOVEMBER 1998

Extradition – Immunity from extradition – Former head of state – Immunity for acts performed in exercise of functions as head of state – Former head of state accused of crimes of torture and hostage-taking while in office – Whether torture and hostage taking a function of a head of state – Whether former head of state entitled to claim immunity from extradition for crimes of torture and hostage taking – State Immunity Act 1978, ss 1, 14(1), 20 – Taking of Hostages Act 1982, s 1(1) – Criminal Justice Act 1988, s 134(1).

The applicant was the former head of state of Chile, and was presently a senator of the Republic of Chile. He was accused in Spain of being responsible for serious crimes committed between 1973 and 1990 while he was head of state, including genocide, murder, torture and the taking of hostages, as well as the murder of Spanish citizens. Proceedings were brought in the National Court of Madrid, which held that it had jurisdiction to try the applicant and issued an international warrant for his arrest. When the applicant entered the United Kingdom in 1998 a Spanish magistrate and then the Spanish government issued a request for the extradition of the applicant. A warrant for his arrest was issued by the metropolitan stipendiary magistrate pursuant to s 8(1)(b) of the Extradition Act 1989 on the basis that there was evidence that he was accused of using the power of the state intentionally to inflict severe pain or suffering on others and cause the taking of hostages and murder in the performance or purported performance of his official duties in Chile, which offences were said to have been committed within the jurisdiction of the Spanish government. Under the Taking of Hostages Act 1982, enacted to implement the International Convention against the Taking of Hostages 1979, the taking of hostages was an offence under international law punishable by the courts of the United Kingdom while, under s 134(1)[a] of the Criminal Justice Act 1988, enacted to implement the Convention against Torture etc, torture by public officials and persons acting in a public capacity was a criminal offence. The applicant claimed immunity from criminal process, including extradition, in the form of (i) state immunity under s 1[b] of the State Immunity Act 1978, which provided for the immunity of a foreign state from the courts of the United Kingdom, and which was extended to a head of state in his public capacity by s 14(1)[c], (ii) the personal immunity of a head of state under s 20[d] of the 1978 Act, which, modifying art 39.2[e] of the Vienna Convention on Diplomatic Relations 1961, provided immunity with respect to acts performed by a head of state or former head of state in the exercise of his functions as a head of

a Section 134(1) is set out at p 916 *d*, post

b Section 1, so far as material, is set out at p 904 *j*, post

state, or (iii) the common law act of state doctrine, and applied for an order of certiorari to quash the warrant for his arrest. The Queen's Bench Divisional Court held that the applicant was entitled to have the warrant quashed on the grounds that he was head of the Chilean state at the time of the alleged offences and therefore, as a foreign sovereign, he was entitled under s 1 of the 1978 Act to immunity from the criminal processes of the English courts. The respondents, the Commissioner of Police and the Spanish government, appealed to the House of Lords.

Held (Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) – 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. Accordingly, the appeal would be allowed (see p 938 *g* to p 939 *c g* to p 940 *a h* to p 941 *h*, p 946 *d* to *f* and p 947 *g* to *j*, post).

Per curiam. The act of state immunity is a principle of domestic law reflecting a recognition by the courts that certain questions of foreign affairs are not justiciable. However, where Parliament has shown that a particular issue is to be justiciable in the English courts, the self-denying principle of act of state cannnot be applied by the courts. The definition of torture in s 134(1) of the Criminal Justice Act 1988, by specifically referring to a 'public official or person acting in an official capacity, whatever his nationality', makes it clear that a prosecution under the section requires an investigation into the conduct of officials acting in an official capacity in foreign countries. It is therefore clear that Parliament did not intend the act of state doctrine to apply in such cases. Similarly, although s 1(1) of the Taking of Hostages Act 1982 merely refers to 'any person, whatever his nationality' who commits the international crime of hostage-taking in the United Kingdom or elsewhere and does not define the offence as one which can be committed only by a public official, it is inconceivable that Parliament is to be taken to have intended that such officials are to be outside the reach of the offence (see p 938 *a* to *c* and p 947 *j*, post).

Notes

For persons subject to extradition, see 18 *Halsbury's Laws* (4th edn) para 210.

For immunity of foreign states and sovereigns, see ibid para 1548.

For the State Immunity Act 1978, ss 1, 14, 20, see 10 *Halsbury's Statutes* (4th edn) (1995 reissue) 757, 766, 771.

For the Taking of Hostages Act 1982, s 1, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 748.

For the Criminal Justice Act 1988, s 134, see ibid 1079.

Cases referred to in opinions

Al Adsani v Kuwait (1996) 107 ILR 536, CA.

Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees) [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL.

Argentina v Amerada Hess Shipping Corp (1989) 488 US 428, US SC.

A-G of Israel v Eichmann (1961) 36 ILR 5, Jerusalem District Ct.

Banco Nacional de Cuba v Sabbatino (1964) 376 US 398, US SC; *rvsg* (1962) 307 F 2d 845, US Ct of Apps (2nd Cir).

Brunswick (Duke) v King of Hanover (1848) 2 HL Cas 1, 9 ER 993.

Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2) [1981] 3 All ER 616, [1982] AC 888, [1981] 3 WLR 787, HL.

Demjanjuk v Petrovsky (1985) 776 F 2d 571, US Ct of Apps (6th Cir).

Filartiga v Peña-Irala (1984) 577 F Supp 860, US District Ct (ED NY); *rvsd* (1980) 630 F 2d 876, US Ct of Apps (2nd Cir).

Hatch v Baez (1876) 7 Hun 596, NY SC.

Hilao v Marcos (1994) 25 F 3d 1467, US Ct of Apps (9th Cir).

I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, [1981] 3 WLR 328, HL.

International Association of Machinists v OPEC (1981) 649 F 2d 1354, US Ct of Apps (9th Cir).

Jimenez v Aristeguieta (1962) 311 F 2d 547, US Ct of Apps (5th Cir).

Kirkpatrick & Co Inc v Environmental Tectonics Corp International (1990) 493 US 400, US SC.

Kuwait Airways Corp v Iraqi Airways Co (29 July 1998, unreported), QBD.

Oetjen v Central Leather Co (1918) 246 US 297, US SC.

Prosecutor v Tadic (1997) 105 ILR 419, Int Trib.

Schooner Exchange v McFaddon (1812) 11 US (7 Cranch) 116, US SC.

Siderman de Blake v Argentina (1992) 965 F 2d 699, US Ct of Apps (9th Cir).

Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.

Underhill v Hernandez (1897) 168 US 250, US SC.

US v Noriega (1990) 746 F Supp 1506, US District Ct (SD of Florida).

Appeal

The Commissioner of Police of the Metropolis and the Spanish government appealed with leave from the decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill CJ, Collins and Richards JJ) ([1998] All ER (D) 629) delivered on 28 October 1998 allowing an application by Senator Augusto Pinochet Ugarte for judicial review by way of an order of certiorari to quash provisional warrants issued for the arrest of the applicant under s 8(1) of the Extradition Act 1989. The Divisional Court certified that a point of law of general public importance was involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state, and ordered that the applicant was not to be released from custody pending an appeal to the House of Lords. Amnesty International, the Medical Foundation for the Care of Victims of Torture, the Redress Trust, Ms Mary Ann Beansire, Ms Juana Francisca Beausire and Dr Sheila Cassidy applied for and were granted leave to intervene in the proceedings before

Marco Antonio Enriguez Espinoza to submit the arguments they wished to lay before the House to the lawyers representing Amnesty International and thereafter to apply to present additional written submissions. The facts are set out in the judgment of Lord Slynn of Hadley.

R Alun Jones QC, Christopher Greenwood, James Lewis and *Campaspe Lloyd-Jacob* (instructed by the *Crown Prosecution Service*, International Division) for the Spanish government and the Commissioner of Police.

Clive Nicholls QC, Clare Montgomery QC, Helen Malcolm, James Cameron and *Julian Knowles* (instructed by *Kingsley Napley*) for the applicant.

David Lloyd Jones (instructed by the *Treasury Solicitor*) as amicus curiae.

Ian Brownlie QC, Michael Fordham, Owen Davies and *Frances Webber* (instructed by *Bindman & Partners*) for Amnesty International and others as interveners.

Their Lordships took time for consideration.

25 November 1998. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, the respondent to this appeal is alleged to have committed or to have been responsible for the commission of the most serious of crimes—genocide, murder on a large scale, torture, the taking of hostages. In the course of 1998, 11 criminal suits have been brought against him in Chile in respect of such crimes. Proceedings have also now been brought in a Spanish court. The Spanish court has held that it has jurisdiction to try him. In the latter proceedings, none of these specific crimes is said to have been committed by the respondent himself.

If the question for your Lordships on the appeal were whether these allegations should be investigated by a criminal court in Chile or by an international tribunal, the answer, subject to the terms of any amnesty, would surely be Yes. But that is not the question and it is necessary to remind oneself throughout that it is not the question. Your Lordships are not being asked to decide whether proceedings should be brought against the respondent, even whether he should in the end be extradited to another country (that is a question for the Secretary of State) let alone whether he in particular is guilty of the commission or responsible for the commission of these crimes. The sole question is whether he is entitled to immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was head of state. We are not, however, concerned only with this respondent. We are concerned on the arguments advanced with a principle which will apply to all heads of state and all alleged crimes under international law.

THE PROCEEDINGS

The proceedings have arisen in this way. On 16 October 1998 Mr Nicholas Evans, a metropolitan magistrate, issued a provisional warrant for the arrest of the respondent pursuant to s 8(1)(b) of the Extradition Act 1989 on the basis that there was evidence that he was accused that—

> 'between 11 September 1973 and 31 December 1983 within the jurisdiction of the Fifth Central Magistrate of the National Court of Madrid

A second warrant was issued by Mr Ronald Bartle, a metropolitan magistrate, on 22 October 1998 on the application of the Spanish government, but without the respondent being heard, despite a written request that he should be heard to oppose the application. That warrant was issued on the basis that there was evidence that he was accused—

> 'between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties within the jurisdiction of the Government of Spain.'

Particulars of other alleged offences were set out, namely (i) between 1 January 1988 and 31 December 1992, being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties; (ii) between 1 January 1982 and 31 January 1992: (a) he detained; (b) he conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages; (iii) between January 1976 and December 1992, conspired together with persons unknown to commit murder in a convention country. It seems, however, that there are alleged at present to have been only one or two cases of torture between 1 January 1988 and 11 March 1990.

The respondent was arrested on that warrant on 23 October.

On the same day as the second warrant was issued, and following an application to the Home Secretary to cancel the warrant pursuant to s 8(4) of the 1989 Act, solicitors for the respondent issued a summons applying for an order of habeas corpus. Mr Michael Caplan, a partner in the firm of solicitors, deposed that the plaintiff was in hospital under medication following major surgery and that he claimed privilege and immunity from arrest on two grounds. The first was that, as stated by the Ambassador of Chile to the Court of St James's, the respondent was 'President of the Government Junta of Chile' according to Decree No 1, dated 11 September 1973, from 11 September 1973 until 26 June 1974 and 'Head of State of the Republic of Chile' from 26 June 1974 until 11 March 1990 pursuant to Decree Law No 527, dated 26 June 1974, confirmed by Decree Law No 806, dated 17 December 1974, and subsequently by the 14th Transitory Provision of the Political Constitution of the Republic of Chile 1980. The second ground was that the respondent was not and had not been a subject of Spain and accordingly no extradition crime had been identified.

An application was also made on 22 October for leave to apply for judicial review to quash the first warrant of 16 October and to direct the Home Secretary to cancel the warrant. On 26 October a further application was made for habeas corpus and judicial review of the second warrant. The grounds put forward were (in addition to the claim for immunity up to 1990) that all the charges specified offences contrary to English statutory provisions which were not in force when the acts were done. As to the fifth charge of murder in a convention country, it was objected that this charged murder in Chile (not a convention country) by someone not a Spanish national or a national of a convention country. Objection was also taken to the issue of a second provisional warrant when the first was treated as being valid.

These applications were heard by the Divisional Court on 26 and 27 October

magistrate's decision of 22 October to issue a provisional warrant was also quashed, but the quashing of the second warrant was stayed pending an appeal to your Lordships' House for which leave was given on an undertaking that the Commissioner of Police and the government of Spain would lodge a petition to the House on 2 November 1998. It was ordered that the applicant was not to be released from custody other than on bail, which was granted subsequently. No order was made on the application for habeas corpus, save to grant leave to appeal and as to costs.

The Divisional Court certified—

> 'that a point of law of general public importance is involved in the Court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was Head of State.'

The matter first came before your Lordships on Wednesday, 4 November. Application for leave to intervene was made first by Amnesty International and others representing victims of the alleged activities. Conditional leave was given to these interveners, subject to the parties showing cause why they should not be heard. It was ordered that submissions should so far as possible be in writing, but that, in view of the very short time available before the hearing, exceptionally leave was given to supplement those by oral submissions, subject to time limits to be fixed. At the hearing no objection was raised to Professor Brownlie QC on behalf of these interveners being heard. Leave was also given to other interveners to apply to put in written submissions, although an application to make oral submissions was refused. Written submissions were received on behalf of these parties. Because of the urgency and the important and difficult questions of international law which appeared to be raised, the Attorney General, at your Lordships' request, instructed Mr David Lloyd Jones as amicus curiae and their Lordships are greatly indebted to him for the assistance he provided in writing and orally at such very short notice. Many cases have been cited by counsel, but I only refer to a small number of them.

At the date of the provisional warrants and of the judgment of the Divisional Court no extradition request had been made by Spain, a party to the European Convention on Extradition 1957 (the Extradition Convention) (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762), nor accordingly any authority to proceed from the Secretary of State under the 1989 Act.

The Divisional Court held that the first warrant was defective. The offence specified of murder in Chile was clearly not said to be committed in Spain so that s 2(1)(a) of the 1989 Act was not satisfied. Nor was s 2(1)(b) of the Act satisfied since the United Kingdom courts could only try a defendant for murder outside the United Kingdom if the defendant was a British citizen (s 9 of the Offences against the Person Act 1861 as amended). Moreover, s 2(3)(a) was not satisfied, since the accused is not a citizen of Spain and it is not sufficient that the victim was a citizen of Spain. The Home Secretary, however, was held not to have been in breach of his duty by not cancelling the warrants. As for the second provisional

that the conduct alleged did constitute a crime here at the time the alleged crime was committed abroad.

As to the sovereign immunity claim, the court found that from the earliest date in the second warrant (January 1976), the respondent was head of state of Chile and, although he ceased to be head of state in March 1990, nothing was relied on as having taken place after March 1990 and indeed the second international warrant issued by the Spanish judge covered the period from September 1973 to 1979. Section 20 in Pt III of the State Immunity Act 1978 was held to apply to matters which occurred before the coming into force of the 1978 Act. The court read the international warrant as accusing the respondent not of personally torturing or murdering victims or causing their disappearance, but of using the powers of the state of which he was head to do that. They rejected the argument that s 20(1) of the 1978 Act and art 39 of the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) only applied to acts done in the United Kingdom, and held that the applicant was entitled to immunity as a former head of state from the criminal and civil process of the English courts.

A request for the extradition of the respondent, signed in Madrid on 3 November 1998 by the same judge who signed the international warrant, set out a large number of alleged murders, disappearances and cases of torture which, it is said, were in breach of Spanish law relating to genocide, to torture and to terrorism. They occurred mainly in Chile, but there are others outside Chile—e g an attempt to murder in Madrid, which was abandoned because of the danger to the agent concerned. The respondent personally is said to have met an agent of the intelligence services of Chile, the Direction de Inteligencia Nacional (the DINA), following an attack in Rome on the Vice-President of Chile in October 1975 and to have set up and directed 'Operation Condor' to eliminate political adversaries, particularly in South America.

> 'These offences have presumably been committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously established and designed for the systematic elimination of the political opponents, specific segments of sections of the Chilean national groups, ethnic and religious groups, in order to remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communist (Marxist) positions, or who simply disagreed.'

By order of 5 November 1998, the judges of the national court criminal division in plenary session held that Spain had jurisdiction to try crimes of terrorism, and genocide even committed abroad, including crimes of torture which are an aspect of genocide and not merely in respect of Spanish victims.

> 'Spain is competent to judge the events by virtue of the principle of universal prosecution for certain crimes—a category of international law—established by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than 50 nationals were killed or

S 696

without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.'

Again there is no mention of a former head of state.

The Diplomatic Privileges Act 1964, unlike the 1978 Act, provides in s 1 that the provisions of the Act, 'with respect to the matters dealt with shall 'have effect in substitution for any previous enactment or rule of law'. By s 2, articles of the Vienna Convention set out in the Schedule, 'shall have the force of law in the United Kingdom'.

The Preamble to the Vienna Convention (which though not part of the Schedule may in my view be looked at in the interpretation of the articles so scheduled) refers to the fact that—

> 'an international convention on diplomatic privileges and immunities would contribute to the development of friendly relations among nations, irrespective of the differing constitutional and social systems'

and records that the purpose of such privileges and immunities is 'not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States'. It confirmed, however, 'that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'.

It is clear that the provisions of the convention were drafted with the head and the members of a diplomatic staff of the mission of a sending state (whilst in the territory of the receiving state and carrying out diplomatic functions there) in mind and the specific functions of a diplomatic mission are set out in art 3 of the convention. Some of the provisions of the Vienna Convention thus have little or no direct relevance to the head of state: those which are relevant must be read 'with the necessary modifications'.

The relevant provisions for present purposes are as follows. (i) Article 29:

> 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

(ii) By art 31(1) a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. (iii) By art 39:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall

It is also to be noted that in art 38, for diplomatic agents who are nationals of or resident in the receiving state, immunity is limited. Such immunity is only in respect of 'official' acts performed in the exercise of his functions.

Reading the provisions 'with the necessary modifications' to fit the position of a head of state, it seems to me that when references are made to a 'diplomatic agent' one can in the first place substitute only the words 'Head of State'. The provisions made cover, prima facie, a head of state whilst in office. The next question is how to relate the time limitation in art 39(1) to a head of state. He does not, in order to take up his post as head of state, 'enter the territory of a receiving State', ie a country other than his own, in order to take up his functions or leave it when he finishes his term of office. He may, of course, as head of state visit another state on an official visit and it is suggested that his immunity and privileges are limited to those visits. Such an interpretation would fit into a strictly literal reading of art 39. It seems to me, however, to be unreal and cannot have been intended. The principle functions of a head of state are performed in his own country and it is in respect of the exercise of those functions that if he is to have immunity that immunity is most needed. I do not accept therefore that s 20 of the 1978 Act read with art 39(2) of the Vienna Convention is limited to visits abroad.

Nor do I consider that the general context of this convention indicates that it only grants immunity to acts done in a foreign state or in connection only with international diplomatic activities as normally understood. The necessary modification to 'the moment he enters the territory of the receiving state on proceeding to take up his post' and to 'the moment when he leaves the country' is to the time when he 'becomes Head of State' to the time 'when he ceases to be Head of State'. It therefore covers acts done by him whilst in his own state and in post. Conversely there is nothing to indicate that this immunity is limited to acts done within the state of which the person concerned is head.

If these limitations on his immunity do not apply to a head of state they should not apply to the position of a former head of state, whom it is sought to sue for acts done during his period as head of state. Another limitation has, however, been suggested. In respect of acts performed by a person in the exercise of his functions as head of a mission, it is said that it is only 'immunity' which continues to subsist, whereas 'privileges and immunities normally cease at the moment when he leaves the country [ie when he finishes his term of office]'. It is suggested that all the provisions of art 29 are privileges not immunities. Mr Nicholls replies that even if being treated with respect and being protected from an attack on his person, freedom or dignity are privileges, the provision that a diplomatic agent (ie head of state) 'shall not be liable to any form of arrest or detention' is an immunity. As a matter of ordinary language and as a matter of principle it seems to me that Mr Nicholls is plainly right. In any event, by art 31 the diplomatic agent/head of state has immunity from the criminal jurisdiction of the receiving state: that immunity would cover immunity from arrest as a first step in criminal proceedings. Immunity in art 39(2) in relation to former heads of state in my view covers immunity from arrest, but so also does art 29.

Where a diplomatic agent (head of state) is in post, he enjoys these immunities and privileges as such—ie ratione personae just as in respect of civil proceedings he enjoys immunity from the jurisdiction of the courts of the United Kingdom under s 14 of the 1978 Act because of his office.

For one who ceases to occupy a post 'with respect to acts performed by such a

immunity shall continue to subsist'. This wording is in one respect different from the wording in art 38 in respect of a diplomat who is a national of the receiving state. In that case, he has immunity in respect of 'official' acts performed in the exercise of his function, but as Professor Eileen Denza suggests, the two should be read in the same way (see *Diplomatic Law* (2nd edn, 1998) p 363).

The question then arises as to what can constitute acts (ie official acts) in the exercise of his functions as head of state.

It is said (in addition to the argument that functions mean only international functions which I reject): (i) that the functions of the head of state must be defined by international law, they cannot be defined simply as a matter of national law or practice; and (ii) genocide, torture and the taking of hostages cannot be regarded as the functions of a head of state within the meaning of international law when international law regards them as crimes against international law.

As to (i), I do not consider that international law prescribes a list of those functions which are, and those which are not, functions for the purposes of art 32. The role of a head of state varies very much from country to country, even as between Presidents in various states in Europe and the United States. International law recognises those functions which are attributed to him as head of state by the law, or in fact, in the country of which he is head as being functions for this purpose, subject to any general principle of customary international law or national law, which may prevent what is done from being regarded as a function.

As to (ii), clearly international law does not recognise that it is one of the specific functions of a head of state to commit torture or genocide. But the fact that in carrying out other functions, a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great. I accept the approach of Sir Arthur Watts QC in his *Hague Lectures* (see 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours pp 56–57):

> '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 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.'

In the present case it is accepted in the international warrant of arrest that in relation to the repression alleged 'the plans and instructions established beforehand from the Government enabled these actions to be carried out'. 'In this sense [the] Commander in Chief of the Armed Forces and Head of the Chilean Government at the time committed punishable acts.'

I therefore conclude that in the present case the acts relied on were done as part of the carrying out of his functions when he was head of state.

The next question is, therefore, whether this immunity in respect of functions

1978 Act. The provisions of the 1978 Act 'fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations' (see *Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees)* [1984] 2 All ER 6 at 8, [1984] AC 580 at 597 per Lord Diplock). So also as I see it must the convention be interpreted.

The original concept of the immunity of a head of state in customary international law in part arose from the fact that he or she was a monarch who by reason of personal dignity and respect ought not to be impleaded in a foreign state: it was linked no less to the idea that the head of state was, or represented, the state and that to sue him was tantamount to suing an independent state extra-territorially, something which the comity of nations did not allow. Moreover, although the concepts of state immunity and sovereign immunity have different origins, it seems to me that the latter is an attribute of the former and that both are essentially based on the principles of sovereign independence and dignity (see eg Suchariktul in his report to the International Law Commission (1980) Vol II Doc A and Marshall CJ in *Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116).

In *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993 the Duke claimed that the King of Hanover had been involved in the removal of the Duke from his position as reigning Duke and in the maladministration of his estates. Lord Cottenham LC said (2 HL Cas 1 at 17–18, 9 ER 903 at 998–999):

> '... a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a *British* subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.' (My emphasis.)

He further said (2 HL Cas 1 at 22, 9 ER 998 at 1000):

> '... if it be a matter of sovereign authority, we cannot try that fact whether it be right or wrong. The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a Sovereign exercising Sovereign authority. If that be so, it does not require another observation to shew, because it has not been doubted, that no Court in this country can entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad.'

This case has been cited since both in judicial decisions and in the writing of jurists and in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616 at 628, [1982] AC 888 at 932 was said by Lord Wilberforce to be 'a case in this House which is still authoritative and which has influenced the law both here and overseas'. In *Hatch v Baez* (1876) 7 Hun 596 the plaintiff claimed that he had suffered injuries in the Dominican Republic as a result of acts done by the defendant in his official

defendant was in New York, he was within the territorial jurisdiction of the state. The court said, however (at 600):

> 'But the immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty thereof, it is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge ... 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, because they emanated from a foreign and friendly government.'

Jurists since have regarded this principle as still applying to the position of a former head of state. Thus in *Oppenheim's International Law* (9th edn, 1992) it is said that a head of state enjoys all the privileges set out as long as he holds that position (ie ratione personae) but that thereafter he may be sued in respect of obligations of a private character. 'For his official acts as Head of State, he will like any other agent of the State enjoy continuing immunity.'

Satow in *Guide to Diplomatic Practice* (5th edn, 1978) is to the same effect. Having considered the Vienna Convention, the Convention on Special Missions 1969 (UN General Assembly, 8 December 1969; Misc 3 (1970); Cmnd 4300) and the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081), the editors conclude (p 9):

> '(2) The personal status of a head of a foreign state therefore continues to be regulated by long established rules of customary international law which can be stated in simple terms. He is entitled to immunity—probably without exception—from criminal and civil jurisdiction ... (2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state. He cannot claim to be entitled to privileges as of right, although he may continue to enjoy certain privileges in other states on a basis of courtesy.'

In his *Hague Lectures* ((1994) 247 Recueil des Cours pp 88–89) Sir Arthur Watts QC wrote that a former head of state had no immunity in respect of his private activities taking place whilst he was head of state:

> 'A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts and he cannot be sued for them even after he has ceased to be Head of State.'

One critical difference between a head of state and the state of course resides in the fact that a head of state may resign or be removed. As these writers show, customary international law whilst continuing to hold immune the head of state for acts performed in such capacity during his tenure of the office, did not hold him immune from personal acts of his own. The distinction may not always be easy to draw, but examples can be found. On the one side in the United States was *Hatch v Baez* (1876) 7 Hun 596 to which I have referred, *Nobili v Charles I of Austria* (1921) I Annual Digest of Public International Law Cases 136. On the other side, in France is *Mellerio v Isabel de Bourbon ex Queen of Spain* (1974) *Journal of International Law* 32; more recently the former King Farouk was held not immune from suits for goods supplied to his former wife whilst he was head of state (see (1964) Review Critique 689).

The reasons for this immunity as a general rule both for the actual and a former head of state still have force and, despite the changes in the role and the person of the head of state in many countries, the immunity still exists as a matter of customary international law. For an actual head of state as was said in *US v Noriega* (1990) 746 F Supp 1506 the reason was to ensure that 'leaders are free to perform their Governmental duties without being subject to detention, arrest or embarrassment in a foreign country's legal system'. There are in my view analogous if more limited reasons for continuing to apply the immunity ratione materiae in respect of a former head of state.

Rules of customary international law change, however, and as Lord Denning MR said in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 at 890, [1977] QB 529 at 554, we should give effect to those changes and not be bound by any idea of stare decisis in international law. Thus, for example, the concept of absolute immunity for a sovereign has changed to adopt a theory of restrictive immunity in so far as it concerns the activities of a state engaging in trade (see *I Congreso del Partido* [1981] 2 All ER 1064, [1983] 1 AC 244). One must therefore ask is there 'sufficient evidence to show that the rule of international law has changed?' (see [1977] 1 All ER 881 at 891, [1977] QB 529 at 556).

This principle of immunity has, therefore, to be considered now in the light of developments in international law relating to what are called international crimes. Sometimes these developments are through conventions. Thus, for example, art 1 of the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893) provides:

> '(1) Any person who seizes or detains and threatens to kill, to injure ... another person ... in order to compel a third party, namely a State, an international governmental organisation, a natural or juridical person, or a group of persons, to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages ...'

States undertake to prosecute if they do not extradite an offender (any offender 'without exception whatsoever') through proceedings in accordance with the law of that state, but subject to 'enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present'. This convention entered into force on 3 June 1983 and was enacted in the United Kingdom in the Taking of Hostages Act 1982 which came into force on 26 November 1982.

By art I of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421):

> 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.'

By art IV:

'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

The Genocide Act 1969 made the acts specified in art II of the convention the criminal offence of genocide, but it is to be noted that art IV of the convention which on the face of it would cover a head of state was not enacted as part of domestic law. It is, moreover, provided in art VI that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction'. It seems to me to follow that if an immunity otherwise exists, it would only be taken away in respect of the state where the crime was committed or before an international tribunal.

There have in addition been a number of charters or statutes setting up international tribunals. There is the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) in 1945 which gave jurisdiction to try crimes against peace, war crimes and crimes against humanity (art 6). By art 7:

'The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

A similar provision was found in the Charter of the International Military Tribunal for the Far East. In 1993 the Statute of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) gave the tribunal power to prosecute persons 'responsible for serious violations of international humanitarian law' (art 1) including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages (art 2), genocide (art 4), crimes against humanity 'when committed in armed conflict whether international or internal in character, and directed against any civilian population' including murder, torture, persecution on political racial or religious grounds (art 5). In dealing with individual criminal responsibility it is provided in art 7(2) that: 'The official position of any accused person whether as Head of State or Government or as responsible Government Official shall not relieve such person of criminal responsibility ...'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) also empowered the tribunal to prosecute persons committing genocide and specified crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population on national political ethnic or other specified grounds' (art 3). The same clause as to head of state as in the Statute of the Tribunal for the Former Yugoslavia is in this statute (see art 6).

The Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) provides in art 5 for jurisdiction in respect of genocide as defined in art 6, and crimes against humanity as defined in art 7 but in each case only with respect to crimes committed after the entry into force of this statute (art 11(2)). Official capacity as a head of state or government shall in no case exempt the person from criminal responsibility under this statute (art 27). Although it is concerned with jurisdiction, it does indicate the limits which states were prepared to impose in this area on the tribunal.

There is thus no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or head of state or other official or diplomatic immunity when charges are brought before international tribunals.

Movement towards the recognition of crimes against international law is to be seen also in the decisions of national courts, in the resolution of the General Assembly of the United Nations 1946, in the reports of the International Law Commission and in the writings of distinguished international jurists.

It has to be said, however, at this stage of the development of international law that some of those statements read as aspirations, as embryonic. It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any jus cogens in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden. I am not satisfied that even now there would be universal acceptance of a definition of crimes against humanity. They had their origin as a concept after the 1914–18 war and were recognised in the Nuremberg Tribunal as existing at the time of international armed conflicts. Even later it was necessary to spell out that humanitarian crimes could be linked to armed conflict internally and that it was not necessary to show that they occurred in international conflict. This is no doubt a developing area but states have proceeded cautiously.

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of 'intransgressible principles of international customary law' when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide Convention provides only for jurisdiction before an international tribunal of the courts of the state where the crime is committed, that the Rome Statute lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts.

So, starting with the basic rule to be found both in art 39(2) and in customary international law that a former head of state is entitled to immunity from arrest or prosecution in respect of official acts done by him in the exercise of his functions as head of state, the question is what effect, if any, the recognition of acts as international crimes has in itself on that immunity. There are two extreme positions. The first is that such recognition has no effect. Head of state immunity is still necessary for a former head of state in respect of his official acts; it is long established, well recognised and based on sound reasons. States must be treated as recognising it between themselves so that it overrides any criminal act, whether national or international. This is a clear cut rule, which for that reason

has considerable attraction. It, however, ignores the fact that international law is not static and that the principle may be modified by changes introduced in state practice, by conventions and by the informed opinions of international jurists. Just as it is now accepted that, contrary to an earlier principle of absolute immunity, states may limit state immunity to acts of sovereign authority (acta jure imperii) and exclude commercial acts (acta jure gestionis) as the United Kingdom has done and just as the immunity of a former head of state is now seen to be limited to acts which he did in his official capacity and to exclude private acts, so it is argued, the immunity should be treated as excluding certain acts of a criminal nature.

The opposite extreme position is that all crimes recognised as, or accepted to be, international crimes are outside the protection of the immunity in respect of former heads of state. I do not accept this. The fact even that an act is recognised as a crime under international law does not mean that the courts of all states have jurisdiction to try it, nor in my view does it mean that the immunity recognised by states as part of their international relations is automatically taken away by international law. There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae.

There is, however, another question to be asked. Does international law now recognise that some crimes are outwith the protection of the former head of state immunity so that immunity in art 39 (2) is equally limited as part of domestic law; if so, how is that established? This is the core question and it is a difficult question.

It is difficult partly because changes in international law take place slowly as states modify existing principles. It is difficult because in many aspects of this problem the appropriate principles of international law have not crystallised. There is still much debate and it seems to me still much uncertainty so that a national judge should proceed carefully. He may have to say that the position as to state practice has not reached the stage when he can identify a positive rule at the particular time when he has to consider the position. This is clearly shown by the developments which have taken place in regard to crimes against humanity. The concept that such crimes might exist was as I have said recognised, for the Nuremberg and Tokyo Tribunals in 1946 in the context of international armed conflict when the tribunals were given jurisdiction to try crimes against humanity. The Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)), the International Law Commission reports and the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ((Rome 4 November 1950; TS 71 (1953); Cmnd 8969) also recognised these crimes as international crimes. Since then there have been, as I have shown, conventions dealing with specific crimes and tribunals have been given jurisdiction over international crimes with a mandate not to treat as a defence to such crimes the holding of official office including that of head of state. National courts as in *A-G of Israel v Eichmann* (1961) 36 ILR 5 held that they had jurisdiction to deal with international crimes (see also *Demjanjuk v Petrovsky* (1985) 776 F 2d 571).

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

I do not find it surprising that this has been a slow process or that the International Law Commission eventually left on one side its efforts to produce a convention dealing with head of state immunity. Indeed, until *Prosecutor v Tadic* (1997) 105 ILR 419 after years of discussion and perhaps even later there was a feeling that crimes against humanity were committed only in connection with armed conflict even if that did not have to be international armed conflict.

If the states went slowly so must a national judge go cautiously in finding that this immunity in respect of former heads of state has been cut down. Immunity, it must be remembered, reflects the particular relationship between states by which they recognise the status and role of each other's head and former head of state.

So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.

In that connection it is necessary to consider when the pre-existing immunity is lost. In my view it is from the date when the national legislation comes into force, although I recognise that there is an argument that it is when the convention comes into force, but in my view nothing earlier will do. Acts done thereafter are not protected by the immunity; acts done before, so long as otherwise qualifying, are protected by the immunity. It seems to me wrong in principle to say that once the immunity is cut down in respect of particular crimes it has gone even for acts done when the immunity existed and was believed to exist. Equally, it is artificial to say that an evil act can be treated as a function of a head of state until an international convention says that the act is a crime when it ceases ex post facto to have been a function. If that is the right test, then it gives a clear date from which the immunity was lost. This may seem a strict test and a cautious approach, but in laying down when states are to be taken as abrogating a long-established immunity it is necessary to be satisfied that they have done so.

THE CRIMES ALLLEGED

What is the position in regard to the three groups of crimes alleged here: torture, genocide and taking hostages?

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593) defines torture as severe pain or suffering intentionally inflicted for specific purposes, 'by

Each state party is to ensure that all acts of torture are offences under its criminal law and to establish jurisdiction over offences committed in its territory, or by a national of that state or, if the state considers it appropriate, when the victim is a national of that state (art 5). It must also establish jurisdiction where, 'the alleged offender is present under its jurisdiction and it does not extradite pursuant to art 8'. Thus, where a person is found in the territory of a state in the cases contemplated in art 5, then the state must, by art 7: '... if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.' States are to give each other the greatest measure of assistance in connection with criminal proceedings.

The important features of this convention are: (1) that it involves action 'by a public official or other person acting in an official capacity'; (2) that by arts 5 and 7, if not extradited, the alleged offender must be dealt with as laid down; and (3) Chile was a state party to this convention and it therefore accepted that, in respect of the offence of torture, the United Kingdom should either extradite or take proceedings against offending officials found in its jurisdiction.

The Torture Convention was incorporated into English law by s 134 of the Criminal Justice Act 1988. Section 134(1) and (2) provides:

> '(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
>
> (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if:—(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence:—(i) of a public official; or (ii) of a person acting in an official capacity; and (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.'

If committed other than in the United Kingdom lawful authority, justification or excuse under the law of the place where the torture was inflicted is a defence, but in Chile the constitution forbids torture.

It is thus plain that torture was recognised by the state parties as a crime which might be committed by the persons, and be punishable in the states, referred to. In particular, the convention requires that the alleged offender, if found in the territory of a state party, shall be, if not extradited, submitted to the prosecution authorities.

This, however, is not the end of the inquiry. The question remains—have the state parties agreed, and in particular have the United Kingdom and Chile, which asserts the immunity, agreed that the immunity enjoyed by a former head of state for acts ratione materiae, shall not apply to alleged crimes of torture? That depends on whether a head of state, and therefore a former head of state, is covered by the words 'a public official or a person acting in that capacity'. As a matter of ordinary usage, it can obviously be argued that he is. But your Lordships are concerned with the use of the words in their context in an international convention. I find it impossible to ignore the fact that in the very conventions and charters relied on by the appellants as indicating that jurisdiction in respect of certain crimes was extended from 1945 onwards, there are specific

pleadable in bar to proceedings in national courts. These provisions do, however, serve as a guide to indicate whether states have generally accepted that former heads of state are to be regarded as 'public officials' and accordingly that the immunity has been taken away from former heads of state in the Torture Convention.

Thus, in the Nuremberg Charter (art 7), the official position of defendants 'whether as *Heads of State* or responsible officials' does not free them from responsibility. In the Genocide Convention persons committing the act shall be punished 'whether they are *constitutionally responsible rulers*, public officials or private individuals'. In the Tribunals for the Former Yugoslavia and Rwanda, 'the official position of any accused person, whether as *Head of State* or Government or as a responsible Government official' is not a defence (art 7). Even as late as the Rome Statute by art 27 'official capacity as a *Head of State or Government* ... or Government official' is not exempted from criminal responsibility.

In these cases, states have not taken the position that the words public or government official are wide enough to cover heads of state or former heads of state, but that a specific exclusion of a defence or of an objection to jurisdiction on that basis is needed. It is nothing to the point that the reference is only to head of state. A head of state on ceasing to be a head of state is not converted into a public official in respect of the period when he was a head of state if he was not so otherwise. This is borne out by the experience of the International Law Commission in seeking to produce a draft in respect of state immunity. The reports of its meeting show the difficulties which arose in seeking to deal with the position of a head of state.

I conclude that the reference to public officials in the Torture Convention does not include heads of state or former heads of state, either because states did not wish to provide for the prosecution of heads of state 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. I appreciate that there may be considerable political and diplomatic difficulties in reaching agreement, but if states wish to exclude the long-established immunity of former heads of state in respect of allegations of specific crimes, or generally, then they must do so in clear terms. They should not leave it to national courts to do so because of the appalling nature of the crimes alleged.

The second provisional warrant does not mention genocide, though the international warrant and the request for extradition do. The Genocide Convention in art 6 limits jurisdiction to a tribunal in the territory in which the act was committed and is not limited to acts by public officials. The provisions in art 4 making 'constitutionally responsible rulers' liable to punishment is not incorporated into the English Genocide Act of 1948. Whether or not your Lordships are concerned with the second international warrant and the request for extradition (and Mr Nicholls submits that you are not), the Genocide Convention does not therefore satisfy the test which I consider should be applied.

The Taking of Hostages Convention, which came into force in 1983, and the 1982 Act clearly make it a crime for 'any person, whatever his nationality ... in the United Kingdom or elsewhere' to take hostages for one of the purposes specified. This again indicates the scope both of the substantive crime and of jurisdiction, but neither the convention nor the Act contain any provisions which

It has been submitted that a number of other factors indicate that the immunity should not be refused by the United Kingdom—the United Kingdom's relations with Chile, the fact that an amnesty was granted, that great efforts have been made in Chile to restore democracy and that to extradite the respondent would risk unsettling what has been achieved, the length of time since the events took place, that prosecutions have already been launched against the respondent in Chile, that the respondent has, it is said, with the United Kingdom government's approval or acquiescence, been admitted into this country and been received in official quarters. These are factors, like his age, which may be relevant on the question whether he should be extradited, but it seems to me that they are for the Secretary of state (the executive branch) and not for your Lordships on this occasion.

THE ALTERNATIVE BASIS—ACTS OF STATE—AND NON-JUSTICIABILITY

United States courts have been much concerned with the defence of act of state as well as of sovereign immunity. They were put largely on the basis of comity between nations beginning with *Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116 (see also *Underhill v Hernandez* (1897) 168 US 250). In *Banco Nacional de Cuba v Sabbatino* (1962) 307 F 2d 845 at 855 it was said that—

> 'the Act of State Doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories ... This doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of international law ... [It] stems from the concept of the immunity of the sovereign because "the sovereign can do no wrong".' (See also (1986) 1 *Third Restatement of The Foreign Relations Law of the United States* (paras 443–444).)

In *International Association of Machinists v OPEC* (1981) 649 F 2d 1354 at 1359 the Ninth Circuit Court of Appeals took the matter further:

> 'The doctrine of sovereign immunity is similar to the acts of state doctrine in that it also represents the need to respect the sovereignty of foreign states ... The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional ... Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity.'

The two doctrines are separate, but they are often run together. The law of sovereign immunity is now contained in the Foreign Sovereignty Immunities Act 1976 (28 USSC-1602) (FSIA) in respect of civil matters and many of the decisions on sovereign immunity in the United States turn on the question whether the exemption to a general state immunity from suit falls within one of the specific exemptions. The FSIA does not deal with criminal head of state immunity. In the United States the courts would normally follow a decision of the executive as to the grant or denial of immunity and it is only when the executive does not take a position that 'Courts should make an independent determination regarding immunity' (see *US v Noriega* (1990) 746 F Supp 1506 per Kravitch SCJ).

In *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400 the court said that, having begun with comity as the basis for the act of state

the conduct of foreign affairs. The Supreme Court said (at 406): 'Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.'

In English law the position is much the same as it was in the earlier statements of the United States courts. The act of state doctrine—

> 'is to the effect that the Courts of one State do not, as a rule, question the validity or legality of the official acts of another Sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts involve the exercise of the State's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are not in themselves contrary to international law' (See *Oppenheim's International Law* (9th edn, 1992) p 365.)

In *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)*, *Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616, [1982] AC 888 Lord Wilberforce spoke of the normal meaning of acts of state as being 'action taken by a foreign sovereign state within its own territory'. In his speech Lord Wilberforce asked whether, apart from cases concerning acts of British officials outside this country and cases concerned with the examination of the applicability of foreign municipal legislation within the territory of a foreign state, there was not 'a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states'—a principle to be considered if it existed 'not as a variety of "act of state", but one of judicial restraint or abstention' (see [1981] 3 All ER 616 at 629, [1982] AC 888 at 931).

Despite the divergent views expressed as to what is covered by the act of state doctrine, in my opinion once it is established that the former head of state is entitled to immunity from arrest and extradition on the lines I have indicated, United Kingdom courts will not adjudicate on the facts relied on to ground the arrest, but in Lord Wilberforce's words, they will exercise 'judicial restraint or abstention'.

Accordingly, in my opinion, the respondent was entitled to claim immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of official acts committed by him whilst he was head of state relating to the charges in the provisional warrant of 22 October 1998. I would accordingly dismiss the appeal.

LORD LLOYD OF BERWICK.

BACKGROUND

My Lords, on 11 September 1973 General Augusto Pinochet Ugarte assumed power in Chile after a military coup. He was appointed president of the governing junta the same day. On 22 September the new regime was recognised by Her Majesty's government. By a decree dated 11 December 1974 General Pinochet assumed the title of President of the Republic. In 1980 a new constitution came into force in Chile, approved by a national referendum. It provided for executive power in Chile to be exercised by the President of the Republic as head of state. Democratic elections were held in December 1989. As a result, General Pinochet handed over power to President Aylwin on 11 March 1990.

In opening the appeal before your Lordships Mr Alun Jones QC took as the first

I return to the narrative. On 19 April 1978, while General Pinochet was still head of state, the senate passed a decree granting an amnesty to all persons involved in criminal acts (with certain exceptions) between 11 September 1973 and 10 March 1978. The purpose of the amnesty was stated to be for the 'general tranquillity, peace and order' of the nation. After General Pinochet fell from power, the new democratic government appointed a Commission for Truth and Reconciliation, thus foreshadowing the appointment of a similar commission in South Africa. The Commission consisted of eight civilians of varying political viewpoints under the chairmanship of Don Raul Rettig. Their terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The Commission reported on 9 February 1991.

In 1994 Senator Pinochet came to the United Kingdom on a special diplomatic mission (he had previously been appointed senator for life). He came again in 1995 and 1997. According to the evidence of Professor Walters, a former foreign minister and ambassador to the United Kingdom, Senator Pinochet was accorded normal diplomatic courtesies. The Foreign Office was informed in advance of his visit to London in September 1998, where at the age of 82 he has undergone an operation at the London Clinic.

At 11.25 pm on 16 October he was arrested while still at the London Clinic pursuant to a provisional warrant (the first provisional warrant) issued under s 8(1)(b) of the Extradition Act 1989. The warrant had been issued by Mr Evans, a metropolitan stipendiary magistrate, at his home at about 9 pm the same evening. The reason for the urgency was said to be that Senator Pinochet was returning to Chile the next day. We do not know the terms of the Spanish international warrant of arrest, also issued on 16 October. All we know is that in the first provisional warrant Senator Pinochet was accused of the murder of Spanish citizens in Chile between 11 September 1973 and 31 December 1983.

For reasons explained by the Divisional Court the first provisional warrant was bad on its face. The murder of Spanish citizens in Chile is not an extradition crime under s 2(1)(b) of the 1989 Act for which Senator Pinochet could be extradited, for the simple reason that the murder of a British citizen in Chile would not be an offence against our law. The underlying principle of all extradition agreements between states, including the Extradition Convention, is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.

On 17 October the Chilean government protested. The protest was renewed on 23 October. The purpose of the protest was to claim immunity from suit on behalf of Senator Pinochet both as a visiting diplomat and as a former head of state, and to request his immediate release.

Meanwhile the flaw in the first provisional warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the state of Spain. At all events, Garzon J in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism. This in turn led to a second provisional warrant of arrest in England issued on this occasion by Mr Ronald Bartle. Senator Pinochet was rearrested in pursuance of the second warrant on 23 October.

The second warrant alleges five offences, the first being that Senator Pinochet—

> 'being a public official conspired with persons unknown to intentionally inflict severe pain or suffering on another in the ... purported performance of his official duties ... within the jurisdiction of the government of Spain.'

In other words, that he was guilty of torture. The reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of s 134 of the Criminal Justice Act 1988 which itself reflects art 1 of the Torture Convention. Section 134(1) provides:

> 'A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.'

It will be noticed that unlike murder, torture is an offence under English law wherever the act of torture is committed. So unlike the first provisional warrant, the second provisional warrant is not bad on its face. The alleged acts of torture are extradition crimes under s 2 of the 1989 Act, as art 8 of the convention required, and as Mr Nicholls QC conceded. The same is true of the third alleged offence, namely the taking of hostages. Section 1 of the Taking of Hostages Act 1982 creates an offence under English law wherever the act of hostage-taking takes place. So hostage-taking, like torture, is an extradition crime. The remaining offences do not call for separate mention.

It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither s 134 of the 1988 Act, nor s 1 of the 1982 Act are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of s 2 of the 1989 Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.

The torture allegations in the second provisional warrant are confined to the period from 1 January 1988 to 31 December 1992. Mr Alun Jones does not rely on conduct subsequent to 11 March 1990. So we are left with the period from 1 January 1988 to 11 March 1990. Only one of the alleged acts of torture took place during that period. The hostage-taking allegations relate to the period from 1 January 1982 to 31 January 1992. There are no alleged acts of hostage-taking during that period. So the second provisional warrant hangs on a very narrow thread. But it was argued that the second provisional warrant is no longer the critical document, and that we ought now to be looking at the complete list of crimes alleged in the formal request of the Spanish government. I am content to assume, without deciding, that this is so.

Returning again to the narrative, Senator Pinochet made an application for certiorari to quash the first provisional warrant on 22 October and a second application to quash the second provisional warrant on 26 October. It was these applications which succeeded before the Divisional Court on 28 October 1998, with a stay pending an appeal to your Lordships' House. The question certified by the Divisional Court was as to—

> 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.'

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state. This latter protest may be based on a misunderstanding. The British government has done nothing. This is not a case where the Secretary of State has already issued an authority to proceed under s 7 of the Extradition Act 1989, since the provisional warrants were issued without his authority (the case being urgent) under s 8(1)(b) of the 1989 Act. It is true that the Secretary of State might have cancelled the warrants under s 8(4). But as the Divisional Court pointed out, it is not the duty of the Secretary of State to review the validity of provisional warrants. It was submitted that it should have been obvious to the Secretary of State that Senator Pinochet was entitled to immunity as a former head of state. But the Divisional Court rejected that submission. In the event leave to move against the Secretary of State was refused.

There are two further points made by Professor Walters in his evidence relating to the present state of affairs in Chile. In the first place he gives a list of eleven criminal suits which have been filed against Senator Pinochet in Chile and five further suits where the Supreme Court has ruled that the 1978 amnesty does not apply. Secondly, he has drawn attention to public concern over the continued detention of Senator Pinochet.

> 'I should add that there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government.'

SUMMARY OF ISSUES

The argument has ranged over a very wide field in the course of a hearing lasting six days. The main issues which emerged can be grouped as follows. (1) Is Senator Pinochet entitled to immunity as a former head of state at common law? This depends on the requirements of customary international law, which are observed and enforced by our courts as part of the common law. (2) Is Senator Pinochet entitled to immunity as a former head of state under Pt I of the State Immunity Act 1978? If not, does Pt I of the 1978 Act cut down or affect any immunity to which he would otherwise be entitled at common law? (3) Is Senator Pinochet entitled to immunity as a former head of state under Pt III of the 1978 Act, and the articles of the Vienna Convention as set out in the Schedule to the Diplomatic Privileges Act 1964? It should be noticed that despite an assertion by the Chilean government that Senator Pinochet is present in England on a diplomatic passport at the request of the Royal Ordnance, Miss Clare Montgomery QC does not seek to argue that he is entitled to diplomatic immunity on that narrow ground, for which, she says, she cannot produce the appropriate evidence. (4) Is this a case where the court ought to decline jurisdiction on the ground that the issues raised are non-justiciable?

is used in different senses in many different contexts. So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.

Issue 1: head of state immunity at common law

As already mentioned, the common law incorporates the rules of customary international law. The matter is put thus in *Oppenheim's International Law* (9th edn, 1992) p 57:

> 'The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law.'

So what is the relevant rule of customary international law? I cannot put it better than it is put by the appellants themselves in para 26 of their written case:

> 'No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head. The immunity is accorded for the benefit not of the former head of state himself but for the state of which he was once the head and any international law obligations are owed to that state and not to the individual.'

The important point to notice in this formulation of the immunity principle is that the rationale is the same for former heads of state as it is for current heads of state. In each case the obligation in international law is owed to the state, and not the individual, though in the case of a current head of state he will have a concurrent immunity ratione personae. This rationale explains why it is the state, and the state alone, which can waive the immunity. Where, therefore, a state is seeking the extradition of its own former head of state, as has happened in a number of cases, the immunity is waived ex hypothesi. It cannot be asserted by the former head of state. But here the situation is the reverse. Chile is not waiving its immunity in respect of the acts of Senator Pinochet as former head of state. It is asserting that immunity in the strongest possible terms, both in respect of the Spanish international warrant, and also in respect of the extradition proceedings in the United Kingdom.

Another point to notice is that it is only in respect of 'certain categories of acts' that the former head of state is immune from the jurisdiction of municipal courts.

on the other. Again I cannot put it better than it is put by the appellants in para 27 of their written case. Like para 26 it has the authority of Professor Greenwood; and like para 26 it is not in dispute.

> 'It is generally agreed that private acts performed by the former head of state attract no such immunity. Official acts, on the other hand, will normally attract immunity ... Immunity in respect of such acts, which has sometimes been applied to officials below the rank of head of state, is an aspect of the principle that the courts of one state will not normally exercise jurisdiction in respect of the sovereign acts of another state.'

The rule that a former head of state cannot be prosecuted in the municipal courts of a foreign state for his official acts as head of state has the universal support of writers on international law. They all speak with one voice. Thus Sir Arthur Watts QC in his monograph on the 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des Cours* at p 89 says:

> 'A head of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state.'

In Satow's *Guide to Diplomatic Practice* (5th edn, 1978) we find:

> '(2.2) The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity—probably without exception - from criminal and civil jurisdiction ... (2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state.'

In *Oppenheim's International Law* (9th edn, 1992) (para 456), we find:

> 'All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity.'

It was suggested by Professor Brownlie that the *Third Restatement of The Foreign Relations Law of the United States* was to the contrary effect. But I doubt if this is so. In vol 1 (para 464) we find:

> 'Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states. However a former head of state appears to have no immunity from jurisdiction to adjudicate.'

or private acts. Unless the court is persuaded that they were private acts the immunity is absolute.

Decided cases support the same approach. In *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993, a case discussed by Professor F A Mann in his illuminating article 'The sacrosanctity of the foreign act of state' (1943) 59 LQR 42, the reigning King of Hanover (who happened to be in England) was sued by the former reigning Duke of Brunswick. It was held by this House that the action must fail, not on the ground that the King of Hanover was entitled to personal immunity so long as he was in England (ratione personae) but on the wider ground (ratione materiae) that a foreign sovereign—

> 'cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad ...' (See (1848) 2 HL Cas 1 at 18; 2 ER 993 at 999.)

In *Hatch v Baez* (1876) 7 Hun 596 the plaintiff complained of an injury which he sustained at the hands of the defendant when president of the Dominican Republic. After the defendant had ceased to be president, he was arrested in New York at the suit of the plaintiff. There was a full argument before what would now, I think, be called the Second Circuit Court of Appeals, with extensive citation of authority including *Duke of Brunswick v King of Hanover*. 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. I quote from the argument ((1876) 7 Hun 596 at 596–597):

> 'No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the man simply, rated as other men are rated in private stations; for in the perpetration of unauthorized offences of this nature, he divests himself of his "regal prerogatives" and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection.'

But the court rejected the plaintiff's argument. Gilbert J said (at 599):

> 'The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St Domingo, while he was residing in that country, and was in all respects subject to its laws. They 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.'

A little later we find (at 600):

> 'The general rule, no doubt, is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also

The court concluded:

> '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, because they emanated from a foreign and friendly government.'

In *Underhill v Hernandez* (1897) 168 US 250 the plaintiff was an American citizen resident in Venezuela. The defendant was a general in command of revolutionary forces, which afterwards prevailed. The plaintiffs brought proceedings against the defendant in New York, alleging wrongful imprisonment during the revolution. In a celebrated passage Fuller CJ said (at 252):

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'

The Supreme Court (at 254) approved a statement by the Circuit Court of Appeals 'that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government'.

On the other side of the line is *Jimenez v Aristeguieta* (1962) 311 F 2d 547. In that case the state of Venezuela sought the extradition of a former chief executive alleging four charges of murder, and various financial crimes. There was insufficient evidence to connect the defendant with the murder charges. But the judge (at 558) found that the alleged financial crimes were committed for his private financial benefit, and that they constituted 'common crimes committed by the Chief of State done in violation of his position and not in pursuance of it'. The defendant argued that as a former chief executive he was entitled to sovereign immunity, and he relied on *Underhill v Hernandez*. Not surprisingly the Fifth Circuit Court of Appeals rejected this argument. They said ((1962) 311 F 2d 547 at 557): 'It is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies.' To the same effect is *US v Noriega* (1990) 746 F Supp 1506. The defendant was charged with various drug offences. He claimed immunity as de facto head of the Panamanian government. The court considered the claim under three heads, sovereign immunity, the act of state doctrine and diplomatic immunity. Having referred to *Hatch v Baez* and *Underhill v Hernandez*, the court continued ((1990) 746 F Supp 1506 at 1521–1522):

> 'In order for the act of state doctrine to apply, the defendant must establish that his activities are "acts of state", ie that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself ... "That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed" ... Though the distinction between the public and private acts of government officials may prove elusive, this difficulty has not prevented courts from scrutinizing the character of the conduct in question.'

The court concluded that Noriega's alleged drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state.

These cases (and there are many others to which we were referred) underline

authority on the other. Despite the plethora of authorities, especially in the United States, the appellants were unable to point to a single case in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office. The nearest they got was *Hilao v Marcos* (1994) 25 F 3d 1467, in which a claim for immunity by the estate of former President Marcos failed. But the facts were special. Although there was no formal waiver of immunity in the case, the government of the Philippines made plain their view that the claim should proceed. Indeed they filed a brief in which they asserted that foreign relations with the United States would *not* be adversely affected if claims against ex-President Marcos and his estate were litigated in US courts. There is an obvious contrast with the facts of the present case.

So the question comes to this: on which side of the line does the present case come? In committing the crimes which are alleged against him, was Senator Pinochet acting in his private capacity or was he acting in a sovereign capacity as head of state? In my opinion there can be only one answer. He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage-taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government, and that he did so in co-operation with other governments under 'Plan Condor', and in particular with the government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

In order to make the above point good it is necessary to quote some passages from the second international warrant.

> 'It can be inferred from the inquiries made that, since September 1973 in Chile and since 1976 in the Republic of Argentina a series of events and punishable actions were committed under the fiercest ideological repression against the citizens and residents in these countries. The plans and instructions established beforehand from the government enabled these actions to be carried out ... It has been ascertained that there were coordination actions at international level that were called "Operativo Condor" in which different countries, Chile and Argentina among them, were involved and whose purpose was to coordinate the oppressive actions among them. In this sense Augusto Pinochet Ugarte, Commander-in-Chief of the Armed Forces and head of the Chilean government at the time, committed punishable acts in coordination with the military authorities in Argentina between 1976 and 1983 ... as he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, both Chileans and individuals from different nationalities, in Chile and in other countries, through the actions of the secret service (DINA) and within the framework of the above-mentioned "Plan Condor".'

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

But the appellants have two further arguments. First they say that the crimes alleged against Senator Pinochet are so horrific that an exception must be made

cannot both condemn conduct as a breach of international law and at the same time grant immunity from prosecution. It cannot give with one hand and take away with the other.

As to the first submission, the difficulty, as the Divisional Court pointed out, is to know where to draw the line. Torture is, indeed, a horrific crime, but so is murder. It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law. Of course it is strange to think of murder or torture as 'official' acts or as part of the head of state's 'public functions'. But if for 'official' one substitutes 'governmental' then the true nature of the distinction between private acts and official acts becomes apparent. For reasons already mentioned I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. I agree with Collins J in the Divisional Court that it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense.

As to the second submission, the question is whether there should be an exception from the general rule of immunity in the case of crimes which have been made the subject of international conventions, such as the Taking of Hostages Convention and the Torture Convention. The purpose of these conventions, in very broad terms, was to ensure that acts of torture and hostage-taking should be made (or remain) offences under the criminal law of each of the state parties, and that each state party should take measures to establish extra-territorial jurisdiction in specified cases. Thus in the case of torture a state party is obliged to establish extra-territorial jurisdiction when the alleged offender is a national of that state, but not where the victim is a national. In the latter case the state has a discretion (see art 5(1)(b)–(c)). In addition there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory—aut dedere aut judicare (see art 7). But there is nothing in the Torture Convention which touches on state immunity. The contrast with the Genocide Convention could not be more marked. Article 4 of the Genocide Convention provides:

> 'Persons committing genocide or any of the other acts enumerated in article 3 shall be punished whether they are constitutionally responsible rulers or public officials or private individuals.'

There is no equivalent provision in either the Torture Convention or the Taking of Hostages Convention.

Moreover, when the Genocide Convention was incorporated into English law by the Genocide Act 1969, art 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would

Genocide Convention (which they did not) it is reasonable to suppose that, as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the conventions.

Nor is any distinction drawn between torture and other crimes in state practice. In *Al Adsani v Kuwait* (1996) 107 ILR 536 the plaintiff brought civil proceedings against the government of Kuwait alleging that he had been tortured in Kuwait by government agents. He was given leave by the Court of Appeal to serve out of the jurisdiction on the ground that state immunity does not extend to acts of torture. When the case came back to the Court of Appeal on an application to set aside service, it was argued that a state is not entitled to immunity in respect of acts that are contrary to international law, and that since torture is a violation of jus cogens, a state accused of torture forfeits its immunity. The argument was rejected. Stuart-Smith LJ observed that the draftsman of the 1978 Act must have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the Torture Convention). If civil claims based on acts of torture were intended to be excluded from the immunity afforded by s 1(1) of the 1978 Act, because of the horrifying nature of such acts, or because they are condemned by international law, it is inconceivable that s 1(1) would not have said so.

The same conclusion has been reached in the United States. In *Siderman de Blake v Argentina* (1992) 965 F 2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the government of Argentina. It was held by the Ninth Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing *Filartiga v Peña-Irala* (1980) 630 F 2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act 1976.

Admittedly these cases were civil cases, and they turned on the terms of the Sovereign Immunity Act in England and the Foreign Sovereign Immunity Act in the United States. But they lend no support to the view that an allegation of torture 'trumps' a plea of immunity. I return later to the suggestion that an allegation of torture excludes the principle of non-justiciability.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under art 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.

extradite or prosecute in all cases. Professor David Lloyd Jones (to whom we are all much indebted for his help as amicus) put the matter as follows:

> 'It is submitted that while there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of jus cogens, eg cases of torture, this does not yet constitute a rule of public international law. In particular it must be particularly doubtful whether there exists a rule of public international law requiring states not to accord immunity in such circumstances. Such a rule would be inconsistent with the practice of many states.'

Professor Greenwood took us back to the Nuremberg Charter, and drew attention to art 7, which provides:

> 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

One finds the same provision in almost identical language in art 7(2) of the Statute of the Tribunal for the Former Yugoslavia, art 6(2) of the Statute of the Tribunal for Rwanda and most recently in art 27 of the Rome Statute. Like the Divisional Court, I regard this as an argument more against the appellants than in their favour. The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal.

Professor Greenwood's reference to these tribunals also provides the answer to those who say, with reason, that there must be a means of bringing such men as Senator Pinochet to justice. There is. He may be tried (1) in his own country, or (2) in any other country that can assert jurisdiction, provided his own country waives state immunity, or (3) before the International Criminal Court when it is established, or (4) before a specially constituted international court, such as those to which Professor Greenwood referred. But in the absence of waiver he cannot be tried in the municipal courts of other states.

On the first issue I would hold that Senator Pinochet is entitled to immunity as former head of state in respect of the crimes alleged against him on well-established principles of customary international law, which principles form part of the common law of England.

Issue 2: immunity under Pt I of the 1978 Act

The long title of the 1978 Act states as its first purpose the making of *new* provision with respect to proceedings in the United Kingdom by or against other states. Other purposes include the making of *new* provision with respect to immunities and privileges of heads of state. It is common ground that the 1978 Act must be read against the background of customary international law current in 1978; for it is highly unlikely, as Lord Diplock said in *Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees)* [1984] 2 All ER 6 at 9–10, [1984] AC 580 at 600 that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compels such a conclusion. It is for this reason that it made sense to start with customary international law before coming to the statute.

> '1. *General immunity from jurisdiction.*—(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question ...
>
> **14.** *States entitled to immunities and privileges.*—(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government, but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—(a) the proceedings relate to anything done by it in the exercise of sovereign authority...
>
> **16.** *Excluded matters.*—(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 ...
>
> (4) This Part of this Act does not apply to criminal proceedings ...'

Mr Nicholls drew attention to the width of s 1(1) of the Act. He submitted that it confirms the rule of absolute immunity at common law, subject to the exceptions contained in ss 2 to 11, and that the immunity covers criminal as well as civil proceedings. Faced with the objection that Pt I of the Act is stated not to apply to criminal proceedings by virtue of the exclusion in s 16(4), he argues that the exclusion applies only to ss 2 to 11. In other words s 16(4) is an exception on an exception. It does not touch s 1. This was a bold argument, and I cannot accept it. It seems clear that the exclusions in s 16(2),(3) and (5) all apply to Pt I as a whole, including s 1(1). I can see no reason why s 16(4) should not also apply to s 1(1). Mr Nicholls referred us to an observation of the Lord Chancellor in moving the Second Reading of the Bill in the House of Lords. In relation to Pt I of the Bill he said: '... immunity from criminal jurisdiction is not affected, and that will remain.' I do not see how this helps Mr Nicholls. It confirms that the purpose of Pt I was to enact the restrictive theory of sovereign immunity in relation to commercial transactions and other matters of a civil nature. It was not intended to affect immunity in criminal proceedings.

The remaining question under this head is whether the express exclusion of criminal proceedings from Pt I of the Act, including s 1(1), means that the immunity in respect of criminal proceedings which exists at common law has been abolished. In *Al Adsani v Kuwait* (1996) 107 ILR 536 at 542 Stuart-Smith LJ referred to the 1978 Act as providing a 'comprehensive code'. So indeed it does. But obviously it does not provide a code in respect of matters which it does not purport to cover. In my opinion the immunity of a former head of state in respect of criminal acts committed by him in exercise of sovereign power is untouched by Pt I of the Act.

Issue 3: immunity under Pt III of the 1978 Act

The relevant provision is s 20, which reads:

> '(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a

diplomatic mission, to members of his family forming part of his household and to his private servants ...

(5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity.'

The 1964 Act was enacted to give force to the Vienna Convention. Section 1 provides that the Act is to have effect in *substitution* for any previous enactment or rule of law.

So again the question arises whether the common law immunities have been abolished by statute. So far as the immunities and privileges of diplomats are concerned, this may well be the case. Whether the same applies to heads of state is more debatable. But it does not matter. For in my view the immunities to which Senator Pinochet is entitled under s 20 of the 1978 Act are identical to the immunities which he enjoys at common law.

The Vienna Convention provides as follows:

'... ARTICLE 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention ...

ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State ...

ARTICLE 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist ...'

The critical provision is the second sentence of art 39(2). How is this sentence to be applied (as it must) to a head of state? What are the 'necessary modifications' which are required under s 20 of the 1978 Act? It is a matter of regret that in such an important sphere of international law as the immunity of heads of state from the jurisdiction of our courts Parliament should have legislated in such a roundabout way. But we must do our best.

The most extreme view, advanced only, I think, by Professor Brownlie for the interveners and soon abandoned, is that the immunity extends only to acts performed by a visiting head of state while within the United Kingdom. I would reject this submission. Article 39(2) is not expressly confined to acts performed in the United Kingdom, and it is difficult to see what functions a visiting head of state would be able to exercise in the United Kingdom as head of state other than

A less extensive view was advanced by Mr Alun Jones as his first submission in reply. This was that the immunity only applies to the acts of heads of state in the exercise of their external functions, that is to say, in the conduct of international relations and foreign affairs generally. But in making the 'necessary modifications' to art 39 to fit a head of state, I see no reason to read 'functions' as meaning 'external functions'. It is true that diplomats operate in foreign countries as members of a mission. But heads of state do not. The normal sphere of a head of state's operations is his own country. So I would reject Mr Alun Jones's first submission.

Mr Alun Jones's alternative submission in reply was as follows:

> 'However, if this interpretation is wrong, and Parliament's intention in section 20(1)(a) of the State Immunity Act was to confer immunity in respect of the exercise of the internal, as well as the external, functions of the head of state, then the second sentence of article 39(2) must be read as if it said: "with respect to official acts performed by a head of state in the exercise of his functions as head of state, immunity shall continue to subsist."'

Here Mr Alun Jones hits the mark. His formulation was accepted as correct by Mr Nicholls and Miss Clare Montgomery QC on behalf of the respondents, and by Mr David Lloyd Jones as amicus curiae.

So the question on his alternative submission is whether the acts of which Senator Pinochet is accused were 'official acts performed by him in the exercise of his functions as head of state'. For the reasons given in answer to issue 1, the answer must be that they were.

So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.

Issue 4: non-justiciability

If I am right that Senator Pinochet is entitled to immunity at common law, and under the statute, then the question of non-justiciability does not arise. But I regard it as a question of overriding importance in the present context, so I intend to say something about it.

The principle of non-justiciability may be traced back to the same source as head of state immunity, namely *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993. Since then the principles have developed separately; but they frequently overlap, and are sometimes confused. The authoritative expression of the modern doctrine of non-justiciability is to be found in the speech of Lord Wilberforce in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616, [1982] AC 888. One of the questions in that case was whether there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Lord Wilberforce answered the question in the affirmative. He said ([1981] 3 All ER 616 at 628, [1982] AC 888 at 932):

> 'In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the

Lord Wilberforce traces the principle from *Duke of Brunswick v King of Hanover* through numerous decisions of the Supreme Court of the United States including *Underhill v Hernandez* (1897) 168 US 250, *Oetjen v Central Leather Co* (1918) 246 US 297 and *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398. In the latter case Lord Wilberforce detected a more flexible use of the principle on a case-by-case basis. This is borne out by the most recent decision of the Supreme Court in *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400. These and other cases are analysed in depth by Mance J in his judgment in *Kuwait Airways Corp v Iraqi Airways Co* (29 July 1998, unreported), from which I have derived much assistance. In the event Mance J held that judicial restraint was not required on the facts of that case. The question is whether it is required (or would be required if head of state immunity were not a sufficient answer) on the facts of the present case. In my opinion there are compelling reasons for regarding the present case as falling within the non-justiciability principle.

In the *Buttes Gas and Oil Co* case [1981] 3 All ER 616 at 633, [1982] AC 888 at 938, the court was being asked—

> 'to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.'

Lord Wilberforce concluded that the case raised issues upon which a municipal court could not pass. In the present case the state of Spain is claiming the right to try Senator Pinochet, a former head of state, for crimes committed in Chile, some of which are said to be in breach of international law. They have requested his extradition. Other states have also requested extradition. Meanwhile Chile is demanding the return of Senator Pinochet on the ground that the crimes alleged against him are crimes for which Chile is entitled to claim state immunity under international law. These crimes were the subject of a general amnesty in 1978, and subsequent scrutiny by the Commission of Truth and Reconciliation in 1990. The Supreme Court in Chile has ruled that in respect of at least some of these crimes the 1978 amnesty does not apply. It is obvious, therefore, that issues of great sensitivity have arisen between Spain and Chile. The United Kingdom is caught in the crossfire. In addition there are allegations that Chile was collaborating with other states in South America, and in particular with Argentina, in execution of 'Plan Condor'.

If we quash the second provisional warrant, Senator Pinochet will return to Chile, and Spain will complain that we have failed to comply with our international obligations under the Extradition Convention. If we do not quash the second provisional warrant, Chile will complain that Senator Pinochet has been arrested in defiance of Chile's claim for immunity, and in breach of our obligations under customary international law. In these circumstances, quite apart from any embarrassment in our foreign relations, or potential breach of comity, and quite apart from any fear that, by assuming jurisdiction, we would only serve to 'imperil the amicable relations between governments and vex the peace of nations' (see *Oetjen v Central Leather Co* (1918) 246 US 297 at 304) we would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give

assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task. In my view this is a case in which, even if there were no valid claim to sovereign immunity, as I think there is, we should exercise judicial restraint by declining jurisdiction.

There are three arguments the other way. The first is that it is always open to the Secretary of State to refuse to make an order for the return of Senator Pinochet to Spain in the exercise of his discretion under s 12 of the 1989 Act. But so far as Chile is concerned, the damage will by then have been done. The English courts will have condoned the arrest. The Secretary of State's discretion will come too late. The fact that these proceedings were initiated by a provisional warrant under s 8(1)(b) without the Secretary of State's authority to proceed, means that the courts cannot escape responsibility for deciding now whether or not to accept jurisdiction.

Secondly it is said that by allowing the extradition request to proceed, we will not be adjudicating ourselves. That will be the task of the courts in Spain. In an obvious sense this is true. But we will be taking an essential step towards allowing the trial to take place, by upholding the validity of the arrest. It is to the taking of that step that Chile has raised objections, as much as to the trial itself.

Thirdly it is said that in the case of torture Parliament has removed any concern that the court might otherwise have by enacting s 134 of the Criminal Justice Act 1988 in which the offence of torture is defined as the intentional infliction of severe pain by 'a public official or ... person acting in an official capacity'. I can see nothing in this definition to override the obligation of the court to decline jurisdiction (as Lord Wilberforce pointed out it is an obligation, and not a discretion) if the circumstances of the case so require. In some cases there will be no difficulty. Where a public official or person acting in an official capacity is accused of torture, the court will usually be competent to try the case if there is no plea of sovereign immunity, or if sovereign immunity is waived. But here the circumstances are very different. The whole thrust of Lord Wilberforce's speech was that non-justiciability is a flexible principle, depending on the circumstances of the particular case. If I had not been of the view that Senator Pinochet is entitled to immunity as a former head of state, I should have held that the principle of non-justiciability applies.

For these reasons, and the reasons given in the judgment of the Divisional Court with which I agree. I would dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords, this appeal concerns the scope of the immunity of a former head of state from the criminal processes of this country. It is an appeal against a judgment of the Divisional Court of the Queen's Bench Division which quashed a provisional warrant issued at the request of the Spanish government pursuant to s 8(b)(i) of the Extradition Act 1989 for the arrest of the respondent, Senator Augusto Pinochet. The warrant charged five offences, but for present purposes I need refer to only two of them. The first offence charged was committing acts of torture contrary to s 134(1) of the Criminal Justice Act 1988. The Act defines the offence as follows:

> 'A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or

The third offence charged was hostage-taking contrary to s 1 of the Taking of Hostages Act 1982. Section 1 defines the offence in these terms:

> 'A person, whatever his nationality, who, in the United Kingdom or elsewhere,—(a) detains any other person ("the hostage"), and (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure, or continue to detain the hostage, commits an offence.'

Both these offences are punishable with imprisonment for life. It is conceded that both offences are extradition crimes within the meaning of the 1989 Act.

The Divisional Court quashed the warrant on the ground that Senator Pinochet was head of the Chilean state at the time of the alleged offences and therefore, as a former sovereign, he is entitled to immunity from the criminal processes of the English courts. The court certified, as a point of law of general public importance, 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state', and granted leave to appeal to your Lordships' House. On this appeal I would admit the further evidence which has been produced, setting out the up-to-date position reached in the extradition proceedings.

There is some dispute over whether Senator Pinochet was technically head of state for the whole of the period in respect of which charges are laid. There is no certificate from the Foreign and Commonwealth Office, but the evidence shows he was the ruler of Chile from 11 September 1973, when a military junta of which he was the leader overthrew the previous government of President Allende, until 11 March 1990 when he retired from the office of president. I am prepared to assume he was head of state throughout the period.

Sovereign immunity may have been a single doctrine at the time when the laws of nations did not distinguish between the personal sovereign and the state, but in modern English law it is necessary to distinguish three different principles, two of which have been codified in statutes and the third of which remains a doctrine of the common law. The first is state immunity, formerly known as sovereign immunity, now largely codified in Pt I of the State Immunity Act 1978. The second is the Anglo-American common law doctrine of act of state. The third is the personal immunity of the head of state, his family and servants, which is now codified in s 20 of the 1978 Act. Miss Montgomery QC, in her argument for Senator Pinochet, submitted that in addition to these three principles there is a residual state immunity which protects former state officials from prosecution for crimes committed in their official capacities.

STATE IMMUNITY

Section 1 of the 1978 Act provides that 'a State is immune from the jurisdiction of the courts of the United Kingdom', subject to exceptions set out in the following sections, of which the most important is s 3 (proceedings relating to a commercial transaction). By s 14(1) references to a state include references to the sovereign or other head of that state in his public capacity, its government and any department of its government. Thus the immunity of the state may not be circumvented by suing the head of state, or indeed any other government official, in his official capacity.

deals with proceedings which, at the time they are started, are in form or in substance proceedings against the state, so that directly or indirectly the state will be affected by the judgment.

In the traditional language of international law, it is immunity ratione personae and not ratione materiae. It protects the state as an entity. It is not concerned with the nature of the transaction alleged to give rise to liability, although this becomes important when applying the exceptions in later sections. Nor is it concerned with whether, in an action against an official or former official which is not in substance an action against the state, he can claim immunity on the ground that in doing the acts alleged he was acting in a public capacity. Immunity on that ground depends upon the other principles to which I shall come. Similarly, Pt I of the Act does not apply to criminal proceedings (s 16(4)). On this s 16(4) is unambiguous. Contrary to the contentions of Mr Nicholls QC, s 16(4) cannot be read as applying only to the exceptions to s 1.

In cases which fall within s 1 but not within any of the exceptions, the immunity has been held by the Court of Appeal to be absolute and not subject to further exception on the ground that the conduct in question is contrary to international law (see *Al Adsani v Kuwait* (1996) 107 ILR 536, where the court upheld the government's plea of state immunity in proceedings where the plaintiff alleged torture by government officials). A similar conclusion was reached by the United States Supreme Court on the interpretation of the Foreign Sovereign Immunities Act 1976 in *Argentina v Amerada Hess Shipping Corp* (1989) 488 US 428. This decision was followed by the Court of Appeals for the Ninth Circuit, perhaps with a shade of reluctance, in *Siderman de Blake v Argentina* (1992) 965 F 2d 699, also a case based upon allegations of torture by government officials. These decisions are not relevant in the present case, which does not concern civil proceedings against the state. So I shall say no more about them.

ACT OF STATE: NON-JUSTICIABILITY

The act of state doctrine is a common law principle of uncertain application which prevents the English court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it. Nineteenth century dicta suggested that it reflected a rule of international law (see eg *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993 and *Underhill v Hernandez* (1897) 168 US 250). The modern view is that the principle is one of domestic law which reflects a recognition by the courts that certain questions of foreign affairs are not justiciable (see *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)*, *Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616, [1982] AC 888) and, particularly in the United States, that judicial intervention in foreign relations may trespass upon the province of the other two branches of government (see *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398).

The doctrine has sometimes been stated in sweepingly wide terms. For instance, in a celebrated passage in *Underhill v Hernandez* (1897) 168 US 250 at 252 Fuller CJ said:

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.'

the legality of the sovereign acts of foreign states (see *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400).

However, it is not necessary to discuss the doctrine in any depth, because there can be no doubt that it yields to a contrary intention shown by Parliament. Where Parliament has shown that a particular issue is to be justiciable in the English courts, there can be no place for the courts to apply this self-denying principle. The definition of torture in s 134(1) of the 1988 Act makes clear that prosecution will require an investigation into the conduct of officials acting in an official capacity in foreign countries. It must follow that Parliament did not intend the act of state doctrine to apply in such cases. Similarly with the taking of hostages. Although s 1(1) of the 1982 Act does not define the offence as one which can be committed only by a public official, it is really inconceivable that Parliament should be taken to have intended that such officials should be outside the reach of this offence. The 1982 Act was enacted to implement the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893), and that convention described taking hostages as a manifestation of international terrorism. The convention was opened for signature in New York in December 1979, and its immediate historical background was a number of hostage-taking incidents in which states were involved or were suspected to have been involved. These include the hostage crisis at the United States embassy in Teheran earlier in that year, several hostage-takings following the hijacking of aircraft in the 1970s, and the holding hostage of the passengers of an El-Al aircraft at Entebbe airport in June 1976.

PERSONAL IMMUNITY

Section 20 of the 1978 Act confers personal immunity upon a head of state, his family and servants by reference ('with necessary modifications') to the privileges and immunities enjoyed by the head of a diplomatic mission under the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565), which was enacted as a Schedule to the Diplomatic Privileges Act 1964. These immunities include, under art 31, 'immunity from the criminal jurisdiction of the receiving state'. Accordingly there can be no doubt that if Senator Pinochet had still been head of the Chilean state, he would have been entitled to immunity.

Whether he continued to enjoy immunity after ceasing to be head of state turns upon the proper interpretation of art 39(2) of the convention:

> 'When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission immunity shall continue to subsist.'

The 'necessary modification' required by s 20 of the 1978 Act is to read 'as a head of state' in place of 'as a member of the mission' in the last sentence. Writ large,

> '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 a head of state.'

Transferring to a former head of state in this way the continuing protection afforded to a former head of a diplomatic mission is not an altogether neat exercise, as their functions are dissimilar. Their positions are not in all respects analogous. A head of mission operates on the international plane in a foreign state where he has been received; a head of state operates principally within his own country, at both national and international levels. This raises the question whether, in the case of a former head of state, the continuing immunity embraces acts performed in exercise of *any* of his 'functions as a head of state' or is confined to such of those acts as have an *international character*. I prefer the former, wider interpretation. There is no reason for cutting down the ambit of the protection, so that it will embrace only some of the functions of a head of state. (I set out below the test for determining what are the functions of a head of state.)

The question which next arises is the crucial question in the present case. It is whether the acts of torture and hostage-taking charged against Senator Pinochet were done in the exercise of his functions as head of state. The Divisional Court decided they were because, according to the allegations in the Spanish warrant which founded the issue of the provisional warrant in this country, they were committed under colour of the authority of the government of Chile. Senator Pinochet was charged, not with personally torturing victims or causing their disappearance, but with using the power of the state of which he was the head to that end. Thus the Divisional Court held that, for the purposes of art 39(2), the functions of head of state included any acts done under purported public authority in Chile. Lord Bingham CJ said the underlying rationale of the immunity accorded by art 39(2) was 'a rule of international comity restraining one sovereign state from sitting in judgment on the sovereign behaviour of another'. It therefore applied to all sovereign conduct within Chile.

Your Lordships have had the advantage of much fuller argument and the citation of a wider range of authorities than the Divisional Court. I respectfully suggest that, in coming to this conclusion, Lord Bingham CJ elided the domestic law doctrine of act of state, which has often been stated in the broad terms he used, with the international law obligations of this country towards foreign heads of state, which s 20 of the 1978 Act was intended to codify. In my view, art 39(2) of the Vienna Convention, as modified and applied to former heads of state by s 20 of the 1978 Act, is apt to confer immunity in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution. This formulation, and this test for determining what are the functions of a head of state for this purpose, are sound in principle and were not the subject of controversy before your Lordships. 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

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.

This was made clear long before 1973 and the events which took place in Chile then and thereafter. A few references will suffice. Under the Nuremberg Charter crimes against humanity, committed before as well as during the 1939–45 war, were declared to be within the jurisdiction of the tribunal, and the official position of defendants, 'whether as heads of state or responsible officials in government', was not to free them from responsibility (arts 6–7). The judgment of the tribunal included the following passage (see 'Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1 November 1945–1 October 1946', 42 vols, IMT Secretariat):

> 'The principle of international law which, under certain circumstance, protects the representatives of a state cannot be applied to acts condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment.'

With specific reference to the laws of war, but in the context the observation was equally applicable to crimes against humanity, the tribunal stated:

> 'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.'

By a resolution passed unanimously on 11 December 1946, the United Nations general assembly affirmed the principles of international law recognised by the Nuremberg Charter and the judgment of the tribunal (see UN GA Resolution 95(I) (1946)). From this time on, no head of state could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity. In 1973 the United Nations put some of the necessary nuts and bolts into place for bringing persons suspected of having committed such offences to trial in the courts of individual states. States were to assist each other in bringing such persons to trial, asylum was not to be granted to such persons, and states were not to take any legislative or other measures which might be prejudicial to the international obligations assumed by them in regard to the arrest, extradition and punishment of such persons. This was in resolution 3074 adopted on 3 December 1973.

RESIDUAL IMMUNITY

Finally I turn to the residual immunity claimed for Senator Pinochet under customary international law. I have no doubt that a current head of state is immune from criminal process under customary international law. This is reflected in s 20 of the 1978 Act. There is no authority on whether customary international 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; Given the largely territorial nature of criminal jurisdiction, it will be seldom that the point arises.

A broad principle of international law according former public officials a degree of personal immunity against prosecution in other states would be consistent with the rationale underlying s 20 of the 1978 Act. It would also be

indistinguishable from the state: l'État, c'est moi. It would be expected therefore that in those times a former head of state would be accorded a special personal immunity in respect of acts done by him as head of state. Such acts were indistinguishable from acts of the state itself. Methods of state governance have changed since the days of Louis XIV. The conduct of affairs of state is often in the hands of government ministers, with the head of state having a largely ceremonial role. With this change in the identity of those who act for the state, it would be attractive for personal immunity to be available to all former public officials, including a former head of state, in respect of acts which are properly attributable to the state itself. One might expect international law to develop along these lines, although the personal immunity such a principle affords would be largely covered also by the act of state doctrine.

Even such a broad principle, however, would not assist Senator Pinochet. In the same way as acts of torture and hostage-taking stand outside the limited immunity afforded to a former head of state by s 20, because those acts cannot be regarded by international law as a function of a head of state, so for a similar reason Senator Pinochet cannot bring himself within any such broad principle applicable to state officials. Acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability. Torture is defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593) and in the United Kingdom legislation (s 134 of the 1988 Act) as a crime committed by public officials and persons acting in a public capacity. As already noted, the Taking of Hostages Convention described hostage-taking as a manifestation of international terrorism. It is not consistent with the existence of these crimes that former officials, however senior, should be immune from prosecution outside their own jurisdictions. The two international conventions made it clear that these crimes were to be punishable by courts of individual states. The Torture Convention, in arts 5 and 7, expressly provided that states are permitted to establish jurisdiction where the victim is one of their nationals, and that states are obliged to prosecute or extradite alleged offenders. The Taking of Hostages Convention is to the same effect, in arts 5 and 8.

I would allow this appeal. It cannot be stated too plainly that the acts of torture and hostage-taking with which Senator Pinochet is charged are offences under United Kingdom statute law. This country has taken extra-territorial jurisdiction for these crimes. The sole question before your Lordships is whether, by reason of his status as a former head of state, Senator Pinochet is immune from the criminal processes of this country, of which extradition forms a part. Arguments about the effect on this country's diplomatic relations with Chile if extradition were allowed to proceed, or with Spain if refused, are not matters for the court. These are, par excellence, political matters for consideration by the Secretary of State in the exercise of his discretion under s 12 of the 1989 Act.

LORD STEYN. My Lords, the way in which this appeal comes before the House must be kept in mind. Spain took preliminary steps under the 1989 Act to obtain the extradition of General Pinochet, the former head of state of Chile, in respect of crimes which he allegedly committed between 11 September 1973 and March 1990 when he ceased to be the President of Chile. General Pinochet applied to

to that effect. If that ruling is correct, the extradition proceedings are at an end. The issues came to the Divisional Court in advance of the receipt of a particularised request for extradition by Spain. Such a request has now been received. Counsel for General Pinochet has argued that the House ought to refuse to admit the request in evidence. In my view it would be wrong to ignore the material put forward in Spain's formal request for extradition. This case ought to be decided on the basis of all the relevant materials before the House. And that involves also taking into account the further evidence lodged on behalf of General Pinochet.

In an appeal in which no fewer than 16 barristers were involved over six days it is not surprising that issues proliferated. Some of the issues do not need to be decided. For example, there was an issue as to the date upon which General Pinochet became the head of state of Chile. He undoubtedly became the head of state at least by 26 June 1974; and I will assume that from the date of the coup d'état on 11 September 1973 he was the head of state. Rather than attempt to track down every other hare that has been started, I will concentrate my observations on three central issues, namely: (1) the nature of the charges brought by Spain against General Pinochet; (2) the question whether he is entitled to former head of state immunity under the applicable statutory provisions; and (3) if he is not entitled to such immunity, the different question whether under the common law act of state doctrine the House ought to declare that the matters involved are not justiciable in our courts. This is not the order in which counsel addressed the issues, but the advantage of so considering the issues is considerable. One can only properly focus on the legal issues before the House when there is clarity about the nature of the charges in respect of which General Pinochet seeks to establish immunity or seeks to rely on the act of state doctrine. Logically, immunity must be examined before act of state. The act of state issue will only arise if the court decides that the defendant does not have immunity. And I shall attempt to show that the construction of the relevant statutory provisions relating to immunity has a bearing on the answer to the separate question of act of state.

THE CASE AGAINST GENERAL PINOCHET

In the Divisional Court Lord Bingham CJ summarised the position by saying that the thrust of the warrant 'makes it plain that the applicant is charged not with personally torturing or murdering victims or ordering their disappearance, but with using the power of the State to that end'. Relying on the information contained in the request for extradition, it is necessary to expand the cryptic account of the facts in the warrant. The request alleges a systematic campaign of repression against various groups in Chile after the military coup on 11 September 1973. The case is that of the order of 4,000 individuals were killed or simply disappeared. Such killings and disappearances mostly took place in Chile but some also took place in various countries abroad. Such acts were committed during the period from 11 September 1973 until 1990. The climax of the repression was reached in 1974 and 1975. The principal instrumentality of the oppression was the DINA, the secret police. The subsequent renaming of this organisation is immaterial. The case is that agents of the DINA, who were specially trained in torture techniques, tortured victims on a vast scale in secret

torture sessions. The case is not one of interrogators acting in excess of zeal. The case goes much further. The request explains:

> '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 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, ie 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.'

As the Divisional Court observed it is not alleged that General Pinochet personally committed any of these acts by his own hand. The case is, however, that agents of the DINA committed the acts of torture and that the DINA was directly answerable to General Pinochet rather than to the military junta. And the case is that the DINA undertook and arranged the killings, disappearances and torturing of victims on the orders of General Pinochet. In other words, what is alleged against General Pinochet is not constructive criminal responsibility. The case is that he ordered and procured the criminal acts which the warrant and request for extradition specify. The allegations have not been tested in a court of law. The House is not required to examine the correctness of the allegations. The House must assume the correctness of the allegations as the backcloth of the questions of law arising on this appeal.

THE FORMER HEAD OF STATE IMMUNITY

It is now possible to turn to the point of general public importance involved in the Divisional Court's decision, namely 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State'. It is common ground that a head of state while in office has an absolute immunity against civil or criminal proceedings in the English courts. If General Pinochet had still been head of state of Chile, he would be immune from the present extradition proceedings. But he has ceased to be a head of state. He claims immunity as a former head of state. Counsel for General Pinochet relied on provisions contained in Pt I of the 1978 Act. Part I does not apply to criminal proceedings (see s 16(4)). It is irrelevant to the issues arising on this appeal. The only arguable basis for such an immunity originates in s 20 of the 1978 Act. It provides as follows:

> '(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants; as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants ...'

It is therefore necessary to turn to the relevant provisions of the 1964 Act. The

agent shall enjoy immunity from criminal jurisdiction in the receiving state. Article 38(1) reads as follows:

> 'Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of *official* acts performed in the exercise of his functions.'

Article 39 so far as it is relevant reads as follows:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State ...
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. *However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist ...*'

Given the different roles of a member of a diplomatic mission and a head of state, as well as the fact that a diplomat principally acts in the receiving state whereas a head of state principally acts in his own country, the legislative technique of applying art 39(2) to a former head of state is somewhat confusing. How the necessary modifications required by s 20 of the 1978 Act are to be achieved is not entirely straightforward. Putting to one side the immunity of a serving head of state, my view is that s 20 of the 1978 Act, read with the relevant provisions of the Schedule to the 1964 Act, should be read as providing that a former head of state shall enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to his official acts performed in the exercise of his functions as head of state. That was the synthesis of the convoluted provisions helpfully offered by Mr Lloyd Jones, who appeared as amicus curiae. Neither counsel for General Pinochet nor counsel for the Spanish government questioned this formulation. For my part it is the only sensible reconstruction of the legislative intent. It is therefore plain that statutory immunity in favour of a former head of state is not absolute. It requires the coincidence of two requirements: (1) that the defendant is a former head of state (ratione personae in the vocabulary of international law) and (2) that he is charged with official acts performed in the exercise of his functions as head of state (ratione materiae). In regard to the second requirement it is not sufficient that official acts are involved: the acts must also have been performed by the defendant in the exercise of his functions as a head of state.

On the assumption that the allegations of fact contained in the warrant and the request are true, the central question is whether those facts must be regarded as official acts performed in the exercise of the functions of a head of state. Lord Bingham CJ observed that a former head of state is clearly entitled to immunity from process in respect of some crimes. I would accept this proposition. Rhetorically, Lord Bingham CJ then posed the question: 'Where does one draw the line?' After a detailed review of the case law and literature, he concluded that even in respect of acts of torture the former head of state immunity would prevail. That amounts to saying that there is no or virtually no line to be drawn. Collins J went further. He said:

> 'The submission was made that it could never be in the exercise of such

> applicant. Unfortunately history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to look very far back in history to see examples of the sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.'

It is inherent in this stark conclusion that there is no or virtually no line to be drawn. It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state. That is where the reasoning of the Divisional Court inexorably leads. Counsel for General Pinochet submitted that this conclusion is the inescapable result of the statutory wording.

My Lords, the concept of an individual acting in his capacity as head of state involves a rule of law which must be applied to the facts of a particular case. It invites classification of the circumstances of a case as falling on a particular side of the line. It contemplates at the very least that some acts of a head of state may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a head of state. If a head of state kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of his functions as head of state. If a head of state orders victims to be tortured in his presence for the sole purpose of enjoying the spectacle of the pitiful twitchings of victims dying in agony (what Montaigne described as the farthest point that cruelty can reach) that could not be described as acts undertaken by him in the exercise of his functions as a head of state. Counsel for General Pinochet expressly, and rightly, conceded that such crimes could not be classified as official acts undertaken in the exercise of the functions of a head of state. These examples demonstrate that there is indeed a meaningful line to be drawn.

How and where the line is to be drawn requires further examination. Is this question to be considered from the vantage point of the municipal law of Chile, where most of the acts were committed, or in the light of the principles of customary international law? Municipal law cannot be decisive as to where the line is to be drawn. If it were the determining factor, the most abhorrent municipal laws might be said to enlarge the functions of a head of state. But I need not dwell on the point because it is conceded on behalf of General Pinochet that the distinction between official acts performed in the exercise of functions as a head of state and acts not satisfying these requirements must depend on the rules of international law. It was at one stage argued that international law spells out no relevant criteria and is of no assistance. In my view that is not right. Negatively, the development of international law since the 1939–45 war justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage-taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.

The essential fragility of the claim to immunity is underlined by the insistence on behalf of General Pinochet that it is not alleged that he 'personally' committed any of the crimes. That means that he did not commit the crimes by his own hand. It is apparently conceded that if he personally tortured victims the position

law, shared by all civilised legal systems, that there is no distinction to be drawn between the man who strikes, and a man who orders another to strike. It is inconceivable that in enacting the 1978 Act Parliament would have wished to rest the statutory immunity of a former head of state on a different basis.

On behalf of General Pinochet it was submitted that acts by police, intelligence officers and military personnel are paradigm official acts. In this absolute form I do not accept the proposition. For example, why should what was allegedly done in secret in the torture chambers of Santiago on the orders of General Pinochet be regarded as official acts? Similarly, why should the murders and disappearances allegedly perpetrated by the DINA in secret on the orders of General Pinochet be regarded as official acts? But, in any event, in none of these cases is the further essential requirement satisfied, namely that in an international law sense these acts were part of the functions of a head of state. The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a head of state. For my part I am satisfied that as a matter of construction of the relevant statutory provisions the charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state. Qualitatively, what he is alleged to have done is no more to be categorised as acts undertaken in the exercise of the functions of a head of state than the examples already given of a head of state murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it. It follows that in my view General Pinochet has no statutory immunity.

Counsel for General Pinochet further argued that if he is not entitled to statutory immunity, he is nevertheless entitled to immunity under customary international law. International law recognises no such wider immunity in favour of a former head of state. In any event, if there had been such an immunity under international law, s 20, read with art 39(2), would have overridden it. General Pinochet is not entitled to an immunity of any kind.

THE ACT OF STATE DOCTRINE

Counsel for General Pinochet submitted that, even if he fails to establish the procedural bar of statutory immunity, the House ought to uphold his challenge to the validity of the warrant on the ground of the act of state doctrine. They argued that the validity of the warrant and propriety of the extradition proceedings necessarily involve an investigation by the House of governmental or official acts which largely took place in Chile. They relied on the explanation of the doctrine of act of state by Lord Wilberforce in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petrolem Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616, [1982] AC 888. Counsel for General Pinochet further put forward wide-ranging political arguments about the consequences of the extradition proceedings, such as adverse internal consequences in Chile and damage to the relations between the United Kingdom and Chile. Plainly it is not appropriate for the House to take into account such political considerations. And the same applies to the argument suggesting past 'acquiescence' by the United Kingdom government.

Concentrating on the legal arguments, I am satisfied that there are several reasons why the act of state doctrine is inapplicable. First, the House is not being asked to investigate, or pass judgment on, the facts alleged in the warrant or request for extradition. The task of the House is simply to take note of the

intent of Parliament was not to give statutory immunity to a former head of state in respect of the systematic torture and killing of his fellow citizens. The ground of this conclusion is that such high crimes are not official acts committed in the exercise of the functions of a head of state. In those circumstances it cannot be right for the House to enunciate an enlarged act of state doctrine, stretching far beyond anything said in the *Buttes Gas and Oil* case [1981] 3 All ER 616, [1982] AC 888, to protect a former head of state from the consequences of his private crimes. Thirdly, any act of state doctrine is displaced by s 134(1) of the 1988 Act in relation to torture and s 1(1) of the 1982 Act. Both Acts provide for the taking of jurisdiction over foreign governmental acts. Fourthly, and more broadly, the Spanish authorities have relied on crimes of genocide, torture, hostage-taking and crimes against humanity. It has in my view been clearly established that by 1973 such acts were already condemned as high crimes by customary international law. In these circumstances it would be wrong for the English courts now to extend the act of state doctrine in a way which runs counter to the state of customary international law as it existed in 1973. Since the act of state doctrine depends on public policy as perceived by the courts in the forum at the time of the suit the developments since 1973 are also relevant and serve to reinforce my view. I would indorse the observation in (1986) 1 *Third Restatement of The Foreign Relations Law of the United States* 370, published by the American Law Institute, to the effect that:

> 'A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.'

But in adopting this formulation I would remove the word 'probably' and substitute 'generally'. Finally, I must make clear that my conclusion does not involve the expression of any view on the interesting arguments on universality of jurisdiction in respect of certain international crimes and related jurisdictional questions. Those matters do not arise for decision.

I conclude that the act of state doctrine is inapplicable.

CONCLUSIONS

My Lords, since the hearing in the Divisional Court the case has in a number of ways been transformed. The nature of the case against General Pinochet is now far clearer. And the House has the benefit of valuable submissions from distinguished international lawyers. In the light of all the material now available I have been persuaded that the conclusion of the Divisional Court was wrong. For the reasons I have given I would allow the appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Nicholls of Birkenhead and Lord Steyn and for the reasons they give I too would allow this appeal.

Appeal allowed.

Celia Fox Barrister.

**DECLARATION OF JUDGE RAFAEL NIETO-NAVIA,
SEPARATE OPINION OF JUDGE SHAHABUDDEEN,
DECLARATION OF JUDGE LAL CHAND VOHRAH**

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza
Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor
Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman

Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcusse

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").
2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.
3. The Decision was stayed by Order of the Appeals Chamber in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities. The Prosecutor responded to the application, asking to be heard on the same point, and in response to this the Appellant withdrew his request.
5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon. This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").
6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention"), informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.
7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day. On 8 December 1999 the Appeals Chamber

issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit. The Appellant objected to this application.

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.
9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the Prosecutor's Motion for Review. The Prosecutor filed her response to these motions on 3 February 2000.
10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.
11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000. The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review. The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.
12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the

appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.
14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.
15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals Chamber. The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."
16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber, and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review. The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.
17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor. New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly. She asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate. In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration. The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.
19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.
20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.
21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies.
22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits. She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.
23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.
24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".
25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.
26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor.

The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person".
28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law.
29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.
30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.
31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.
32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.
33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.
35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to

reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.

36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

REVIEW

General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.
38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence . Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts". Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "
39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a court will undertake a review can differ from that provided in the legislation for this Tribunal.
40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.
41. Returning to the procedure in hand, it is clear from the Statute and the Rules that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.
42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact . In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".

Further, the Appeals Chamber stated that-

a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed in *Prosecutor v. Dražen Erdemovic,* the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadic* in consideration of the matter before it now.
44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.

As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.
47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals demonstrate that a right of appeal is also available in *inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction. Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that

the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the " convicted person" in the wording of the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.
49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.
50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.
52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.
53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996. It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent ». The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui.

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon. In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States. Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997 the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant", as there was no proof to the contrary. The above information

however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000, the Appeals Chamber decides to accept this additional information.
60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.
61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

    There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial

delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).
64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."
65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.
66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse".
67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*. In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

> I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.
70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

United Nations Charter

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Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

**DECLARATION OF JUDGE RAFAEL NIETO-NAVIA,
SEPARATE OPINION OF JUDGE SHAHABUDDEEN,
DECLARATION OF JUDGE LAL CHAND VOHRAH**

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza
Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor
Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman

Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcusse

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").
2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.
3. The Decision was stayed by Order of the Appeals Chamber in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities. The Prosecutor responded to the application, asking to be heard on the same point, and in response to this the Appellant withdrew his request.
5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon. This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").
6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention"), informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.
7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day. On 8 December 1999 the Appeals Chamber

issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit. The Appellant objected to this application.

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.
9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the Prosecutor's Motion for Review. The Prosecutor filed her response to these motions on 3 February 2000.
10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.
11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000. The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review. The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.
12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the

appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.
14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.
15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals Chamber. The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."
16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber, and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review. The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.
17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor. New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly. She asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate. In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration. The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.
19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.
20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.
21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies.
22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits. She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.
23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.
24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".
25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.
26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor.

The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person".
28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law.
29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.
30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.
31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.
32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.
33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.
35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to

reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.

36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

REVIEW

General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.
38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence . Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts". Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "
39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a court will undertake a review can differ from that provided in the legislation for this Tribunal.
40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.
41. Returning to the procedure in hand, it is clear from the Statute and the Rules that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.
42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact . In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

> Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".

Further, the Appeals Chamber stated that-

> a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed in *Prosecutor v. Dražen Erdemovic,* the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadic* in consideration of the matter before it now.
44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

> Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.
>
> As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.
47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals demonstrate that a right of appeal is also available in *inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction. Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that

the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the " convicted person" in the wording of the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.
49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.
50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.
52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.
53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996. It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent ». The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui.

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon. In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States. Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997 the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant", as there was no proof to the contrary. The above information

however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000, the Appeals Chamber decides to accept this additional information.
60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.
61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

    There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial

delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).
64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."
65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.
66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse".
67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*. In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

> I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.
70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: