

**CASE CONCERNING
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION
ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

**VOLUME II OF THE ANNEXES
TO THE WRITTEN STATEMENT
OF OBSERVATIONS AND SUBMISSIONS
ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION
SUBMITTED BY UKRAINE**

14 JANUARY 2019

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Annex 51

Criminal Code of the Russian Federation, art. 25

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Written Submission, but stands ready to provide additional translations should the Court so require.

RUSSIAN FEDERATION

Criminal Code of the Russian Federation

[. . .]

Article 25. Crimes Committed Intentionally

1. An act committed with direct or indirect intent shall be recognized as a crime committed intentionally.
2. A crime is committed with direct intent, if the person was conscious of the social danger of his actions (inactions), foresaw the possibility or the inevitability to bring about dangerous consequences, and desired to bring about such consequences to ensue.
3. A crime shall be deemed to be committed with indirect intent, if the person realized the social danger of his actions (inaction), foresaw the possibility of the onset of socially dangerous consequences, did not wish, but consciously allowed these consequences or treated them with indifference.

[. . .]

Annex 52

Statement of the Ministry of Foreign Affairs of the Russian Federation About Russia's
Signing of the International Convention for the Suppression of the Financing of
Terrorism (6 April 2000)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

11/16/2018 [illegible]



Ministry for Foreign Affairs of the Russian
Federation

04/06/00

ABOUT RUSSIA'S SIGNING THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

About Russia's Signing of the International Convention for the Suppression of the Financing of Terrorism

On April 3 of this year, S.V. Lavrov, Permanent Representative of the Russian Federation at the United Nations, signed the International Convention for the Suppression of the Financing of Terrorism on behalf of the Russian Federation. The Convention was adopted by the UN General Assembly on December 9, 1999 and has been open for signing as of January 10 of this year.

In addition to Russia, the United Kingdom, Finland, France, the USA, Italy, Canada, Malta, the Netherlands, and Sri Lanka have so far signed the Convention.

The Convention may become one of the more effective factors in the concerted efforts by the international community to prevent and eliminate the terrorist threat. The Convention fills in a gap in the international legal framework for combating terrorism, as, for the first time ever, the states' commitment to criminalizing the financing of terrorist activities has been universally formalized. It is designed to erect reliable legal barriers to deny terrorists access to sources of financing and to encourage effective preventive measures at the international and national levels to prevent and suppress financial support for terrorism.

At the signing of the Convention, we made the following statement:

“The Russian Federation proceeds from the premise that the provisions of Article 15 of the Convention should be applied so as to ensure that liability for the commission of crimes falling within the scope of the Convention is inevitable, with no detriment to the effectiveness of international cooperation on extradition and legal assistance.”

The Convention is highly relevant for Russia, in particular, in the context of suppressing the financing of Chechen terrorists by their foreign accomplices.



http://www.mid.ru/foreign_policy/international_safety/crime/-/asset_publisher/3F5IZsLVsX4R/content/id/6059

Annex 53

Statement of the Ministry of Foreign Affairs of the Russian Federation About the
Convention for the Suppression of the Financing of Terrorism (13 April 2000)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*



**Ministry for Foreign Affairs of the Russian
Federation**

04/13/00

**ABOUT THE CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF
TERRORISM
(BACKGROUND)**

**About the Convention for the Suppression of the Financing of Terrorism
(Background)**

The viability of today's terrorism and the possibility that its level of activity will increase is rooted in the availability of major sources of its financing. Therefore, the matters of combatting the financing of terrorism are currently the focus of the international community's attention.

On December 9, 1999, the UN General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism. As of January 10, of this year, it has been open for signing. On April 3 of this year, S.V. Lavrov, Permanent Representative of the Russian Federation at the United Nations, signed the Convention on behalf of the Russian Federation. At the signing of the Convention, we made the following statement:

"The Russian Federation proceeds from the premise that the provisions of Article 15 of the Convention should be applied so as to ensure that liability for the commission of crimes falling within the scope of the Convention is inevitable, with no detriment to the effectiveness of international cooperation on extradition and legal assistance."

In addition to Russia, Finland, France, Malta, the Netherlands, Sri Lanka, the United Kingdom, the USA, Italy, and Canada have signed this important document.

The Convention fills in a gap in the international legal framework for combating terrorism. For the first time ever, the states' commitment to criminalize the financing of terrorist activities has been universally formalized. The Convention is designed to erect reliable legal barriers to deny terrorists access to sources of financing and to encourage effective preventive measures at the international and national levels to prevent and suppress financial support for terrorism.

Key to the Convention is the article stipulating that any person commits an offence if that person by any means, unlawfully and willfully, provides or collects funds in order to carry out: an act that constitutes an offence within the scope of a number of the existing anti-terrorism conventions; or any other act intended to cause death or inflict serious bodily harm on a civilian, “in a situation of armed conflict, when the purpose of such act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

The Convention provides for a range of instruments to prevent and suppress financial preparations for acts of terrorism, including:

- introducing criminal liability, including for legal entities, for providing and gathering funds with the intent that they be used for carrying out acts of terrorism;
- detecting and freezing any funds used by terrorists for purposes of possible forfeiture;
- ensuring that punishment of terrorists is inevitable, including by applying the “extradite or prosecute” principle;
- extraditing terrorists, including on the basis of this Convention itself;
- prohibiting refusals of requests for mutual legal assistance on the ground of bank secrecy, etc.

The Convention is highly relevant for Russia, in particular, in the context of suppressing the financing of Chechen terrorists by their foreign accomplices.

Annex 54

The Ministry of Foreign Affairs of the Russian Federation, Information and Press
Department Statement No. 2079-23-10-2013, *Comment By the Information and Press
Department of the Russian Ministry of Foreign Affairs Regarding the Situation Around
the Arctic Sunrise (23 October 2013)*



23 October 2013

№ 2079-23-10-2013

**Comment by the Information and Press Department of the Russian Ministry
of Foreign Affairs regarding the situation around the Arctic Sunrise**

In connection with the arbitration action against Russia related to the Arctic Sunrise, on the 21 October the Netherlands turned to the International Tribunal for the Law of the Sea in Hamburg, asking them to define provisional measures based on Article 290(5) of the United Nations Convention on the Law of the Sea of 1982. This concerns measures to protect the interests of a party to a dispute, which are adopted before trial on the merits during the arbitration proceedings. The Dutch asked the Tribunal to make a decision to release the ship and its crew and to order the Russian party to stop any and all enforcement actions in connection with this incident.

When ratifying the United Nations Convention on the Law of the Sea in 1997, the Russian Federation announced that it does not accept the dispute settlement procedures under this Convention, which lead to decisions that are binding on the parties in disputes regarding the implementation of sovereign rights and jurisdiction. We are implementing the same jurisdiction in our situation with the Arctic Sunrise. On the 18 September Greenpeace activists violated Russian law on our exclusive economic zone and coastal shelf with their actions against the Prirazlomnaya platform. A criminal investigation into this incident is currently ongoing.

On the basis of this, the Russian party informed the Netherlands and the International Tribunal for the Law of the Sea that it does not accept the arbitration procedure in the case concerning the Arctic Sunrise, and also that it does not intend to participate in the Tribunal proceedings connected to the issue of provisional measures. At the same time, Russia remains open for settlement of this situation.

23 October 2013

Annex 55

Memorandum Opinion for the Deputy Attorney General of the United States, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking* (14 July 1994)

United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking

The Aircraft Sabotage Act of 1984 applies to the police and military personnel of foreign governments. In particular, the Act applies to the use of deadly force by such foreign governmental actors against civil aircraft in flight that are suspected of transporting illegal drugs. There is accordingly a substantial risk that United States Government officers and employees who provide flight tracking information or certain other forms of assistance to the aerial interdiction programs of foreign governments that have destroyed such aircraft, or that have announced an intent to do so, would be aiding and abetting conduct that violated the Act.

July 14, 1994

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL*

This memorandum summarizes our earlier advice concerning whether and in what circumstances United States Government ("USG") officers and employees may lawfully provide flight tracking information and other forms of technical assistance to the Republics of Colombia and Peru. The information and other assistance at issue have been provided to the aerial interdiction programs of those two countries for the purpose of enabling them to locate and intercept aircraft suspected of engaging in illegal drug trafficking.

Concern over the in-flight destruction of civil aircraft as a component of the counternarcotics programs of foreign governments is not novel. In 1990, soon after the inception of the USG assistance program, the United States made an oral *démarche* to the Colombian government informing that government that Colombian use of USG intelligence information to effect shootdowns could result in the suspension of that assistance.

More recently, we understand that the government of Peru has used weapons against aircraft suspected of transporting drugs and that the government of Colombia has announced its intention to destroy in-flight civil aircraft suspected of involvement in drug trafficking. The possibility that these governments might use the information or other assistance furnished by the United States to shoot down civil aircraft raises the question of the extent to which the United States and its governmental personnel may lawfully continue to provide assistance to such programs.

On May 1, 1994, in light of these concerns, the Department of Defense suspended a variety of assistance programs. Thereafter, in a draft opinion, an inter-agency working group concluded that the United States aid was probably unlawful.

* Editors Note: In response to this opinion, Congress enacted Pub. L. No. 103-337, § 1012, 108 Stat. 2663, 2837 (1994) (codified at 22 U.S.C. § 2291-4 (1994)).

The group included lawyers from the Criminal Division, the Departments of State, Defense (including the Joint Chiefs of Staff), the Treasury, and Transportation (including the Coast Guard), and the Federal Aviation Administration. On May 26, 1994, this Department advised all relevant agencies that assistance programs directly and materially supportive of shootdowns should be suspended pending the completion of a thorough review of the legal questions.

After careful consideration of the text, structure and history of the Aircraft Sabotage Act of 1984, the most relevant part of which is codified at 18 U.S.C. § 32(b)(2), we have concluded that this statute applies to governmental actors, including the police and military personnel of foreign countries such as Colombia and Peru. Accordingly, there is a substantial risk that USG personnel who furnish assistance to the aerial interdiction programs of those countries could be aiding and abetting criminal violations of the Aircraft Sabotage Act. *See* 18 U.S.C. § 2(a) (aiding and abetting statute). We caution, however, that these conclusions are premised on our close analysis of § 32(b)(2) and should not be taken to mean that other domestic criminal statutes will necessarily apply to USG personnel acting officially.

I.

International law forms an indispensable backdrop for understanding § 32(b)(2). A primary source of international law regarding international civil aviation is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 ("the Chicago Convention"). The Chicago Convention is administered by the International Civil Aviation Organization ("ICAO").

Article 3(d) of the Chicago Convention declares that "[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Parties have interpreted the due regard standard quite strictly, and have argued that this provision proscribes the use of weapons by states against civil aircraft in flight.¹ For example, the United States invoked this provision during the international controversy over the Korean Air Lines Flight 007 ("KAL 007") incident.² While acknowledging that Article 1 of the Chicago Convention recognized the customary rule that "every State has complete and exclusive sovereignty over the airspace above its territory," the United States argued that the Soviet Union had violated both Article 3(d) and customary international legal norms in shooting down KAL

¹ Article 89 of the Chicago Convention relieves a state party from its obligations under the Convention if it declares a national emergency and certifies that declaration to ICAO. To date, neither Colombia nor Peru has made such a certification. The Chicago Convention contains no explicit exemption permitting the in-flight destruction of aircraft suspected of carrying contraband or of otherwise being involved in the drug trade.

² On September 1, 1983, a Soviet military aircraft shot down a civil aircraft, KAL 007, that had overflown Soviet territory while on a scheduled international flight to Seoul.

007. The Administrator of the Federal Aviation Authority stated to the ICAO Council that:

The ICAO countries have agreed that they will “have due regard for the safety of navigation of civil aircraft” when issuing regulations for their military aircraft. It is self-evident that intercepts of civil aircraft by military aircraft must be governed by this paramount concern.

The international community has rejected deadly assault on a civil airliner by a military aircraft in time of peace as totally unacceptable. It violates not only the basic principles set forth in the [Chicago] convention but also the fundamental norms of international law^[3]

In the wake of KAL 007, the ICAO Assembly unanimously adopted an amendment to the Chicago Convention to make more explicit the prohibitions of Article 3(d).⁴ This amendment, Article 3 *bis*, reads in part as follows:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.⁵

Article 3 *bis* should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is self-defense from attack.⁶ We understand that the United States has not yet ratified Article 3 *bis*. There is, however, support for the view that the principle it announced is declaratory of customary international law.⁷

³ *FAA Administrator Helms' Statement, ICAO Council, Sept 15, 1983 Montreal*, Dep't St Bull, Oct. 1983, at 17, 18. We further note that the ICAO Council Resolution of September 16, 1983, condemned the shootdown of KAL 007 and “[r]eaffirm[ed] the principle that States, when intercepting civil aircraft, should not use weapons against them” *Id.* at 20.

⁴ See Jeffrey D. Laveson, *Korean Airline Flight 007. Stalemate in International Aviation Law — A Proposal for Enforcement*, 22 San Diego L. Rev. 859, 882-84 (1985)

⁵ USG representatives proposed a reference to the United Nations Charter (“Charter”) to reflect the view that an international law prohibition on the use of weapons against civil aircraft in flight would not restrict a state’s right of self-defense as provided for in Article 51 of the Charter.

⁶ See Steven B. Stokdyk, Comment, *Airborne Drug Trafficking Deterrence — Can A Shootdown Policy Fly?*, 38 UCLA L. Rev. 1287, 1306 (1991)

⁷ See, e.g., Andreas F. Lowenfeld, *Looking Back and Looking Ahead*, 83 Am J Int’l L. 336, 341 & n 17 (1989); Sompong Suchantkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 Loy L A Int’l &

In addition to the Chicago Convention, the United States has ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 U.S.T. 567, 10 I.L.M. 1151 (1971) ("the Montréal Convention"). Article 1 of the latter Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1,1(b) states that "[a]ny person commits an offence if he unlawfully and intentionally . . . destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Article 1,2 makes it an offense to attempt to commit a previously enumerated offense, or to be an accomplice of an offender.⁸ Further, Article 10 requires states "in accordance with international and national law," to "endeavour to take all practicable measures for the purpose of preventing" substantive offenses.

The Montréal Convention imposes on states certain duties with respect to offenders or alleged offenders. Article 3 declares that the contracting states "undertake[] to make the offences mentioned in Article 1 punishable by severe penalties." This obligation is specified by requiring states to take measures to establish jurisdiction over certain offenses (Article 5), to take custody of alleged offenders within their territory (Article 6), and either to extradite the alleged offender or to submit the case to their competent authorities for prosecution (Article 7). Further, states have the obligation to report the circumstances of an offense, and the results of their extradition or prosecution proceedings, to the ICAO (Article 13).

Nearly all nations with a significant involvement in air traffic are parties to the Montréal Convention, and have thus incurred the responsibility to execute it. The United States implemented the Convention in 1984 by enacting the Aircraft Sabotage Act, Pub. L. No. 98-473, §§ 2011-2015, 98 Stat. 1837, 2187-90 (1984). Congress specifically stated that legislation's purpose was "to implement fully the [Montréal] Convention . . . and to expand the protection accorded to aircraft and related facilities." *Id.* § 2012(3); *see also* S. Rep. No. 98-619 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682.⁹ The criminal prohibition now codified at 18 U.S.C. § 32(b)(2) was enacted as part of that legislation.

Comp. L J 513, 519-20 (1994) *But see* D J Harris, *Cases and Materials on International Law* 221 (4th ed 1991)

⁸ In general, the furnishing of information or assistance to another nation in circumstances that clearly indicate a serious risk that the information or assistance will be used by that nation to commit a wrongful act may itself be a wrongful act under international law. *Cf* Article 27 of the International Law Commission's Draft Convention on State Responsibility, which provides that "[a]id or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation." *Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2 Y B Int'l L Comm'n 33, U.N. Doc. A/35/10.

⁹ It is undoubtedly within Congress's power to provide that attacks on civil aircraft should be criminal acts under domestic law, even if they were committed extraterritorially and even absent any special connection between this country and the offense. An attack on civil aircraft can be considered a crime of "universal concern" to the community of nations. *See United States v Yunis*, 924 F 2d 1086, 1091 (D.C. Cir. 1991),

II.

We turn to the question of criminal liability under domestic law. At least two criminal statutes are relevant to this inquiry. The first is 18 U.S.C. § 32(b)(2), which implements Article 1,1(b) of the Montréal Convention, and prohibits the destruction of civil aircraft. The second is 18 U.S.C. § 2(a), which codifies the principle of aiding and abetting liability.¹⁰

A.

18 U.S.C. § 32(b)(2) was enacted in 1984, one year after the destruction of KAL 007. The statute makes it a crime “willfully” to “destroy[] a civil aircraft registered in a country other than the United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft’s safety in flight.”¹¹ The text, structure and legislative history of the statute establish that it applies to the actions of the Peruvian and Columbian officials at issue here.

The term “civil aircraft,” as used in § 32(b)(2), is defined broadly to include “any aircraft other than . . . an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.” 49 U.S.C. app. § 1301(17), (36) (definitions section of Federal Aviation Act of 1958). *See* 18 U.S.C. § 31 (in chapter including § 32(b)(2), “civil aircraft” has meaning ascribed to term in Federal Aviation Act). The qualifying language providing that the section applies to “civil aircraft *registered in a country other than the United States*,” 18 U.S.C. § 32(b)(2) (emphasis added), has an expansive rather than restrictive purpose — to extend United States criminal jurisdiction over persons destroying

see generally Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev 785 (1988)

¹⁰ Other criminal statutes may also be relevant. For example, 49 U.S.C. app. § 1472(i)(1) makes it a crime to commit, or to attempt to commit, aircraft piracy. “Aircraft piracy” is defined to “mean[] any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.” *Id.* § 1472(i)(2). The “special aircraft jurisdiction of the United States” includes “civil aircraft of the United States” while such aircraft is in flight. *Id.* § 1301(38)(a). We do not consider in this memorandum whether the prohibition on aircraft piracy, or any criminal statutes other than § 32(b) and the aiding and abetting and conspiracy statutes, would be applicable to the USG activities in question here.

¹¹ Section 32(b) is a felony statute, and pursuant to 18 U.S.C. § 34, persons who violate § 32 are subject to “the death penalty or to imprisonment for life” if the crime “resulted in the death of any person.” However, § 34 predates the Supreme Court decision in *Furman v Georgia*, 408 US 238 (1972), and may not be applicable consistent with that decision. In a pending case, *United States v Cheely*, 21 F.3d 914 (9th Cir. 1994), a divided panel of the Ninth Circuit issued an opinion on April 11, 1994, concluding that the death penalty provided for by 18 U.S.C. § 844(d) (which incorporates § 34 by reference) is unconstitutional. However, the court has, *sua sponte*, requested the parties to address the issue whether the case should be reheard en banc, and it remains uncertain whether § 34 can be applied constitutionally. Pending crime legislation would resolve this issue for future violations by providing a constitutional death penalty provision.

civil aircraft “even if a U.S. aircraft was not involved and the act was not within this country.” *United States v. Yunis*, 681 F. Supp. 896, 906 (D.D.C. 1988) (citation omitted).¹²

Section 32(b)(2) was intended to apply to governmental actors (here, the military and police forces of Colombia and Peru) as well as to private persons and groups. When Congress adopted § 32(b)(2) in 1984, it had been a crime for nearly thirty years under § 32(a)(1) for anyone willfully to “set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce.” 18 U.S.C. § 32(a)(1).¹³ This Department has sought, under § 32(a), to prosecute state actors whom it believes to have sponsored terrorist acts (specifically, the bombing of Pan American Flight 103 at the behest of Libya). Because of the obvious linguistic and structural similarities between §§ 32(a)(1) and 32(b)(2), we read those sections to have the same coverage in this regard, i.e., to apply to governmental and non-governmental actors alike.¹⁴

¹² It might be argued that § 32(b)(2)'s reference to aircraft “registered in a country other than the United States” is restrictive in meaning, i.e., that the section does not protect *unregistered* aircraft. Moreover, we are informed that the registration numbers of aircraft engaged in drug trafficking over Colombia and Peru have in some cases been painted over or otherwise obscured. It is suggested that unregistered aircraft, or aircraft whose registration is concealed, may be made targets under a shootdown policy without violating the statute. There are several flaws in this suggestion. (1) Congress stated that its purpose in enacting the Aircraft Sabotage Act was “to implement fully” the Montréal Convention. See 18 U.S.C. § 31 note. Article 1,1(b) of the Convention (from which 18 U.S.C. § 32(b)(2) is derived) prohibits the destruction of civil aircraft *as such*, without regard to registration. Because § 32(a)(1) had already forbidden the willful destruction of “any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce,” Congress evidently sought to discharge this country’s remaining obligations under the Montréal Convention by affording the same protection to all other civil aircraft. Accordingly, the protections provided by § 32(b)(2) should not be deemed to hinge on whether a foreign civil aircraft is in fact registered, had Congress done no more than that, the United States would have fallen short of fulfilling its treaty obligations, although Congress intended that it should fulfill them. Section 32(b)(2)'s reference to “civil aircraft registered in a country other than the United States” “must be taken to refer to the class with which the statute undertakes to deal.” *United States v. Jim Fuey Moy*, 241 U.S. 394, 402 (1916) (Holmes, J.) (construing scope of registration requirement in criminal statute). See also *United States v. Rodgers*, 466 U.S. 475, 478-82 (1984), *Continental Traming Services Inc. v. Cavazos*, 893 F.2d 877, 883 (7th Cir. 1990). (2) We are advised by the Federal Aviation Authority that the concealment or obscuring of a registration number does not legally “deregister” an airplane, and that only an official act by the registering government can achieve that effect. Accordingly, suspected drug traffickers whose registration is concealed cannot be deemed to be unregistered. (3) There is no logical connection between the class of aircraft engaged in drug smuggling and the class of unregistered aircraft. Nor do we know of any empirical evidence that the two classes significantly overlap. Further, drug traffickers may own, lease or steal planes; and even if it were their practice not to register the planes they own, the owners of the planes they have leased or stolen might normally do so. (4) We are also unaware of any reliable means by which foreign law enforcers who have intercepted a plane could determine while it was in flight whether it was registered or not. Indeed, the very act of destroying a plane might prevent investigators from determining its registration (if any). Thus, it would be difficult, if not impossible, to monitor a “shoot down” policy so as to ensure that the participants in it avoided criminal liability by targeting only unregistered planes.

¹³ Section 32(a) was adopted in 1956, see Pub. L. No. 84-709, 70 Stat. 538, 539 (1956).

¹⁴ While § 32(a) does not have the broad extraterritorial scope of § 32(b)(2), it does apply to acts against United States-registered aircraft abroad, and thus would apply with respect to any such aircraft shot down by Colombian or Peruvian authorities.

The legislative history of the Aircraft Sabotage Act confirms that Congress intended § 32(b)(2) to reach governmental actions. The original bill was introduced as part of a package of four related measures proposed by the Administration and designed to enable the United States to combat international terrorism, including state-sponsored actions, more effectively. In submitting this legislative package to Congress, the President explained that it was largely concerned with

a very worrisome and alarming new kind of terrorism . . . : the direct use of instruments of terror *by foreign states*. This “state terrorism” . . . accounts for the great majority of terrorist murders and assassinations. Also disturbing is state-provided training, financing, and logistical support to terrorists and terrorist groups.

Message to the Congress Transmitting Proposed Legislation To Combat International Terrorism, *Pub. Papers of Ronald Reagan* 575 (1984) (emphasis added).

Further, in testimony given at a Senate Judiciary Committee hearing on these bills on June 5, 1984, Wayne R. Gilbert, Deputy Assistant Director of the Criminal Investigative Division of the Federal Bureau of Investigation, underscored that:

Recent years reflect increasing concern both in the United States and in foreign nations over the use of terrorism *by foreign governments* or groups. We have seen an increased propensity on the part of terrorist entities to plan and carry out terrorist acts worldwide.

Legislative Initiatives to Curb Domestic and International Terrorism: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 98th Cong. 44 (1984) (“Hearings”) (statement of Wayne R. Gilbert) (emphasis added). In written testimony, the Department of Justice also explained that “[t]hese four bills address some of the risks caused by the growing worldwide terrorism problem, *especially state-supported terrorism*.” *Id.* at 46-47 (prepared statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division) (emphasis added).¹⁵ The legislative history of § 32(b)(2) thus shows that the statute was intended to reach shootdowns by officials or agents of governments as well as by private individuals and organizations.

Because § 32(b)(2) applies generally to foreign governments, it must apply to shootdowns of foreign-registered civil aircraft by law enforcement officers or military personnel of the governments of Colombia and Peru. The statute contains no exemption for shootdowns in pursuance of foreign law enforcement activity; nor

¹⁵ In a colloquy between Senator Denton and Mr. Gilbert on the bill addressed to aircraft sabotage, Senator Denton commented that “we should not ignore the fact that in Libya a General Wolf, whose full name is Marcus Wolf, set up and acts as the chief of Libyan Intelligence.” *Id.* at 81. In context, Senator Denton’s comment seems to reflect his understanding that the legislation would reach state-sponsored attacks on civil aircraft or air passengers and the officials responsible for such attacks.

does it exempt shootdowns of aircraft suspected of carrying contraband.¹⁶ USG personnel who aid and abet violations of § 32(b)(2) by the Colombian or Peruvian governments are thus themselves exposed to criminal liability by virtue of 18 U.S.C. § 2(a), *see* Part II B below.¹⁷

Our conclusion that § 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially. Our Office's precedents establish the need for careful examination of each individual statute. For example, we have opined that USG officials acting within the course and scope of their duties were not subject to section 5 of the Neutrality Act, 18 U.S.C. § 960. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) ("Neutrality Act Opinion"). In general terms, that statute forbids the planning of, provision for, or participation in "any military or naval expedition or enterprise to be carried on from [the United States] against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace," 18 U.S.C. § 960; it does not explicitly exempt USG-sponsored activity. Our conclusion with respect to the Neutrality Act was based upon an examination of the legislative history of the Act, its practical construction over two centuries by Presidents and Congresses, and the judicial decisions interpreting it.¹⁸

B.

The question we have been asked presupposes that USG personnel would not themselves directly carry out shootdowns of civil aircraft or encourage others to do

¹⁶ Although the legislative history emphasizes the dangers of state-sponsored "terrorism," we do not understand the statute to exempt state activity that could arguably be characterized as "law enforcement." An action such as the Soviet Union's shooting down of KAL 007 could have been viewed as the enforcement of national security laws regulating overflights in militarily sensitive airspace, and thus distinguished from acts of terrorist violence. Nevertheless, we think that § 32(b)(2) would apply to such attacks on civil aviation.

¹⁷ Section 32(b)(2) would also apply directly to USG personnel who themselves shot down foreign-registered civil aircraft, although on the facts as we understand them such conduct — as distinct from aiding and abetting foreign governmental violations — is not at issue here. (For further discussion, *see* Part V below.) Nothing in the legislative history of § 32(b)(2) suggests that that statute would not apply to USG personnel in proper cases as much as it does to foreign governmental personnel.

¹⁸ We noted in the Neutrality Act Opinion that "the Act's purpose was to enhance the President's ability to implement the foreign policy goals that have been developed by him, with appropriate participation by Congress." *Id.* at 72. Accordingly, we found that "it would indeed be anomalous" to construe that Act to limit what USG officials acting under Presidential foreign policy directives could lawfully do. *Id.* By contrast, interpreting the Aircraft Sabotage Act to reach such actors would not obstruct the statute's purpose, which in any case was not to ensure the President's ability to conduct a unified and consistent foreign policy unimpeded by private citizens' interferences. If anything, it would be contrary to the Aircraft Sabotage Act's policy of protecting international civil aviation from armed attacks to allow USG officials, but not those of any other country, to carry out such attacks. Furthermore, although it is often true that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," *id.* (quoting *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947)), that maxim is "no hard and fast rule of exclusion," and much depends on the context, the subject matter, legislative history, and executive interpretation." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)).

so. Thus, the lawfulness of USG activities and the potential liability of USG personnel, under the circumstances outlined to us, depend on the proper application of the federal aider and abettor statute, 18 U.S.C. § 2(a).

Section 2(a) does not itself define any criminal offense, but rather provides that a person who is sufficiently associated with the criminal act of another is liable as a principal for that act.

Under the “classic interpretation” of this offense, “[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”

United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)) (internal quotation marks and citations omitted).

Aiding and abetting liability for a crime can be usefully analyzed as consisting of three elements: “[1] *knowledge* of the illegal activity that is being aided and abetted, [2] a *desire* to help the activity succeed, and [3] some *act* of helping.” *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (enumeration added), *aff’d*, 506 U.S. 534 (1993). All three elements must be present for aiding and abetting liability to attach. *Id.*

1. Knowledge of unlawful activity. A person must know about unlawful activity in order to be guilty of aiding and abetting it: “a person cannot very well aid a venture he does not know about.” *United States v. Allen*, 10 F.3d 405, 415 (7th Cir. 1993). With respect to most or perhaps all countries to which the United States provides information or other assistance (other than Colombia and Peru), the absence of this first element of aiding and abetting eliminates entirely any possibility that the USG activities implicate 18 U.S.C. § 32(b). In the absence of some serious reason to think otherwise, the United States is entitled to assume that the governments of other nations will abide by their international commitments (such as the Chicago Convention) and customary international law. The fact that another government theoretically could act otherwise cannot render USG aid activities legally problematic. Furthermore, the United States is under no general obligation to attempt to determine whether another government has an as-yet unrevealed intention to misuse USG assistance in a violation of § 32(b). *See United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (“Aider and abettor liability is not negligence liability.”). Therefore, if a foreign nation with no announced policy or known practice of unlawful shutdowns did in fact use USG aid in carrying out a shutdown, that event would create no liability for the prior acts of USG personnel,

although it probably would require a reevaluation of USG assistance to that country and, depending on the circumstances, might require changes in that assistance.

The same analysis, however, does not apply where the foreign state does have an announced policy or known practice of carrying out shootdowns that violate § 32(b)(2) — precisely the situation with respect to Colombia and Peru. It is obvious that the United States has knowledge of Colombia's publicly avowed policy. We believe that the United States is equally on notice about Peru's *de facto* shoot-down policy on the basis of the incidents that have occurred.¹⁹ It appears to be settled law that the knowledge element of aiding and abetting is satisfied where the alleged aider and abettor attempted to escape responsibility through a "deliberate effort to avoid guilty knowledge" of the primary actor's intentions. *Giovannetti*, 919 F.2d at 1229. Someone who suspected the existence of illegal activity that his or her actions were furthering and who took steps to ensure that the suspicion was never confirmed, "far from showing that he was not an aider and abettor . . . would show that he was." *Id.* On the facts as presented to us, we think that the knowledge element is met with respect to Colombia and Peru unless there is a change in the policies of those countries.

2. Desire to facilitate the unlawful activity. "[T]he aider and abettor must share the principal's purpose" in order to be liable under 18 U.S.C. § 2. *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986). The contours of this element in the definition of aiding and abetting are not without ambiguity, *see Zafiro*, 945 F.2d at 887, although as a general matter mere knowledge of the criminal activity (the existence of the first, knowledge element) does not in itself satisfy this second, purpose element. Many courts state the purpose element in terms of a "specific intent that [the aider and abettor's] act or omission bring about the underlying crime," *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985), and the Supreme Court's most recent restatement of the aiding and abetting statute's reach suggests — if it does not quite endorse — this view. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 181 (1994) (section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime") (citing *Nye & Nissen*, 336 U.S. at 619).

At first glance it might appear that the United States could negate this element of aiding and abetting — and thus render USG assistance to Colombia and Peru lawful and USG personnel free of potential liability under 18 U.S.C. § 32(b)(2) — simply by announcing this Government's opposition to any violations of § 32(b) by anyone. It might seem that after such an announcement it would not be possible to say that USG personnel acted with a desire to help unlawful shootdowns succeed.

¹⁹ For the purposes of the aiding and abetting statute, it is immaterial whether an aider and abettor knew of the unlawful activity because the primary actor told him or her, or simply took actions that made obvious what was happening. *See generally Giovannetti*, 919 F.2d at 1226-29.

However, “there is support for relaxing this requirement [of specific intent to bring about the criminal act] when the crime is particularly grave: . . . ‘the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use’” would be guilty of aiding and abetting the buyer’s subsequent use of the “cocktails” in an act of terrorism. *Fountain*, 768 F.2d at 798 (quoting with approval *People v. Lauria*, 251 Cal. App. 2d 471, 481 (1967) (*dictum*)). Where a person provides assistance that he or she knows will contribute directly and in an essential manner to a serious criminal act, a court readily may infer a desire to facilitate that act. *See Zafiro*, 945 F.2d at 887 (if someone “knowingly provides essential assistance, we can infer that [that person] does want [the primary actor] to succeed, for that is the natural consequence of his deliberate act”).²⁰

Were this a case in which a foreign government provided direct and material assistance to an attack upon United States civil aircraft, both our Government and, we believe, the courts of this country would view the offense against § 32(b)(2) to be of a very serious nature, and would adopt an expansive view of the “desire to help the [unlawful] activity succeed” that constitutes this element of aiding and abetting. *United States v. Carson*, 9 F.3d 576, 586 (7th Cir. 1993), *cert. denied*, 513 U.S. 844 (1994). As we understand the facts, USG assistance is critical to the ability of Colombia and Peru to effect shootdowns. USG personnel have been fully engaged in the air interdiction operations of each country, providing substantial assistance that has contributed in an essential, direct and immediate way (whether by “real time” information or otherwise) to those countries’ ability to shoot down civil aircraft. Moreover, our assistance has been of a type and extent that Colombia and Peru would have difficulty in providing for themselves or in obtaining from other sources. In the absence of changes in the policies and practices of Colombia and Peru, there is a very substantial danger that the USG activities described to us meet the purpose element of aiding and abetting.

3. Acts of assistance. The application of the third element to the question we are considering is, we think, fairly straightforward. As the Supreme Court recently reiterated, aiding and abetting “comprehends all assistance rendered by words, acts, encouragement, support, or presence.” *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (quoting *Black’s Law Dictionary* 68 (6th ed. 1990)). Gauged by this definition, many or most forms of USG activities that have been described

²⁰ In general, USG information-sharing and other forms of assistance to foreign nations do not implicate the United States in those nations’ actions because, among other reasons, the purpose element of aiding and abetting is not met. However important USG aid may be as an overall matter, the provision of information, resources, training, and support to a foreign nation would not in itself provide a basis for concluding that the United States intended to facilitate that nation’s unlawful actions. Indeed, the general nature of such aid and its legitimate purposes (the furtherance of the diplomatic, national security, and democratization goals of USG foreign policy) rebut any assertion that its purpose is to support the occasional or unexpected unlawful acts of recipient governments. *See generally United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir.) (en banc) (aiding and abetting requires “a fuller engagement with [the primary actor’s] activities” than accidental or isolated assistance creates), *cert denied*, 493 U.S. 901 (1989)

to us could be fairly described as “act[s] of helping” Colombia or Peru to carry out a shutdown policy. That conclusion, when combined with our analysis of the knowledge and purpose elements, leads us to think that there is grave risk that the described USG activities contravene 18 U.S.C. § 32(b)(2).

C.

It has been suggested that the problems for USG information-sharing and other assistance to Colombia and Peru that are posed by 18 U.S.C. §§ 2(a) and 32(b) might be eliminated by seeking assurances from the governments of those countries with respect to their shutdown activities. Two possible forms of such an assurance have been posited: an assurance that Colombia and Peru would engage in no more shutdowns of civil aircraft, or an assurance that Colombia and Peru would make no use of information (or other aid) provided by the United States in effecting shutdowns. The argument would be that such assurances would negate either the first, knowledge element, or the second, purpose prong of aiding and abetting.

An initial point applies to both forms of assurance: to be of any legal significance, an assurance must be made by an official of the other government with authority to bind that government, and it must be deemed reliable by a high officer of the United States, acting with full knowledge of the relevant facts and circumstances. Assurances from subordinate officials could not reasonably be taken to represent a position that would be adhered to by other officials of that government. The acceptance of assurances that were not deemed credible *in fact* by USG officials might readily be characterized as a “deliberate effort to avoid [the] knowledge,” *Giovannetti*, 919 F.2d at 1229, that the assurance did not represent the actual intentions of the other government. In light of the gravity of the issue, the decision to accept and act on such an assurance would be a policy decision of such significance that it could be appropriately made only by a very high officer of this Government.

A reliable assurance (as we have defined it) that the foreign government would carry out *no* shutdowns falling within the prohibition of § 32(b)(2) would, in our opinion, clearly negate the knowledge element of aiding and abetting. With such an assurance, there would be no known or suspected intention to effect unlawful shutdowns for USG officials to have knowledge of; put another way, the acceptance of such an assurance as reliable would constitute a judgment that the foreign government was engaged in no criminal activity in this respect. If it subsequently became apparent that this judgment was mistaken, a reevaluation of the legal status of USG assistance would be necessary, but until and if evidence emerged that the other government intended to violate its assurance, USG aid of all sorts, including the provision of real-time flight information, would be lawful. For similar reasons, a reliable assurance that the foreign government would

not carry out any unlawful shutdowns would eliminate any argument that USG officials had a “desire to help the activity succeed,” *Carson*, 9 F.3d at 586, because it would represent a judgment that no unlawful activity was contemplated or under way.

A more problematic case is posed if the foreign government declined to renounce its shutdown policy but offered assurances that it would not use USG-supplied information or other assistance in carrying out shutdowns violating § 32(b)(2). (In such a case, the foreign government might carry out such activities using information or assistance obtained from other sources.) A bare assurance to that effect, without more, would be insufficient to remove the risk of contravening the statute, given what we understand to be the widespread use of USG-supplied information, the commingling of USG and foreign government information, and the temptation on the part of the foreign government’s operational officers to make use of information or assistance extremely valuable to effecting their own government’s law enforcement program.

We believe that there are conditions in which such assurances would be sufficiently reliable to permit the United States to continue to provide information and assistance to a foreign country’s antinarcotics program even if that country declined to renounce its shutdown policy. First, the United States and the foreign country should agree that the sole purpose for which USG information and other assistance would be provided and used was to assist in the execution of a ground-based end game (searches, seizures and arrests), and that such information and assistance would not be used to target civil aircraft for destruction. Second, the agreement should establish mechanisms by which USG personnel would obtain detailed and specific knowledge as to how the USG-provided information and assistance were in fact being used, and thus be able to identify at an operational level any instances of non-compliance with the agreement. Third, the agreement should stipulate that if any incident should occur in which the foreign government’s agents fired on a civil aircraft, USG personnel would be able to verify whether USG-provided information and assistance had been used in that instance, or whether the foreign country had employed only information and assistance from other sources in carrying out that operation. Finally, the agreement should provide for the termination of USG-supplied information and assistance in the event of material non-compliance. Were it possible to reach an agreement that incorporated such safeguards, we believe that it would insulate USG personnel from liability in the event the foreign government destroyed a civil aircraft.

III.

United States aid to Colombia and Peru might also implicate USG personnel in those governments’ shutdown policies on a conspiracy rationale. *See* 18 U.S.C.

§ 371. The concept of conspiracy is distinct from that of aiding and abetting.²¹ Aiding and abetting liability does not depend on an actual agreement between the primary actor and the aider and abettor.²² In contrast, “agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact.” *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). In addition, liability for participation in a conspiracy may attach to someone even though he or she provides no material assistance toward the conspiracy’s goals, and even if the primary criminal activity that is the object of the conspiracy never takes place. *See, e.g., United States v. Townsend*, 924 F.2d 1385, 1399 (7th Cir. 1991).²³ USG activities — including information-sharing and technical advice — that would be of material assistance in effecting shootdowns do not in themselves constitute an agreement between USG personnel and others to carry out shootdowns, but as we understand the facts the following are both true. (1) The United States intends, and has agreed with the governments of Colombia and Peru, to bolster the antinarcotics law enforcement activities of those countries. (2) The governments of Colombia (expressly) and Peru (in practice) regard shootdowns as an integral part of their antinarcotics law enforcement activities. In those circumstances, courts might well view the distinction between USG assistance to their antinarcotics programs generally and USG assistance to the shootdown component of those programs as thin or non-existent, and thus construe ongoing USG assistance as evidence of an agreement. *See United States v. Lechuga*, 994 F.2d 346, 350 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 982 (1993).

We believe that it is imperative to make this Government’s disapproval of shootdowns in violation of § 32(b) clear in order to eliminate any suggestion that

²¹ In this memorandum, we focus on the potential for aiding and abetting liability for two reasons. First, it is unclear that under the circumstances outlined to us the relationship between the activities of USG personnel and shootdown actions by foreign governments could reasonably be deemed an “agreement” to violate 18 U.S.C. § 32(b)(2). A lesser degree of association with a criminal venture suffices to create aiding and abetting liability, however, and we think that a more serious argument can be made that some forms of USG assistance could fall within the definition of aiding and abetting. *See United States v. Cowart*, 595 F.2d 1023, 1031 (5th Cir. 1979) (the “community of unlawful intent” present in aiding and abetting, although “similar to the ‘agreement’ upon which the crime of conspiracy is based, does not rise to the level of ‘agreement’”). In addition, and vitally, as stated in the text we believe the risk that USG personnel might plausibly be viewed as conspirators can and should be eliminated by the communication to foreign governments and USG operational personnel of the United States’s firm opposition to any shootdowns of civil aircraft contrary to § 32(b)(2) or international law.

²² The Seventh Circuit recently hypothesized a case illustrating this point.

Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members — with whom he had no previous, or for that matter subsequent, dealings — of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it.

Carson, 9 F.3d at 586 (quoting *Zafiro*, 945 F.2d at 884)

²³ Thus, USG personnel theoretically could be liable for conspiracy if their actions were construed as constituting an agreement with officials of the foreign government to carry out shootdowns and if the latter took some overt action toward accomplishing a shootdown. It would be unnecessary under the law of conspiracy for a shootdown to take place or for any USG actions actually to contribute to a shootdown.

USG personnel have entered into a conspiratorial agreement with foreign officials involving unlawful shutdowns since liability as a conspirator attaches even if the substantive unlawful act never takes place. In addition, we think that USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shutdowns. *See generally Iannelli*, 420 U.S. at 777-79.

IV.

This case is characterized by a combination of factors: it involves a criminal statute that explicitly has extraterritorial reach, that is applicable to foreign government military and police personnel, and that defines a very serious offense. Moreover, our government is fully engaged in furnishing direct and substantial assistance that is not otherwise available to the foreign nations involved, and at least some of the USG personnel who provide that assistance have actual knowledge that it is likely to be used in committing violations.

Given this combination of factors, we conclude that, in the absence of reliable assurances in the sense defined above, USG agencies and personnel may not provide information (whether “real-time” or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.

Furthermore, we note that § 32(b)(2) prohibits the destruction of civil aircraft “while such aircraft is *in service*,” as well as “damage to such an aircraft which renders that aircraft incapable of flight” (emphasis added). The statute defines “[i]n services” to “mean[] any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing.” 18 U.S.C. § 31. Thus, USG assistance for certain operations against aircraft *on the ground* may come within the statutory prohibitions. Section 32(b)(2) does not preclude ordinary law enforcement operations directed at a plane’s crew or cargo during those times.²⁴ It does, however, appear to forbid airborne law enforcers to bomb or strafe a suspect plane that has landed or that is preparing to take off²⁵

²⁴ For example, nothing in the section forbids the police to order the crew of a suspected drug trafficking plane to surrender upon landing, or to search or seize the plane or its cargo (Consequential damage to the aircraft would not constitute a violation of the statute) Nor does the section forbid the police to use deadly force against a plane if they are themselves endangered by its crew’s armed resistance to their legitimate orders. The police may also use force to rescue any hostages held aboard the plane.

²⁵ A valid law enforcement operation intended to seize a plane on the ground and arrest its crew and an attack on the airplane itself in violation of § 32(b)(2) may both result in the disabling or destruction of the aircraft. No liability under the section would attach, either to primary actors or to those who assist them, in the former circumstance. As described to us, however, the Colombian and Peruvian counternarcotics programs each encompass (potential) actions that would intentionally fall within the latter, forbidden category. Obviously, on different facts we could reach a different conclusion.

We will be pleased to cooperate with legal counsel for other agencies in evaluating specific programs or forms of aid under that standard.

V.

Our conclusions here must not be exaggerated. We have been asked a specific question about particular forms of USG assistance to the Colombian and Peruvian aerial interdiction programs. The application of the legal standard described here to any other USG programs — including other programs designed to benefit Colombia or Peru — will require careful, fact-sensitive analysis. We see no need to modify USG programs whose connection to those governments' shootdown policies is remote and attenuated, and (as noted above) we perceive no implications for USG assistance to any other foreign country unless another government adopts a policy of shooting down civil aircraft.

Other limitations on our conclusions should be noted. In certain circumstances, USG personnel may employ deadly force against civil aircraft without subjecting themselves to liability under § 32(b)(2). “The act is a criminal statute, and therefore must be construed strictly, ‘lest those be brought within its reach who are not clearly included.’”²⁶ Although these circumstances are extremely limited, they may in fact arise.

Specifically, we believe that the section would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities.²⁷ As discussed above, § 32(b)(2) was intended to implement the United States's obligations under the Montréal Convention. That Convention does not appear to apply to acts of armed forces that are otherwise governed by the laws of armed conflict.²⁸ (The general rule under the law of armed conflict is that civil

²⁶ *Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries*, 42 Op. Att'y Gen 229, 232 (1963) (quoting *United States ex rel Marcus v Hess*, 317 U.S. 537, 542 (1943))

²⁷ We do not mean to confine a “state of hostilities” to some specific legal category, such as a state of declared war in the constitutional sense, *see* U.S. Const. art. I, § 8, cl. 11, or a situation such as to trigger the reporting requirements of the War Powers Resolution, *see* 50 U.S.C. § 1543(a)

²⁸ International agreements such as the Montréal Convention are generally concluded with a view to regulating ordinary, peace-time conditions. Accordingly, one treatise writer has stated it to be the general rule that “[i]f, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention.” Bin Cheng, *The Law of International Air Transport* 483 (1962) (quoting *The S S Wimbledon* (Gr. Brit. et al. v. Germ.), 1923 P.C.I.J. (ser. A) No. 1, at 36 (Aug. 17) (dissenting opinion of Judges Anzilotti and Huber)) *Accord* Preliminary Objections Submitted by the United States of America, *Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)* at 200, 203 (Mar. 4, 1991) (“the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives. The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces.”) This conclusion is corroborated by article 89 of the

aircraft are immune from attack unless they are being used for military purposes or pose an immediate military threat.²⁹) We do not think that § 32(b)(2) should be construed to have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict. We note specifically that the application of § 32(b)(2) to acts of United States military personnel in a state of hostilities could readily lead to absurdities: for example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution. Unless Congress by a clear and unequivocal statement declares otherwise, § 32(b)(2) should be construed to avoid such outcomes.³⁰ Thus, we do not think the statute, as written, should apply to such incidents as the downing on July 3, 1988 of Iran Air Flight 655 by the United States Navy cruiser *Vincennes*.³¹

Furthermore, even in cases in which the laws of armed conflict are inapplicable, we believe that a USG officer or employee may use deadly force against civil aircraft without violating § 32(b)(2) if he or she reasonably believes that the aircraft poses a threat of serious physical harm to the officer or employee or to another person.³² A situation of this kind could arise, for example, if an aircraft suspected of narcotics trafficking began firing on, or attempted to ram, a law enforcement aircraft that was tracking it. Assuming that such aggressive actions posed a direct and immediate threat to the lives of USG personnel or of others aboard the tracking

Chicago Convention, which declares in part that “[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.” See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 *Yale J Int’l L.* 245, 267 (1991) (“the nature of the Montreal Convention as an anti-hijacking and sabotage treaty seems to preclude its application to the acts of armed forces governed by the law of armed conflict under article 89 of the Chicago Convention”). See also 7 Green Hackworth, *Digest of International Law* 552-55 (1943) (describing earlier practice and theory).

²⁹ See Department of the Air Force, *International Law — The Conduct of Armed Conflict and Air Operations*, ¶ 4-3(a)(1), (b) (1976); Stokdyk, Comment, *Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?*, *supra* note 6, at 1321.

³⁰ Cf. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869) (holding that statute punishing obstruction of mail did not apply to temporary detention of mail caused by carrier’s arrest for murder); *Nardone v. United States*, 302 U.S. 379, 384 (1937) (public officers may be implicitly excluded from statutory language embracing all persons because “a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm”).

³¹ See Marian Nash Leich, *Denial of Liability. Ex Gratia Compensation on a Humanitarian Basis*, 83 *Am. J. Int’l L.* 319, 321-22 (1989) (quoting Congressional testimony of State Department Legal Adviser Sofaer that “[i]n the case of the Iran Air incident, the damage caused in firing upon #655 was incidental to the lawful use of force The commander of the U.S.S. *Vincennes* evidently believed that his ship was under imminent threat of attack from a hostile aircraft, and he attempted repeatedly to identify or contact the aircraft before taking defensive action. Therefore, the United States does not accept legal responsibility for this incident . . .”).

³² See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (discussing constitutionally reasonable use of deadly force); *New Orleans and Northeastern R.R. v. Jopes*, 142 U.S. 18, 23 (1891) (“the law of self-defense justifies an act done in honest and reasonable belief of immediate danger”).

aircraft, and that no reasonably safe alternative would dispel that threat, we believe that the use of such force would not constitute a violation of § 32(b)(2).³³

WALTER DELLINGER
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Office of Legal Counsel

³³ To the extent that § 32(b)(2) does not apply to the use of deadly force by USG military or other personnel in the circumstances described above, it would of necessity be inapplicable as well to the actions of similarly situated personnel of the Colombian or Peruvian governments. That is, such foreign governmental agents could employ deadly force against civilian aircraft in the same circumstances in which USG personnel were able to do so. USG personnel who assisted foreign government agents in such lawful and legitimate acts of self-defense would of course not be subject to liability, since one cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime. *See Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)

Annex 56

R., ex parte Pinochet v. Bartle and ors, [2000] United Kingdom House of Lords, Vol. 17
(24 March 1999)

1 A.C.

A

[HOUSE OF LORDS]

REGINA v. BOW STREET METROPOLITAN STIPENDIARY
MAGISTRATE AND OTHERS, *Ex parte* PINOCHET UGARTE (No. 3)

1999 Jan. 18, 19, 20, 21, Lord Browne Wilkinson, Lord Goff of Chieveley,
25, 26, 27, 28; Lord Hope of Craighead, Lord Hutton,
Feb. 1, 2, 3, 4; Lord Saville of Newdigate, Lord Millett and
B March 24 Lord Phillips of Worth Matravers

Extradition—Extradition crime—Double criminality—Torture committed outside jurisdiction of both requesting state and England—Alleged offences committed before extraterritorial torture punishable in England—Extradition requested after offence made punishable under English law—Whether relevant time for consideration of criminality date of offence or date of request—Whether offence extraditable—Extradition Act 1989 (c. 33), s. 2

C

*International Law—State immunity—Former head of state—Request for extradition in respect of crimes of torture and conspiracy to torture relating to period when applicant head of state—Whether immunity in respect of acts performed in exercise of functions as head of state—Whether governmental acts of torture attributable to functions of head of state—Whether former head of state entitled to immunity *ratione materiae* in relation to acts of torture—Diplomatic Privileges Act 1964 (c. 81), s. 2(1), Sch. 1, arts. 29, 31, 39—State Immunity Act 1978 (c. 33), s. 20(1)—Criminal Justice Act 1988 (c. 33), s. 134(1)*

D

The applicant, a former head of state of Chile who was on a visit to London, was arrested under a provisional warrant issued by a metropolitan stipendiary magistrate pursuant to section 8(1) of the Extradition Act 1989¹ following the issue of an international warrant of arrest issued by the Central Court of Criminal Proceedings No. 5, Madrid. Six days later a second section 8(1) warrant was issued by a magistrate upon receipt of a second international warrant of arrest issued by the Spanish court alleging, *inter alia*, that the applicant, during his period of office between 1973 and 1990, had ordered his officials to commit acts of torture falling within section 134(1) of the Criminal Justice Act 1988² and acts of hostage-taking within section 1 of the Taking of Hostages Act 1982.³ The applicant issued proceedings in the Divisional Court for orders of certiorari to quash the first provisional warrant as disclosing no act amounting to an extradition crime, as defined by section 2 of the Act of 1989, and both warrants as relating to acts performed by the applicant in exercise of his functions as head of state and in respect of which he was entitled to immunity under customary international law and the provisions of section 20(1) of Part III of the State Immunity Act 1978,⁴ read with section 2 of, and articles 29, 31, and 39 of Schedule 1 to, the Diplomatic Privileges Act 1964.⁵ The Divisional Court, having found that the first warrant was bad as falling outside section 2 of the Act of 1989, held with respect to both warrants that the applicant, as a former head of state, was

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¹ Extradition Act 1989, s. 2: see post, pp. 193G-194C.

² Criminal Justice Act 1988, s. 134(1): see post, p. 231D-E.

³ Taking of Hostages Act 1982, s. 1(1): see post, p. 230E-F.

⁴ State Immunity Act 1978, s. 20(1): see post, p. 203A.

⁵ Diplomatic Privileges Act 1964, Sch. 1, art. 39: see post, p. 209F-G.

entitled to immunity from civil and criminal process in the English courts in respect of acts committed in the exercise of sovereign power. The court quashed both warrants. On appeal by the Commissioner of Police of the Metropolis and the Government of Spain the House of Lords allowed the appeal by a majority of three to two. The applicant challenged that decision on the ground that the Appellate Committee was improperly constituted. The House of Lords set aside the decision and ordered that the appeal be reheard before a differently constituted committee. By the time the case came on for rehearing the Spanish authorities had particularised further charges against the applicant, including charges of torture and conspiracy to torture, conspiracy to murder, attempted murder and murder. Most offences were alleged to have occurred in Chile but some were said to have occurred variously in Spain, Italy, France and Portugal and some offences were said to have taken place as early as 1 January 1972. As a result of the widening of the case against the applicant he took the additional point that he could not be extradited to face most of the charges as they did not amount to "extradition crimes" within the meaning of section 2 of the Act of 1989.

On the rehearing of the appeal:—

Held, (1) that the requirement in section 2 of the Act of 1989 that the alleged conduct which was the subject of the extradition request be a crime under United Kingdom law as well as the law of the requesting state was a requirement that the conduct be a crime in the United Kingdom at the time when the alleged offence was committed; that (Lord Millett dissenting) extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect on 29 September 1988; and that, accordingly, all the alleged offences of torture and conspiracy to torture before that date and all the alleged offences of murder and conspiracy to murder which did not occur in Spain were crimes for which the applicant could not be extradited (post, pp. 195B-196B, 196C-197B, 208D-F, 229H-230C, 237E-F, H-238B, 249C-E, 265C-D, 268A-B, 279E-F).

(2) Allowing the appeal in part (Lord Goff dissenting), that, a former head of state had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of state pursuant to section 20 of the State Immunity Act 1978 when read with article 39(2) of Schedule 1 to the Diplomatic Privileges Act 1964; but that torture was an international crime against humanity and *jus cogens* and after the coming into effect of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 there had been a universal jurisdiction in all the Convention state parties to either extradite or punish a public official who committed torture; that in the light of that universal jurisdiction the state parties could not have intended that an immunity for ex-heads of state for official acts of torture (*per* Lord Hope of Craighead, for systematic and widespread acts of official torture) would survive their ratification of the Convention; that (*per* Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Saville of Newdigate) since Chile, Spain and the United Kingdom had all ratified the Convention by 8 December 1988 the applicant could have no immunity for crimes of torture or conspiracy to torture after that date; that (*per* Lord Hutton) the relevant date when the immunity was lost was 29 September 1988 when section 134 of the Act of 1988 came into effect; that (*per* Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton and Lord Saville of Newdigate) there was nothing to show that states had agreed to remove the immunity for charges of murder which immunity

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A accordingly remained effective; that, on the facts alleged, no offence of hostage-taking within the meaning of section 1(1) of the Act of 1982 arose; and that, accordingly, the applicant had no immunity from extradition for offences of torture or conspiracy to torture which were said to have occurred after 8 December 1988 and the extradition could proceed on those charges (post, pp. 198E-H, 200F-201A, 203C-F, 204F-205B, 205F-H, 231A-B, F-G, 234E-H, 240G-241C, 241E-F, 242B-C, 247E-248H, 261A-B, E-F, 262B-C, 263D-F, 265A-B, 266G-267E, G-268A, 270A-D, 277C-F, G-278B, 287E-288A, 289E-290C, F-G, 292E-F).

B *Per* Lord Millett and Lord Phillips of Worth Matravers. The systematic use of torture was an international crime for which there could be no immunity even before the Convention came into effect and consequently there is no immunity under customary international law for the offences relating to torture alleged against the applicant. Nor is there immunity for the offence of conspiracy to murder in Spain (post, pp. 275C-F, 276D-E, 277B, 279B-C, 290A-C, E-G, 292E-F).

C Decision of the Divisional Court of the Queen's Bench Division reversed in part.

The following cases are referred to in their Lordships' opinions:

- D *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536, C.A.
Alcom Ltd. v. Republic of Colombia [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)
Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683
Brunswick (Duke of) v. King of Hanover (1848) 2 H.L.Cas. 1, H.L.(E.)
Buck v. Attorney-General [1965] Ch. 745; [1965] 2 W.L.R. 1033; [1965] 1 All E.R. 882, C.A.
Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)
- E *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571
Farouk of Egypt (Ex-King) v. Christian Dior (1957) 24 I.L.R. 228
Hatch v. Baez (1876) 7 Hun 596
Ireland v. United Kingdom (1978) 2 E.H.R.R. 25
Israel (Attorney-General of) v. Eichmann (1962) 36 I.L.R. 5
Jaffe v. Miller (1993) 13 O.R.(3d) 745
- F *Jean Dessès (Société) v. Prince Farouk* (1963) 65 I.L.R. 37
Jimenez v. Aristeguieta (1962) 311 F.2d 547
Lafontant v. Aristide (1994) 844 F.Supp. 128
Liangsiriprasert (Somchai) v. Government of the United States of America [1991] 1 A.C. 225; [1990] 3 W.L.R. 606; [1990] 2 All E.R. 866, P.C.
Lotus S.S., The Case of, Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10
- G *Marcos and Marcos v. Federal Department of Police* (1989) 102 I.L.R. 198
Persinger v. Islamic Republic of Iran (1984) 729 F.2d 835
Piracy Jure Gentium, In re [1934] A.C. 586, P.C.
Prinz v. Federal Republic of Germany (1994) 26 F.3d 1166
Prosecutor v. Furundzija (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10
- H *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 A.C. 61; [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897, H.L.(E.)
Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2) [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; [1999] 1 All E.R. 577, H.L.(E.)

- Reg. v. Sansom* [1991] 2 Q.B. 130; [1991] 2 W.L.R. 366; [1991] 2 All E.R. 145, C.A. A
- Saltany v. Reagan* (1988) 702 F.Supp. 319
- Sampson v. Federal Republic of Germany* (1997) 975 F.Supp. 1108
- Schooner Exchange v. M'Faddon* (1812) 11 U.S. (7 Cranch) 116
- Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d 699
- Smith v. Socialist People's Libyan Arab Jamahiriya* (1995) 886 F.Supp. 306; (1996) 101 F.3d 239
- Syrian Ambassador (Former) to the German Democratic Republic, In re* (unreported), 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96 B
- Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.
- Underhill v. Hernandez* (1897) 168 U.S. 250
- United States of America v. Noriega* (1990) 746 F.Supp. 1506; (1997) 117 F.3d 1206 C
- The following additional cases were cited in argument:
- Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* [1921] 3 K.B. 532, C.A.
- Arantzazu Mendi, The* [1939] A.C. 256; [1939] 1 All E.R. 719, H.L.(E.)
- Azanian Peoples Organisation (A.Z.A.P.O.) v. President of the Republic of South Africa* (1996) 8 B.C.L.R. 1015 D
- Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398
- Barcelona Traction, Light and Power Co. Ltd., In re* [1970] I.C.J. Rep. 3
- Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)
- Caire, Jean-Baptiste (Estate of) (France) v. United Mexican States* (1929) 5 U.N.R.I.A.A. 516 E
- Canada (Government of) v. Aronson* [1990] 1 A.C. 579; [1989] 3 W.L.R. 436; [1989] 2 All E.R. 1025, H.L.(E.)
- Carl Marks & Co. Inc. v. Union of Soviet Socialist Republics* (1987) 665 F.Supp. 323; (1988) 841 F.2d 26
- Castioni, In re* [1891] 1 Q.B. 149, D.C.
- Chung Chi Cheung v. The King* [1939] A.C. 160; [1938] 4 All E.R. 786, P.C.
- Church of Scientology Case* (1978) 65 I.L.R. 193
- Compania Naviera Vascongado v. S.S. Cristina* [1938] A.C. 485; [1938] 1 All E.R. 719, H.L.(E.) F
- Duff Development Co. Ltd. v. Government of Kelantan* [1924] A.C. 797, H.L.(E.)
- East Timor (Portugal v. Australia), In re* [1995] I.C.J. Rep. 90
- Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] 2 Lloyd's Rep. 171, C.A.
- Empson v. Smith* [1966] 1 Q.B. 426; [1965] 3 W.L.R. 380; [1965] 2 All E.R. 881, C.A. G
- Filartiga v. Pena-Irala* (1980) 630 F.2d 876; (1984) 577 F.Supp. 860
- Frolova v. Union of Soviet Socialist Republics* (1985) 761 F.2d 370
- Goering, In re* (1946) 13 I.L.R. 203
- Grand Jury Proceedings, John Doe 700, In re* (1987) 817 F.2d 1108
- Harrison v. Tew* [1990] 2 A.C. 523; [1990] 2 W.L.R. 210; [1990] 1 All E.R. 321, H.L.(E.) H
- Herbage v. Meese* (1990) 747 F.Supp. 60
- Hilao v. Estate of Marcos* (1994) 25 F.3d 1467
- Holland v. Lampen-Wolfe* [1999] 1 W.L.R. 188, C.A.

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- A *Honecker, In re* (1984) 80 I.L.R. 365
Iran (Empire of), Claim against (1963) 45 I.L.R. 57
Jacobus v. Colgate (1916) 217 N.Y. 235
Kadic v. Karadžić (1995) 70 F.3d 232
Kendall v. Kingdom of Saudi Arabia (1965) 65 Adm. 885
Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701
- B *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694, H.L.(E.)
Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998, Mance J.
Letelier v. Republic of Chile (1980) 63 I.L.R. 378; 488 F.Supp. 665
Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82; [1994] 4 All E.R. 203, C.A.
Liu v. Republic of China (1989) 892 F.2d 1419
- C *L'Office Cherifien des Phosphates v. Yamashita-Shirnihon Steamship Co. Ltd.* [1994] 1 A.C. 486; [1994] 2 W.L.R. 39; [1994] 1 All E.R. 20, H.L.(E)
Maal Case, The (1903) 10 U.N.R.I.A.A. 730
Monetary Gold, The [1954] I.C.J. Rep. 19
Naghdi, In re [1990] 1 W.L.R. 317; [1990] 1 All E.R. 257, D.C.
Nelson v. Saudi Arabia (1991) 88 I.L.R. 189
Nielsen, In re; [1984] A.C. 606; [1984] 2 W.L.R. 737; [1984] 2 All E.R. 81; 79 Cr.App.R. 1, H.L.(E.)
- D *North Sea Continental Shelf,* [1969] I.C.J. Rep. 3
Oetjen v. Central Leather Co. (1918) 246 U.S. 297
Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.)
Paul v. Avril (1993) 812 F.Supp. 207
Philippines (Republic of) v. Marcos (1986) 806 F.2d 344
- E *Polyukhovitch v. Commonwealth of Australia* (1991) 91 I.L.R. 1
Propend Finance Pty. Ltd. v. Sing, The Times, 2 May 1997; Court of Appeal (Civil Division) Transcript No. 572 of 1997, C.A.
Prosecutor v. Blaškić (Subpoenae) (1997) 110 I.L.R. 607
Prosecutor v. Tadić (unreported), 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T
Reg. v. Doot [1973] A.C. 807; [1973] 2 W.L.R. 532; [1973] 1 All E.R. 940, H.L.(E.)
- F *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556; [1962] 3 W.L.R. 1013; [1962] 3 All E.R. 529, H.L.(E.)
Reg. v. Governor of Pentonville Prison, Ex parte Cheng [1973] A.C. 931; [1973] 2 W.L.R. 746; [1973] 2 All E.R. 204, H.L.(E.)
Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3) [1990] 1 W.L.R. 878; [1990] 1 All E.R. 999, D.C.
- G *Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 504; [1974] 1 All E.R. 692, D.C. and H.L.(E.)
Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886; [1998] 3 W.L.R. 1011; [1997] 2 All E.R. 638, D.C.
Roncarelli v. Duplessis [1959] S.C.R. 121
Société Levant Express Transport v. Chemins de fer du gouvernement iranien (1969) in *Grands Arrêts* 3rd ed. (1988), p. 372
- H *United Kingdom v. France,* Permanent Court of International Justice, Advisory Opinion No. 4 of 7 February 1923
United States Diplomatic and Consular Staff in Tehran, In re [1980] I.C.J. Rep. 3; 61 I.L.R. 504

United States of America v. Allard [1991] 1 S.C.R. 861

United States of America and Republic of France v. Dollfus Mieg et Cie. S.A. and Bank of England [1949] Ch. 369; [1949] 1 All E.R. 946; [1950] Ch. 333; [1950] 1 All E.R. 747, C.A.; [1952] A.C. 582; [1952] 1 All E.R. 572, H.L.(E.).

Velásquez Rodríguez Case (1989) 95 I.L.R. 232

Youmans (Thomas H.) (U.S.A.) v. United Mexican States (1926) 4 U.N.R.I.A.A. 110

Zoernsch v. Waldock [1964] 1 W.L.R. 675; [1964] 2 All E.R. 256, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

This was the rehearing of an appeal by the Commissioner of Police of the Metropolis and the Government of Spain from a decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) of 28 October 1998 granting orders of certiorari to quash warrants issued pursuant to section 8(1) of the Extradition Act 1989, at the request of the Central Court of Criminal Proceedings No. 5, Madrid, for the provisional arrest of the applicant, Senator Augusto Pinochet Ugarte, a former head of state of the Republic of Chile, (i) dated 16 October 1998, by Nicholas Evans, Bow Street Metropolitan Stipendiary Magistrate, and (ii) dated 22 October 1998, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate.

Leave to appeal was granted by the Divisional Court which, in accordance with section 1(2) of the Administration of Justice Act 1960, certified that a point of law of general public importance was involved in its 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."

The appeal was originally heard by the House in November 1998 and allowed by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting). That decision was set aside by the House (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton) on 15 January 1999 and a rehearing ordered before a differently constituted committee.

Leave to intervene was given to Amnesty International, the Medical Foundation for the Care of Victims of Torture, the Redress Trust, Mary Ann Beausire, Juana Francisca Beausire and Sheila Cassidy and the Association of the Relatives of the Disappeared Detainees. Additionally, an order was made permitting Human Rights Watch to intervene to the extent of presenting written submissions.

The facts are stated in the opinions of Lord Browne-Wilkinson and Lord Hope of Craighead.

Alun Jones Q.C., Christopher Greenwood, James Lewis and Campaspe Lloyd-Jacob for the appellants. Criminal liability is personal. A state does not commit crimes. The crimes alleged are crimes against international law and three Conventions underlie the relevant English statutes: the European Convention on the Suppression of Terrorism of 27 January 1977 (1977) (Cmnd. 7031), the International Convention against the Taking of

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A Hostages of 18 December 1979 (1983) (Cmnd. 9100) and the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm. 1775). The Conventions provide machinery for extradition for crimes which have been recognised for decades as crimes by international law and which are recognised as crimes by the United Kingdom, Spain and Chile.

B The provisional warrant, in respect of which the appeal was brought, no longer has life or effect and has been superseded by the Secretary of State's authority to proceed. The applicant is now remanded under section 9(2) of the Extradition Act 1989. Provisional arrest terminated on the issue by the Secretary of State of the authority to proceed: see *Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1, 25 and *Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3)* [1990] 1 W.L.R. 878. The certified question can nonetheless be answered properly and finally, although the case is now more developed and complex.

C If the appeal were to be decided on the basis of the limited facts alleged in the provisional warrant the result would be wholly artificial and the matter would be open to further argument. It is now alleged that complete conspiracies to commit crimes of torture, hostage taking and murder were formed before the earliest date on which the applicant became head of state. The overt acts committed in foreign countries are not merely evidence of the primary conspiracies but amount to sub-conspiracies, or, in some cases, substantive crimes, within those states. The provisional warrant did not disclose this.

D It is common in extradition cases for crimes which are generally and broadly described in Civil Code countries to be represented in authorities to proceed in English proceedings as individual charges. Consequently, it is necessary to look at the conduct in the request and not at the terminology of the charge. The details of what amounts to a crime in Spain do not have to be considered. The issue is whether the acts amount to an offence under English law. The conduct alleged is a concluded agreement and acts done in furtherance of it. Such conduct is a conspiracy under English law, although Spain calls the alleged acts terrorism. In English law a conspiracy remains a continuing offence until it is completed. Overt acts are not part of the conspiracy, merely evidence of it: see *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225. The dates of the alleged acts are not normally included in the authority to proceed: see *In re Naghdi* [1990] 1 W.L.R. 317.

E It is common in extradition cases for crimes which are generally and broadly described in Civil Code countries to be represented in authorities to proceed in English proceedings as individual charges. Consequently, it is necessary to look at the conduct in the request and not at the terminology of the charge. The details of what amounts to a crime in Spain do not have to be considered. The issue is whether the acts amount to an offence under English law. The conduct alleged is a concluded agreement and acts done in furtherance of it. Such conduct is a conspiracy under English law, although Spain calls the alleged acts terrorism. In English law a conspiracy remains a continuing offence until it is completed. Overt acts are not part of the conspiracy, merely evidence of it: see *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225. The dates of the alleged acts are not normally included in the authority to proceed: see *In re Naghdi* [1990] 1 W.L.R. 317.

F Substantive acts of torture are particularised for August 1973 and, therefore, the conspiracy was complete before the coup on 11 September 1973. However, the applicant did not become head of state at the time of the coup but merely the head of a military junta. He did not become head of state until 17 June 1974. Consequently, the issue of immunity does not arise for acts committed before that date. If there was a pre-existing plan to commit these offences before the applicant became head of state then there is an extraditable offence and he can have no immunity.

G The State Immunity Act 1978 and the Diplomatic Privileges Act 1964 determine the immunity issue.

H Section 20 of the Act of 1978 equates the position of a head of state to that of an ambassador and applies only to acts committed in the

performance of the functions of a head of state, not to acts committed previously. A former head of state only has immunity with regard to his acts as a head of state but not with regard to acts which fall outside his role as head of state. If he also had the role of head of government he enjoys no immunity for his actions in that capacity.

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A former head of state cannot have immunity for acts of murder committed outside his own territory. International law recognises crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes.

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A head of state's functions in a foreign country are of a diplomatic nature. The essential nature of the protection afforded by section 20 relates to the carrying out of a diplomatic function in the United Kingdom: see, Hansard (H.L. Debates, 17 January 1978, col. 58; 16 March 1978, col. 1537).

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If, however, section 20 has no application to acts performed outside the United Kingdom then the matter is determined by Conventions. Parliament cannot have intended that there should be immunity outside the elaborate statutory scheme and the Conventions and there can be no fallback on the common law. The policy of Acts and Conventions of recent years is that people should take individual and personal responsibility for certain crimes, without any protection for acts done in the name of the state.

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The prohibition under the Hostage Taking Convention applies to everyone regardless of his position and the duty to prosecute those who commit such offences applies to the United Kingdom. Hostage-taking is not specifically charged in the Spanish indictment but the offence is made out on the facts alleged.

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The Torture Convention applies to all "public officials" irrespective of position. It is inconceivable that it was intended to exclude those who gave orders while including those who followed them. The Convention gives a state a right and an obligation to establish jurisdiction where the victim is a national of that state. Article 8(4) combined with article 5 amounts to an acknowledgment that offences of torture committed in one state can be regarded as having taken place in the state of which the victim is a national. The United Kingdom has an obligation to extradite the applicant to Spain if no prosecution is brought in the United Kingdom. Chile has not requested extradition so the applicant cannot be extradited there. Section 26(2) of the Act of 1989, deeming the torture to have taken place in Spain, prevents Chile claiming a priority of jurisdiction as the place where the acts took place. Chile, like Spain and the United Kingdom, has ratified the Torture Convention and torture has been outlawed by the Constitution of Chile since 1925. Consequently, Chilean law reflects and embodies the same principles as the Convention and Chile cannot claim exclusive jurisdiction.

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Older presumptions as to territoriality of crimes such as these have been replaced. Section 6(1) of the Act of 1989 prohibits extradition for offences of a "political character" but section 24 provides that no act to which section 1 of the Suppression of Terrorism Act 1978 applies shall be

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A regarded as of a political character. For an analysis of “political offence” and “political character” see *In re Castioni* [1891] 1 Q.B. 49; *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931 and *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556. Certain crimes are deemed so odious that no reticence in involving the United Kingdom in the internal disputes of foreign states would be shown in relation to them.

B *Greenwood* following. International law does not require the United Kingdom to accord immunity to a former head of state for acts which international law not only prohibits but for which it imposes individual criminal responsibility. Indeed, there is a positive duty under international law not to grant immunity in such circumstances.

C No international agreement specifically provides for the immunities of a head of state or former head of state. However, under customary international law a state is entitled to expect that the head of state will enjoy a measure of immunity from the jurisdiction of the courts of other states. That immunity reflects the respect due to the dignity of the head of state but the extent of the immunity is uncertain: see Sir Arthur Watts Q.C., Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994-III) 247 *Recueil des cours*, pp. 32, 36–37, 52–68 and *Oppenheim’s International Law*, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.), pp. 1037–1038.

D A head of state may be treated as the state itself and entitled to the same immunities. That is the rationale behind section 14 of the State Immunity Act 1978. In so far as proceedings are brought against the head of state in his personal capacity he enjoys the same immunities as an ambassador, immunity *ratione personae*, attaching to the individual on account of his office.

E Of the four possible rationales advanced for former head of state immunity, the first, the dignity of the state, applies only to an existing head of state. The second, that courts will not sit in judgment on the acts of another state, is one of the principal grounds for the act of state and non-justiciability doctrines. The third, that acts of an official character performed by a head of state engage the responsibility of the state itself and not the individual, can be answered by pointing out that the state’s responsibility does not automatically do away with personal responsibility. The fact that the acts of which the applicant is accused might be attributable to Chile does not mean that the United Kingdom has to grant him immunity. The conviction of Nazi war criminals after the Second World War shows that. The fourth, that a former head of state needs immunity so that he is not hindered in the exercise of his public functions while he holds office, is a functional rationale. The last three of these could apply equally to proceedings against any official or former official.

G A former head of state no longer represents the grandeur of his nation. He does not enjoy immunity for personal acts performed while he was head of state. Any requirement to accord immunity applies only in respect of acts of an official character performed in the exercise of the functions of head of state, immunity *ratione materiae* and does not extend to conduct criminal under international law. The absence of any authority establishing

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the right to prosecute former heads of state in common law jurisdictions arises from the lack of extraterritorial jurisdiction until recently.

In showing an international intention to prohibit an express practice, such as torture, it is not necessary that each country prohibits it in the same way, nor is it necessary that each state's law prohibits torture wherever it occurs. The various laws of states considered in the light of the fact that every recent human rights treaty has prohibited torture provide evidence that customary international law prohibited torture before the Torture Convention and that, under customary international law, torture was an international crime if committed by a public official. There was no head of state exception and states other than the state where the offence took place were entitled to exercise jurisdiction.

The Torture Convention codified existing customary law norms prohibiting torture, but added a duty to exercise the jurisdiction which existed under customary international law. No signatory to that Convention can object to the exercise of the jurisdiction by another state as being an interference with the signatory's internal affairs. Accordingly, either the Torture Convention establishes that the applicant can have no immunity from prosecution for acts of torture or alternatively the prohibition against torture has the status of *jus cogens* and he can be prosecuted under customary international law. The applicable law is the present law as evidenced by the Torture Convention. If it is necessary to show that torture was a crime under international law in 1973 when the acts occurred that requirement is satisfied because it was a crime under customary international law at that time. Even if torture itself was not a crime under international law then the widespread and systematic torture practised in Chile was a crime against humanity, as that concept has developed over the century.

International law recognises international crimes. The oldest is piracy: see *In re Piracy Jure Gentium* [1934] A.C. 586. It has long been recognised that individuals may be prosecuted for war crimes and crimes against humanity under international law. The development since the First World War of the concept of "war crimes" illuminates the point that for some international crimes there can be no immunity.

The attempt to put the Kaiser on trial before an international tribunal after the war shows that at that time there was no immunity for a head of state. The United States objected on the grounds that there should be an immunity for a head of state but no concern was expressed about a former head of state. The failure of the attempt led to a different approach to the question of immunity at the end of the Second World War: see the London Declaration 1942; the Moscow Declaration 1943; the Charter of the International Military Tribunal, Nuremberg, adopted by the Big Four Powers (1945) and the Charter of the International Military Tribunal for the trial of major war criminals in the Far East (1946).

Under the Nuremberg Charter the vast majority of defendants were tried in the territories where the crimes occurred. Only the leaders whose crimes were not confined to a specific location were tried before the international tribunal at Nuremberg. While only one former head of state (Admiral Donitz) was tried before the international tribunal, there was no suggestion that this was necessary to overcome any immunity or that he

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A could not have been tried before a national court. The Big Four Powers were exercising jointly a right which each could have exercised separately: see *Oppenheim's International Law*, vol. II, 7th ed. (1952) (ed. Sir Hersch Lauterpacht), pp. 580–581. If ever there was a clear immunity for heads of state or former heads of state it has been eroded during the course of this century.

B The definition of an international crime is a substantive question. Whether the trial should be before an international tribunal or a national court is a procedural question. Crimes against humanity are crimes not against a state but against individuals and are triable anywhere. Until recently there were almost no international tribunals so international crimes could be tried only before a national court.

C Even in 1946 the concept of territoriality of jurisdiction for crimes against humanity was not really in issue. The Nuremberg Tribunal certainly felt restricted to regarding crimes against humanity as linked to war crimes or crimes against the peace but that has been broadened over the years.

D The significance of the Nuremberg Charter and the approach of the tribunal is that it provided the bedrock upon which the United Nations' and the international approach to human rights has developed. The United Nations adopted the Nuremberg declaration: see the Affirmation of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (G.A. Res. 95, 1st Sess., 1144; U.N. Doc. A/236 (1946)). The absence of immunity for international crimes tried before national courts has been reaffirmed on a number of occasions: see *The British Manual of Military Law*, (1958) (ed. Sir Hersch Lauterpacht), paras. 632, 637; the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1954; the four Geneva Conventions on the Law of Armed Conflict of 1949 (implemented in the United Kingdom by the Geneva Conventions Act 1957); U.N. General Assembly Resolution No. 3074 on the Principles of International Co-operation on Persons Guilty of War Crimes and Crimes Against Humanity adopted in 1973; the Statute of the War Crimes Tribunal for former Yugoslavia (1993); the Statute of the War Crimes Tribunal for Rwanda (1994); the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996

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G The Draft Code of 1996 is the International Law Commission's view of existing international law. Article 8 envisages the establishment of an international court but in its absence the jurisdiction must be exercisable by national courts. The Code shows that crimes against humanity are crimes in international law which need not be connected with armed conflict and that state officials have no immunity.

H The Appeals Tribunal for the former Yugoslavia has held that, while the tribunal's statute restricts the definition of crimes against humanity, that restriction is not a requirement of substantive law: see *Prosecutor v. Tadić* (unreported), 7 May 1997; International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-T. In *Prosecutor v. Furundzija* (unreported), 10 December 1998, International Criminal Tribunal for the

Former Yugoslavia, Case No. IT-95-17/1-T 10 the tribunal dealt with torture as a crime against humanity.

Attorney-General of Israel v. Eichman (1962) 36 I.L.R. 5 is a particularly striking example of the universality of jurisdiction for crimes against humanity as Israel did not exist at the times when the crimes were committed.

The failure of the United States to sign the Rome Statute of the International Criminal Court (adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998) is based on an objection to some parts of the statute rather than to the validity of international tribunals as such, or to the concept of trials for international crimes.

The idea that individuals benefit from the immunity of the state is based on civil cases where to make the individual liable would directly implicate the state: see *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S.Ct. 683 and *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d 699. That idea cannot apply to criminal proceedings as the criminal law cannot implead the state: see *Princz v. Federal Republic of Germany* (1994) 26 F.3d 1166.

Hatch v. Baez (1876) 7 Hun 596 concerned civil, not criminal, proceedings and is therefore distinguishable. The rationale for the decision is the same as is given in many act of state cases. If that doctrine were to be applied here the provisions of the Torture Convention would be meaningless. *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536 is also distinguishable as it concerned a statutory immunity from civil proceedings granted by section 1 of the State Immunity Act 1978. In any event the present case does not involve a statutory scheme from which the Spanish Government are trying to carve out an exception. It is highly unlikely that Parliament intended to lay down an immunity which is not recognised in international law. The Act of 1978 and other statutes should be construed in the light of the relevant rules of international law: see *Alcom Ltd. v. Republic of Colombia* [1984] A.C. 580, 597, 600 and *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529.

The applicant's amnesty under Chilean law is ambiguous and, in any event, does not touch on the question of immunity. The Spanish court has held that the amnesty is not relevant to their law. The issue is one for the Home Secretary to consider.

The provisions of the Torture Convention combined with section 134 of the Criminal Justice Act 1988 are incompatible with any notion of immunity for a foreign official for acts of torture. Although under the Vienna Convention diplomat in office has total immunity, there can be no immunity after he has left office

"Public official" naturally includes the head of state. Past agreements in international law have dealt with the head of state with a specific provision but "public official" in the Torture Convention and section 134 appears to be a general term. The lack of a specific mention of heads of state cannot mean they were excluded from the description and have immunity. The provisions are clear: there is no immunity for anyone who commits torture.

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A As a matter of United Kingdom law a serving head of state has immunity, but there is no such immunity for torture under international law. A head of state is an “official” like any other within the terms of the Convention and of section 134.

The relevant time for assessing the criminality of an act in the United Kingdom is the time of the extradition request. Immunity is a procedural issue and has to be determined at that time, not when the acts occurred.

B There is no doubt that the alleged conduct was prohibited under international law throughout the period when it occurred: see *Filartiga v. Pena-Irala* (1980) 630 F.2d 876, 880, 888; *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F.2d 571.

C Act of state and non-justiciability have developed as two distinct doctrines in English law. Under the doctrine of act of state English courts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1. The doctrine of non-justiciability (see *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888, 931–932, per Lord Wilberforce) prevents English courts from adjudicating upon certain transactions of foreign states in the international sphere. Neither doctrine is applicable.

D Under the Extradition Act 1989 it is not for the court to examine the weight of the evidence, the situation in Chile in 1973 or current relations with Chile. In the United States, where the two doctrines have not always been treated as separate (see *Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* (1990) 110 S.Ct. 701; 493 U.S. 400, 405), all cases, applying the *Restatement of the Law 3rd: The Foreign Relations Law of the United States*, vol. 1, (1986), p. 370, reject the notion that the act of state doctrine bars proceedings against an individual for acts of torture: see *Filartiga v. Pena-Irala* (1984) 577 F.Supp. 860; *Hilao v. Estate of Marcos* (1994) 25 F.3d 1467 and *Liu v. Republic of China* (1989) 892 F.2d 1419.

E It has frequently been held that neither doctrine bars judicial inquiry into conduct which involves a violation of fundamental human rights: see *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported), 29 July 1998; *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] 2 Lloyd’s Rep. 171 and *Letelier v. Republic of Chile* (1980) 488 F.Supp. 665. Nor does the act of state doctrine apply to acts performed by one state in the territory of another.

F Section 20 of the State Immunity Act and the Vienna Convention are the basis of the immunity for a former head of state. The role of head of state has to be analogous to that of a diplomat as defined in article 3 of the Convention. The acts alleged against the applicant were outside his functions as head of state. Chilean law expressly prohibits torture. This is not a case of one state foisting its standards on another but of behaviour which is universally accepted as being abhorrent and criminal.

G *Jones Q.C.* resuming. Conspiracy is a crime in Spain, as is a conspiracy which is not carried out. The Spanish approach is to roll conspiracy up in the offence charged as a continuing or schematic offence. Pursuance of the plan is an element of the charge rather than the charge itself. That is the whole tone of the Spanish indictment.

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The allegations of pre-coup conspiracy formed in Chile to commit acts in Chile and abroad amount to an offence under English law: see *Reg. v. Doot* [1973] A.C. 807. Conspiracy to torture is caught by one or other part of section 2(1) of the Extradition Act 1989. Even if the acts are not deemed to have taken place in Spain, torture is an extraterritorial offence under English law by virtue of section 2(2).

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The conspirators were serving military officers and therefore public officials for the purposes of section 134 of the Criminal Justice Act 1988. It was not necessary that they were acting on behalf of the state. It would be absurd if two factions during a civil disturbance committed acts of torture but only those acting under government orders could be liable under section 134.

B

If the applicant was not acting as a public official in plotting to take over the state and organising torture then the acts of torture after the coup make him liable under section 134 on the basis of a continuing action. As the basic conspiracy was hatched before 11 September 1973 and before the applicant was in control of the country he can claim no immunity based on his status as head of state.

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Ian Brownlie Q.C., Peter Duffy Q.C., Michael Fordham, Owen Davies, Frances Webber and David Scorey for Amnesty International and others. Given the clear incorporation of the Torture Convention into English statute law, almost all the relevant international law has been brought into United Kingdom law and domesticated. That is a sufficient basis to determine the appeal. However, it is unrealistic to leave the matter at that and it is necessary to consider the wider issues.

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The amnesty granted to the applicant in Chile is an issue for the Home Secretary to consider. If, however, it is unlikely that justice will be done in Chile the only matters to consider are the extradition proceedings and trial before the Spanish courts.

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No immunity is provided by Part I of the State Immunity Act 1978 as it does not apply to criminal proceedings. No immunity is provided by Part III of the Act because the alleged acts cannot constitute official acts done in the exercise of the functions of a head of state. The relevant principles of international law do not recognise any immunity in respect of crimes of torture and hostage-taking, which are crimes against international law. In the absence of any basis for immunity in domestic law, as construed in the context of international law, the applicant cannot derive any benefit from the act of state doctrine.

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Neither a former head of state nor a current head of state can have immunity from criminal proceedings in respect of acts which constitute crimes under international law. There is no distinction between a head of state and a former head of state.

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The immunity granted to a head of state by section 20 of the Act of 1978 is the same as the immunity accorded by the Diplomatic Privileges Act 1964 (incorporating the Vienna Convention) to an ambassador. The references to "sending state" and "receiving state" (see articles 1, 23 and 31 of the Convention) show that geographical focus is on immunity for acts performed within the United Kingdom. Parliament cannot have intended that immunity to apply to conduct outside the United Kingdom. In any event, article 39(2) of the Vienna Convention, as applied by

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A section 20, only confers immunity in respect of acts performed in the exercise of functions which international law recognises as official functions of a head of state.

B The intentions of Parliament when passing the State Immunity Act 1978 must be related to the intentions behind the Extradition Act 1989. Section 22 of the Act of 1989 makes express reference to the extradition crimes of torture and hostage taking and section 23 to genocide. With such crimes state oppression is the paradigm and the head of state is the paradigm accused. Parliament cannot have picked out such crimes for mention while intending to grant immunity for a head of state.

C If there is no immunity under the statutes then it is necessary to consider whether there is immunity under the common law, a question which must be approached with caution for several reasons. First, it is appropriate to resolve any uncertainties by reference to the intentions of Parliament as articulated in legislation. Second, section 1 of the Diplomatic Privileges Act 1964 provides that its provisions shall "have effect in substitution for any previous enactment or rule of law." Third, the purpose of the State Immunity Act 1978, as stated in the long title, is "to make new provision with respect to the immunities and privileges of heads of state."

D The English courts are open to the concept of consulting customary international law, as it has evolved over time, as a basis for the common law: see *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, 551–554, 576–579; *I Congreso del Partido* [1983] 1 A.C. 244, 261 and *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82.

E The common law has long since rejected absolute immunity in favour of a restricted theory which developed primarily in the context of civil proceedings and commercial matters: see the *Trendtex* and *I Congreso* cases. Parliament has continued this restricting trend in, for example, the torts exception in section 5 of the Act of 1978 reflecting a policy against immunity in respect of death or personal injury even for the purposes of civil proceedings. Such an exception is also found in the Foreign Sovereign Immunities Act 1976 of the United States. Consequently there can be no immunity, for example, for a political assassination: see *Letelier v. Republic of Chile* (1980) 488 F.Supp. 665, 673; *Shaw, International Law*, 4th ed. (1997), p. 510–511 and J.R. Crawford "A Foreign State Immunities Act for Australia?" in *The Australian Yearbook of International Law* (1983), ed. D.W. Greig.

G Apart from the conventions, the starting point is the Charter of the Nuremberg Tribunal (1945) which was annexed to the London Agreement. It is important to note that the London Agreement was an international agreement which was signed by 19 states in addition to the four victorious powers. It was intended from the first to be a law making exercise. The principles of the Charter were affirmed by General Assembly Resolution 95 of 11 December 1946. The victorious powers transformed themselves into the United Nations (the axis powers were not admitted until 1955) and all members signed Resolution 95. General Assembly resolutions are used for a variety of purposes and some, such as Resolution 95, are consciously law-making. Those law making powers are not to be taken lightly.

The academic sources of customary international law tend to recognise a limited immunity enjoyed by a former head of state in respect of acts committed while acting as head of state. However, state immunity does not usually get discussed in the context of criminal liability. The only case in which a head of state claimed immunity in respect of criminal charges is Erich Honecker of East Germany: *In re Honecker* (1984) 80 I.L.R. 365. The opinion of jurists on criminal liability in a general context is clear that there is no immunity: see *Oppenheim's International Law*, vol. I, pp. 1043–1044 and footnote 3 on p. 366 and Sir Arthur Watts Q.C., Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994-III) 247 *Recueil des cours*, pp. 52, 82–84, 88–89, 112–113. In so much as the passage in *Satow's Guide to Diplomatic Practice*, 5th ed. (1979), p. 10, para. 2.4 appears to disagree it is unlikely that the editors of such a specialised work would be concerned with developments in other areas of international law.

For further academic support for the proposition that immunity does not apply to crimes under international law see *Manual of Military Law, Part III: The Law of War on Land*, (1958) (ed. Sir Hersch Lauterpacht), pp. 179, 180, paras. 632, 637; *Restatement of the Law 3rd: The Foreign Relations Law of the United States*, vol. 1 (1986), p. 471, para. 464, note 14 and *Brownlie's Principles of Public International Law* 4th ed. (1990), p. 335.

Roncarelli v. Duplessis [1959] S.C.R. 121 involved an official using his office to carry out a private and personal policy. There is no warrant for treating that case as determinative of the question whether acts would normally be described as “private” or committed “in person.”

Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1 should be seen as a non-justiciability case rather than an act of state case. The act of state doctrine has no application to the applicant's case. The decision predates several major developments in international law such as the Geneva Convention of 1864, the harbinger of developments in the human rights field: see *Oppenheim's International Law*, vol. II, pp. 227–228. Even in 1848 the courts would not have ignored a piratical sovereign. It is important not to give an ambit to the *Duke of Brunswick* decision which is unrelated to recent developments. Similarly *Hatch v. Baez*, 7 Hun 596 which relies heavily on the *Duke of Brunswick* case is of little authority.

There is no place for the act of state doctrine in the present case. It is the English policy of judicial self-restraint. The policy represents a supplementary principle but is not intended to block the effective operation of legislation. It is concerned with issues of justiciability which are not at all similar to issues of immunity which rely on the application of rules of law. Foreign acts of state may be disregarded if contrary to public policy in England: see *Oppenheimer v. Cattermole* [1976] A.C. 249, 278.

In so far as act of state is a principle of public international law it does not permit recognition of foreign acts of state which are contrary to international law: see *Oppenheim's International Law*, vol. I, pp. 365–366 and *Restatement of the Law 3rd: The Foreign Relations Law of the United States*, vol. 1 (1986), p. 370, para. 443, and pp. 374–375.

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A Extradition procedure is sui generis. The element of discretion has been canalised and transposed to the Home Secretary, hence the elements of the act of state doctrine are matters for him. There are grounds for the view that act of state does not apply to cases involving criminal charges against individuals. There is no English precedent to the contrary and American cases involve states for the most part and civil liability. Act of state is no more than a general principle of policy and is not a source of overriding principles.

B There is no link between the creation of new principles of international law relating to crimes and the universality of jurisdiction of national courts as perceived by Lord Slynn of Hadley [2000] 1 A.C. 61, 79C-D. The existence of universal jurisdiction is a normal concomitant of universal crimes but not a requirement: see *Oppenheim's International Law*, vol. I, p. 468 and *Shaw, International Law*, p. 470. All crimes classed as international crimes attract no immunity.

C There are not many criminal cases involving heads of state and examples of actual trials are very few. There are a few American cases which all involve waiver of immunity by the successor government. The low incidence of such cases is of no relevance.

D The Government of Chile is not a party to these proceedings and is not impleaded. The immunity of a state itself cannot confer immunity from prosecution for international crimes. Chile is herself a party to the Torture Convention. Chile cannot confer or withdraw immunity in these circumstances. Chile does not have sole jurisdiction for the offences charged against the applicant. Issues of human rights are not part of the reserved areas of a state.

E *Duffy Q.C.* following. The effect of section 134 of the Criminal Justice Act 1988 is that our courts are competent to deal with the crime of torture wherever it occurs and despite the official context in which the act was done (the purported performance of official duties is a constituent element of the crime). Section 134 leaves no scope for a domestic jurisdiction/invasion of sovereignty ouster or a defence based on the act of state doctrine. Section 1(1) of the Taking of Hostages Act 1982 also provides for the personal criminal responsibility of the perpetrator regardless of his nationality or where the event occurred.

F Section 134 refers without qualification to "public officials" or persons acting in an official capacity. A former head of state cannot be excluded from its ambit. The ordinary meaning of the words does not support limitation, and, as a provision giving effect to the United Kingdom's obligations under a Convention it should, where possible, be construed compatibly with those obligations. Thirdly, and decisively, the inclusion of heads of state is clear from the travaux of the Torture Convention are considered: see *Burgers and Danelius, Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, (1984), pp. 41-46 and 119. Fourthly, to reject the exclusion of heads of state will put the Torture Convention in line with other international standards such as the Rome Statute of the International Criminal Court. Under customary international law heads of state are responsible internationally for grave crimes against humanity including torture.

There is no need to consider public international law to reach the conclusions, based on the domestic statutes alone, that personal criminal responsibility exists in this country for the crimes for which the applicant's extradition is sought, that our courts are competent to rule on such crimes when committed in an official capacity, and that no scope is left for an act of state doctrine.

If personal criminal responsibility were to be tempered by state immunity the United Kingdom's obligations under the Torture Convention would be seriously compromised. To recognise a *ratione materiae* immunity in respect of complicity in torture would be to contradict the very scheme of the Torture Convention. In November 1998 the Committee Against Torture, the authoritative body established under article 17 of the Convention, recommended that the applicant's case should be considered by the public prosecutor with a view to initiating criminal proceedings in this country in the event that the decision is made not to extradite him. That recommendation is irreconcilable with the existence of a legitimate immunity for the applicant in this matter.

Section 20(1) of the State Immunity Act 1978, properly construed, is concerned with the international functions of a head of state. At most, it confers a *ratione materiae* immunity with regard to the international functions of a former head of state. The applicant cannot make out any immunity claim based on the Act. For the relationship between the common law and statute see *Bennion on Statutory Interpretation*, 3rd ed. (1997), pp. 133–135. Where statute is silent on whether the common law is to be abolished or modified the approach to be taken is that outlined in *Harrison v. Tew* [1990] 2 A.C. 523. Applying that test of inconsistency it is clear that the immunity claimed is inconsistent with the statutory schemes to be found in the various Acts concerning hostage-taking and torture.

To give effect to the will of the legislature any common law criminal immunity of a former head of state which may have existed prior to these enactments was modified by them so that the overriding effect of the statutory provisions for criminal jurisdiction can have effect.

Consideration of the relationship between the common law and public international law produces the same result. The common law, absent statutory adjustment, is to be read consistently with public international law. The residual *ratione materiae* immunity enjoyed by a former head of state does not encompass that individual's conduct when it constitutes behaviour which is contrary to international criminal standards that states have engaged to enforce before their courts or by way of extradition.

[Reference was made to the Amnesty International document "United Kingdom: The Pinochet case—Universal jurisdiction and the absence of immunity for crimes against humanity" (January 1999) and the U.N. Security Council Resolution of 27 February 1995 on the arrest of persons responsible for acts within the jurisdiction of the Rwanda Tribunal.]

Instruments such as the Torture Convention mean that any customary international immunity of a serving head of state should be modified so as to make these fundamental norms effective against all who exercise any state power or function.

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1 A.C. *Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))*

A At the heart of Chile's case is the claim that Chile has sole jurisdiction and the subject matter of this dispute concerns Chile's internal affairs. However, in Advisory Opinion No. 4 of 7 February 1923 (*United Kingdom v. France*) the Permanent Court of International Justice ruled that there was no automatic reserved internal affairs domain.

B To regard the rule against torture as *jus cogens* and *erga omnes* underlines its fundamental place in the public policy of international law. Chile's assertion that *jus cogens* is not a principle which justifies supplanting pre-existing international law but is confined to treaties is unacceptable: see *In re Barcelona Traction, Light and Power Co. Ltd.* [1970] I.C.J. Rep. 3.

C The effect of Chile's signature and ratification of the Torture Convention means that Chile has accepted the Convention's scheme that an alleged torturer is to be tried in the country in which he is found unless he is extradited for trial elsewhere. By its ratification of the treaty Chile has accepted this scheme by the most formal manner known to international law, and should be taken to have consented in principle to the exercises of the jurisdiction which its treaty obligations envisage.

Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B. Knowles for the applicant.

D *Montgomery Q.C.* States and organs of states, including heads of state and former heads of state, are entitled to absolute immunity from criminal proceedings before national courts just as a state is entitled to immunity in respect of sovereign government acts. Far from being an anomalous relic, immunity from foreign courts ensures that competent jurisdiction is allocated to the state concerned. It is a doctrine of competence not impunity.

E There are four hurdles which the appellants have to overcome to establish that immunity has been overridden in the instant case. (1) They must show that there exists a body of international criminal law overriding immunity for the alleged crimes. There is not the hint of a suggestion that immunity in front of a foreign national court has been done away with. (2) They must prove that the international crime existed at the time the conduct complained of occurred or that when the international crime was created it was intended to have retrospective effect. (3) They must establish a universal jurisdiction in respect of the international crime so that Spain may assert it is prosecuting a crime in international law rather than asserting a permissive national jurisdiction over a non-international crime. The parties to the Convention on the Prevention and Suppression of the Crime of Genocide (1948) agreed on the establishment of an international crime to be tried before an international court or the home court of the perpetrators. If Israel prosecutes for genocide it is doing so on the basis of a permissive national jurisdiction not under that Convention. (4) They must establish that there is no conflict between rules of immunity and the principles which govern international crime. Rules of international law deal with liability, not jurisdiction. The recognition of a human right is quite different from conferring jurisdiction to try those who infringe it.

H At the turn of the century there was an internationally accepted doctrine of absolute immunity in respect of all civil and criminal jurisdiction: see *Chung Chi Cheung v. The King* [1939] A.C. 160 and

Compania Naviera Vascongado v. S.S. Cristina [1938] A.C. 485. If that doctrine is to be limited there must be some developed competing rule of international law, created during the course of the century, limiting immunity in respect of identifiable international crimes and evidenced by a consistent and general state practice engendered by the belief that the practice is obligatory. Under the Torture and Hostage Taking Conventions or customary international law there must be an absolute duty to exert criminal process by extradition or before domestic courts without exception or scope for derogation of any sort for either the state or purposes of diplomatic immunity. If there is any derogation there is no reason in principle for saying a derogation cannot apply to a head of state. Any scope for the exercise of a discretion will militate against an absolute rule.

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Under the Nuremberg trials process the vast majority of people were tried before the national courts of their own states. All the crimes criminalised under the Rome Statute of the International Criminal Court will be identified as ordinary national crimes. Most cases will be tried on home territory. There is no universal jurisdiction for such crimes. That is the position under international law.

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The Conventions relied on by the appellants do not establish the rule for which they contend. Article 1 of the Torture Convention defines torture as the intentional infliction of pain by “public officials” or those acting in an official capacity. Article 4 refers to “all” torture and refers to all “forms” rather than “wherever occurring.” There is nothing to alter the immunities under the Vienna Convention or any other immunities.

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The term “public officials” does not include heads of state. The Nuremberg Charter, the Convention on the Prevention and Suppression of the Crime of Genocide (1948), the Yugoslav and Rwanda Charters and the Rome Statute all refer specifically to heads of state as well as public officials. It is therefore inconceivable that the framers of the Torture Convention intended to include heads of state within the definition of public officials. The Criminal Justice Act 1988 is equally silent on the position of heads of state and Parliament must also have intended to exclude heads of state as Lord Slynn of Hadley concluded [2000] 1 A.C. 84A-B. The Hostages Convention and the Taking of Hostages Act 1982 are equally silent. [Reference was also made to Crawford, “The I.L.C. Adopts a Statute for an International Criminal Court” (1995) 89 A.J.I.L. 404 and Shubber “The International Convention Against the Taking of Hostages,” *British Yearbook of International Law* 1982.]

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The primary jurisdiction under the Torture Convention and the other Conventions is given to the state the offender comes from or where the offence took place and the obligation is to extradite a person to that state. Article 4 of the Torture Convention requires criminalisation of torture but is not concerned with jurisdiction. Article 5 does not require that the United Kingdom claims jurisdiction for all cases of torture wherever occurring. The Convention does not require that the United Kingdom try a Chilean for torture occurring in Chile if Chile refuses to exercise the jurisdiction. Either state has complete freedom whether or not to act.

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Even though the Chilean Constitution outlawed torture it can still be described as a sovereign act if it is performed by a person as part of his

A official functions. State immunity covers all people performing an official role. Acts done in connection with foreign relations, by the military or the police, are acts which are a manifestation of public and governmental power: see *Propend Finance Pty. Ltd. v. Sing*, The Times, 2 May 1997; Court of Appeal (Civil Division) Transcript No. 572 of 1997. The perpetrator is liable but it is his home state which can assert jurisdiction over him or waive immunity.

B Although by ratifying the Torture Convention Chile has accepted Spain's right to try Chileans for torturing Spaniards in Chile, the Convention has no retrospective effect and the crux of this case is that it does not deal with Spanish victims but with Chilean victims. The Convention is not about immunity but about liability. The whole basis of diplomatic immunity would be undermined if the Convention gave jurisdiction for all acts of torture. The signatories were not intending that effect. It is because of the possibility of waiver of immunity by a home state that the Torture Convention allocates a right to any state to try anybody, although jurisdiction over torture will rarely raise issues of immunity.

C Waiver of immunity must be either explicit or, if implicit, clear. Customary international law does not seem to recognise implied waiver.

D The only enactment which does is the American Foreign Sovereign Immunities Act 1976. Waiver is not an issue when an international tribunal asserts a jurisdiction over a state. The issue of waiver only arises when national courts are trying to assert jurisdiction. If the Torture Convention has to be seen as a waiver of immunity by all signatories it does not override the immunities under the Vienna Convention: see *Frolova v. Union of Soviet Socialist Republics* (1985) 761 F.2d 370, 376;

E *Sampson v. Federal Republic of Germany* (1997) 975 F. Supp. 1108 and *Smith v. Socialist People's Libyan Arab Jamahiriya* (1995) 886 F. Supp. 306. It is one thing for a state to assert a principle of international law by signing a Convention, quite another to relinquish jurisdiction: see *East Timor (Portugal v. Australia)*, Judgment [1995] I.C.J. Rep. 90. It is necessary for the appellants to show there was no immunity at the time the alleged acts occurred see: *Princz v. Federal Republic of Germany*, 26 F.3d 1166. The international Conventions concerned here were simply not dealing with immunity: see Reimann, "A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz" (1995) 16:403 M.J.I.L. 403.

F The Torture Convention is the high point of the appellants' case but there is still a distinction between acts of state and assertion of jurisdiction.

G It takes more than one Convention to overturn hundreds of years of practice in the area.

H Even if the Torture Convention has removed the head-of-state immunity it has not overridden previous rules which were relevant at the time the acts occurred. The language of the Convention is prospective and, in any event, the principle of non-retroactivity should not be broken without clear words. Nor did Parliament in enacting its provisions intend the Convention to have retrospective effect: see *Hansard*, H.L. 6th Series vol. 135 (1987–1988), 13–24 June. The Criminal Justice Act 1988 itself provided that section 134 should apply to offences two months after it

came into effect. Even if Chile has accepted third-party jurisdiction by ratifying the Torture Convention it still has a vested right to assert immunity up to the point when the Convention came into effect: see *Carl Marks & Co. Inc. v. Union of Soviet Socialist Republics* (1987) 665 F.Supp. 323; (1988) 841 F.2d 26 and *Jacobus v. Colgate* (1916) 217 N.Y. 235.

The State Immunity Act 1978 applies to civil proceedings alone and the absolute immunity for states in criminal matters is left unaffected: see the Lord Chancellor's statement, *Hansard*, H.L. Debates, 17 January 1978, cols. 51–52. The problem section 20 of the Act was intended to address is the one identified by Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 *Recueil des cours*, pp. 53–58. The avowed purpose of section 20 was the private capacity protection but it is wider than that as the immunity covers both public and private acts: see also *The British Yearbook of International Law 1980*, pp. 429–436. Section 20 in clear and unequivocal terms confers the privileges contained in the Diplomatic Privileges Act 1964 on a head of state, whether or not he is in the United Kingdom. The intended effect of the amendment was to extend immunity to heads of state by mirroring customary international law. The Act and the Vienna Convention, article 31, confer on a former head of state an immunity *ratione materiae* for acts effected in his official capacity.

Parliament intended to extend to a head of state and a former head of state the full article 39(2) protection for official acts. In *In re Former Syrian Ambassador to the German Democratic Republic* (unreported), 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96 the court concluded that article 39 protection will stand even in the face of war crimes.

If the position is not governed by section 20 the customary international law position and test are exactly the same in that a former head of state has immunity for acts effected in his official capacity: see Watts at p. 66. See also *Satow's Guide to Diplomatic Practice*, pp. 8–10; *Oppenheim's International Law*, vol. I, para. 456; *The American Law Institute Restatement of the Law 3d: Foreign Relations Law of the United States* (1986) vol. 1, p. 471, section 464; *Lewis, State and Diplomatic Immunity*, 3rd ed. (1999), pp. 125–126. The analyses of these writers are reflected in case law: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1. That was applied in *Hatch v. Baez*, 7 Hun 596 and followed in the United States in *Underhill v. Hernandez* (1897) 168 U.S. 250

In determining whether an act is sovereign, public or governmental and whether it is an official act for which a common law immunity subsists, assistance can be gained from the analysis which has been undertaken in identifying the bounds of the restrictive doctrine of state immunity in the context of distinguishing private commercial and trading transactions from transactions of state: see *I Congreso del Partido* [1983] 1 A.C. 244 and *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529. There is nothing to indicate that those restrictions on immunity which relate to certain civil proceedings are also intended to apply to criminal proceedings.

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1 A.C. Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

A If Sucharitkul, "State Immunities and trading Activities in International Law" (1959) is correct in eliding civil and criminal proceedings then United Kingdom law is wider than international law and it is necessary to look at the issues considered in *I Congreso del Partido* and to decide on which side of the state/personal activity line the acts concerned here fall.

B The American cases are distinguishable. They all involve either a waiver, private acts which cannot sensibly be said to have been done under the colour of state authority, or specific exceptions to immunity under the Foreign Sovereign Immunities Act 1976: see *Jimenez v. Aristeguieta* (1962) 311 F.2d 547; *United States of America v. Noriega* (1990) 746 F.Supp. 1506; (1997) 117 F.3d 1206; *Hilao v. Estate of Marcos*, 25 F.3d 1467; *Lafontant v. Aristide* (1994) 844 F.Supp. 128; *Nelson v. Saudi Arabia* (1991) 88 I.L.R. 189; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699; *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S.Ct. 683; *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536 and *Princz v. Federal Republic of Germany*, 26 F.3d 1166.

C The approach of the courts of other countries has been the same: see *In re Honecker*, 80 I.L.R. 365 and *Marcos and Marcos v. Federal Department of Police* (1989) 102 I.L.R. 198. The established practice is for states not to try foreign heads of state.

D The United States and other countries have enacted specific exceptions to immunity but not one has enacted a human rights exception. Given the importance of establishing state practice that is significant. There is state practice condemning torture but none which denies immunity or vests jurisdiction. The American courts have taken the approach that they have claimed jurisdiction but do not intend to overrule immunity.

E State practice has to be extensive and uniform over a significant period of time before any principle of jus cogens can arise: see *North Sea Continental Shelf Case*, Judgment [1969] I.C.J. Rep.3. Even a convention or United Nations General Assembly Resolution does not become part of international law without state practice. The practice emerges when all the aspirations expressed in the convention or resolution are accepted by states and acted upon. When a high ideal, e.g. to prosecute crimes against humanity, is expressed, the practice is often the opposite—to give complete immunity to certain categories of people without carving out a human rights exception. In the face of such contrary practice it is impossible to say that immunity is overridden: see *Saltany v. Reagan* (1988) 702 F. Supp. 319 and *Persinger v. Islamic Republic of Iran*, 729 F.2d 835

F State practice shows that there is immunity except for international crimes, namely genocide, war crimes and crimes against humanity. The definition of those crimes requires that they take place in the context of an armed conflict, even if it is only an internal conflict. They are crimes which threaten the peace or the world order. Torture does not and is not an international crime: see *Higgins, Problems and Process: International Law and How We Use It* (1994), pp. 87–89. The mere existence of a treaty to cover the conduct concerned does not make it an international crime. There are numerous treaties covering controlled drugs but possession of cannabis is not an international crime.

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The precursor agreements to the Torture Convention do not support the appellants' case that it establishes customary rules. The General Assembly Resolution of 1973 and the Draft Agreement of 1975 demonstrate that torture was condemned in terms of aspiration only and that nothing was done to encourage third state jurisdiction. The most powerful argument against the Torture Convention as evidence of a customary international law practice is that it took until 1987 for the Convention to come into effect.

The appellants' argument that in any event the crimes alleged are crimes against humanity and have been since Nuremberg also fails. Crimes against humanity are always associated with armed conflict: see the Yugoslav Tribunal Statute and the Draft Code of Crimes Against the Peace and Security of Mankind (1996). The only agreement which took crimes against humanity out of an armed conflict scenario was the Draft Agreement of 1954 and the 1996 Draft reinstated the connection: see also *Polyukhovich v. Commonwealth of Australia* (1991) 91 I.L.R. 1.

International Law Commission Drafts have little weight as evidence of existing customary international law. If anything they are evidence of a lack of universal practice. The law on immunity is clearer as there is evidence of universal practice: see *Higgins Problems and Process: International Law and How We Use It*, pp. 87-89 and Brownlie, "Contemporary problems concerning the jurisdictional immunity of states," *Institute of International Law Yearbook 1987*, vol. 62, part 1. p. 13.

There was no conflict in Chile except on the day of the coup. The allegations against the applicant do not fall within the definition of crimes against humanity. The Spanish allegations are of torture, murder and conspiracy, not crimes against humanity.

In relation to pre-coup conduct, any conduct complained of before 11 September 1973 is covered by either immunity or the act of state doctrine. Acts done pursuant to the planning and execution of a coup are, if the coup is successful, the acts of the state and protected: see *Underhill v. Hernandez*, 168 U.S. 250 and *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297. Once there is the nucleus of a government the act of state doctrine applies from the start of the revolution, not from the formation of the new government: see *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888 and article 15 of the International Law Commission Draft Articles on State Responsibility.

Pre-coup conduct in 1973 was not an offence under English law and does not satisfy the extradition requirement of double criminality as at that time the statutes which could make the conduct a crime under English law had not been enacted. They have to rely on Lord Bingham of Cornhill C.J.'s formulation of the test and Lord Lloyd of Berwick [2000] 1 A.C. 61, 88D-E. Consideration has to be given to the time when the action occurred but the point goes further as consideration of the principle of double criminality under the Extradition Act 1989 shows.

The Extradition Act 1989 consolidated procedures for extradition to foreign states and Commonwealth countries and provided for new arrangements under the European Convention on Extradition (1957). The principle of double criminality must be the same for all circumstances. The

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1 A.C. Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

A definition of an extradition crime for Schedule 1 cases in paragraph 20 requires one to look back to the Extradition Act 1870 (33 & 34 Vict. c. 52). Section 26 of that Act defines an extradition crime and Schedule 1 specifies the relevant date as the date of the alleged crime. [Reference was also made to *United States of America v. Allard* [1991] 1 S.C.R. 861; the Interdepartmental Working Party Report, "A Review of the Law and Practice of Extradition in the United Kingdom," (1982); the Green Paper, "Extradition" 1985 (Cmnd. 9421) and the White Paper "Criminal Justice Plans for Legislation," 1986 (Cmnd. 9658).]

B The magistrate must exercise the extradition jurisdiction in the same way as the domestic criminal jurisdiction: see The Law Commission and The Scottish Law Commission "Report on the Consolidation of Legislation Relating to Extradition" 1989 (Law Com. No. 182; Scottish Law Com. 119). He must apply the law which existed at the time of the offence. The objective is to give the defendant the same rights as a defendant under English law: see *Bassiouni, International Extradition: United States Law and Practice*, 3rd ed. (1996), pp. 497–500, 596–598 and *Shearer, Extradition in International Law* (1971), pp. 136–139.

C In the light of these authorities which were not before the Divisional Court or the previous Appellate Committee, the applicant cannot be extradited to Spain to stand trial in respect of acts which would not have been contrary to United Kingdom law at the time they were done because the provisions of the Torture Convention had not been brought into effect. "Conduct" in section 2 of the Act of 1989 is not just any activity taken out of its element and time but conduct which is punishable under United Kingdom law at the time when it takes place. The relevant time for determining double criminality is thus the date of the alleged crime.

D *Nicholls Q.C.* following. Even if "conduct" in section 2 of the Extradition Act 1989 contains no temporal element the pre-coup conduct is not an extradition crime because it is not the conduct with which the applicant is charged in Spain. For there to be liability to extradition under section 1 there must be a link between the offence with which a defendant is accused in the foreign state and the offences alleged in the extradition proceedings. It is not permissible for the Crown Prosecution Service to draft charges about the pre-coup period as that is not conduct complained about by Spain. It has been raised solely to avoid the immunity issue. The requesting state must specify the conduct complained about so the requested state can draft its own matching charges. It is incumbent on the magistrate to have regard to the crime with which the defendant is accused in the foreign state: see *In re Nielsen* [1984] A.C. 606.

E All the Spanish charges relate to repression after the coup, not to conspiracies and plots. The applicant is not charged with a pre-coup conspiracy. Although the House can look at all the documentation now produced by the appellants, the first provisional warrant is definitive because it fixes the starting point. In so far as a plan is mentioned it is merely as factual background. All the substantive allegations relate to post-coup activities.

H Applying the non retrospectivity principle and considering the current charges on the basis that section 134 came into force on 29 September

1988 very few survive. Hostage taking is not made out and conspiracy before the acts became criminal falls away.

Lawrence Collins Q.C. for the Government of Chile. Chile is intervening to defend its national sovereignty, to assert its interest in having the matters at issue dealt with in Chile, maintain the rule of law in Chile and to protect the national jurisdiction from outside interference contrary to international law, but not to defend the applicant's acts as head of state. The Government of Chile deplores the fact that the government at the time violated human rights and reaffirms its commitment to human rights. Chile's assertion of its own immunity is not intended as a personal shield for the applicant nor to grant him immunity from prosecution in Chile or impunity.

The sole questions for present purposes are whether a person is immune under section 1 of the Extradition Act 1989 in relation to conduct defined in section 2 and whether that conduct is immune under section 20 of the State Immunity Act 1978. Whether conduct amounts to an offence under English law is irrelevant. Section 1(1) of the Act of 1989 is general in its terms but it is natural to read it as subject to the normal immunities applicable to diplomats and heads of state. Such immunities are to be found only in the Act of 1978 and customary international law. Section 134 of the Criminal Justice Act does not provide an implied escape from immunity. The United Nations Committee Against Torture [1990] II, No. 1-2 H.R.L.J. 14 has decided that the Torture Convention does not have retrospective effect.

The Republic of Chile claims immunity from the courts of the United Kingdom for acts alleged to have been carried out by its former head of state, over which Chile and its national courts have sole jurisdiction. The sovereign equality of states and the maintenance of international relations require that the courts of one state should not adjudicate on the governmental acts of another, or intervene in its internal affairs. Head of state immunity is an aspect of state immunity, which applies equally to criminal and civil proceedings and includes immunity for agents of the state acting in exercise of sovereign authority: see *Yearbook of the International Law Commission 1980*, vol. II (Part 2), "Jurisdictional Immunities of States and their Property, Second Report," pp. 14-15, 18-19, 207-210; *Zoernsch v. Waldock* [1964] 1 W.L.R. 675; *Propend Finance Pty. Ltd. v. Sing*, *The Times*, 2 May 1997; *Church of Scientology Case* (1978) 65 I.L.R. 193 and *Herbage v. Meese* (1990) 747 F.Supp. 60. The immunity is for the benefit of the state, not the individual, and only the state may choose whether to waive it: see *Jaffe v. Miller* (1993) 13 O.R.(3d) 745. *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82 and *Holland v. Lampen Wolfe* [1999] 1 W.L.R. 188, C.A. show the parallel immunities of the individual and the state. If immunity, or absence of immunity, depends on questions of fact, then a party asserting immunity, or its absence, must show that there is a serious issue to be tried.

The rules of comity require that the United Kingdom does not assert or assist in the assertion of jurisdiction over the internal acts of a foreign state: see *I Congreso del Partido* [1983] 1 A.C. 244; *Buck v. Attorney-General* [1965] Ch. 745 and *Institut de Droit International Annuaire*,

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1 A.C. Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))

A vol. 64-II (1991), p. 389 “Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement.” The Spanish charges are substantially based on the Report of the Chilean National Commission on Truth and Reconciliation (1991). As required by Presidential Decree No. 355 of 25 April 1990 the commission passed on relevant evidence to the Chilean courts and made proposals for action. These are not matters for foreign courts: see *Azanian Peoples Organisation (A.Z.A.P.O.) v. President of the Republic of South Africa* (1996) 8 B.C.L.R. 1015, a decision of the South African Court of Appeal on the status and constitutionality of amnesties granted by the South African Truth and Reconciliation Commission.

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C The immunity of an existing head of state for acts performed in his governmental capacity is well recognised. A similar immunity applies to a former head of state: see Sir Arthur Watts Q.C., Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994-III) 247 *Recueil des cours*, p. 89; *Hatch v. Baez*, 7 Hun 596 and *Marcos and Marcos v. Federal Department of Police*, 102 I.L.R. 198.

D In some cases state immunity has been denied to an individual claiming it. They involved circumstances where the acts concerned were the personal and private acts of the head of state (*Ex-King Farouk of Egypt v. Christian Dior* (1957) 24 I.L.R. 228 and *Société Jean Desses v. Prince Farouk* (1963) 65 I.L.R. 37), where the foreign state either did not claim or waived immunity (*In re Grand Jury Proceedings, John Doe 700* (1987) 817 F.2d 1108; *Republic of Philippines v. Marcos* (1986) 806 F.2d 344; *Hilao v. Estate of Marcos*, 25 F.3d 1467 and *Paul v. Avril* (1993) 812 F.Supp. 207), where the defendant was not recognised as head of state (*United States of America v. Noriega*, 746 F.Supp. 1506; (1997) 117 F.3d 1206), or where the state had ceased to exist (*In re Honecker*, 80 I.L.R. 365).

F Both international law and the State Immunity Act 1978 recognise a clear parallel between former head of state immunity and the immunity of former diplomatic agents now codified in article 39(2) of the Vienna Convention on Diplomatic Relations: see, *Denza, Diplomatic Law*, 2nd ed. (1998), pp. 357–363; *Yearbook of the International Law Commission 1991*, vol. II (Part 2) “Jurisdictional Immunities of States and their Property,” p. 18; *Mann, Studies in International Law* (1973), pp. 422–433; *Marcos and Marcos v. Federal Department of Police* (1989) 102 I.L.R. 198 and *Zoernsch v. Waldock* [1964] 1 W.L.R. 675. *In re Former Syrian Ambassador to the German Democratic Republic*, 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96 stands alone in saying there is a major difference between diplomatic immunity and state immunity.

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H The test for immunity is whether the act is a governmental act or sovereign act: see *I Congreso del Partido* [1983] 1 A.C. 244. The applicant is not charged with private acts. The term “official acts” which so influenced the panel on the previous hearing [2000] 1 A.C. 61 finds no place in article 39(2). “Official” is misleading as it carries connotations of legality. The French use the expression “an act of public power:” *Société Levant Express Transport v. Chemins de fer du gouvernement iranien* (1969) in *Grands Arrêts* 3rd ed. (1998), p. 372. The paradigm case of the exercise

of sovereign power is military and police action: see *Claim against Empire of Iran* (1963) 45 I.L.R. 57; *Duke of Brunswick v. King of Hanover*, 2 H.L.Cas. 1; *Nelson v. Saudi Arabia*, 88 I.L.R. 189; *Kendall v. Kingdom of Saudi Arabia* (1965) 65 Adm. 885. A

The only issue in the instant case is the jurisdiction of the foreign courts, not the legitimacy of the applicant's acts. Immunity subsists irrespective of whether the acts are illegal or unauthorised according to internal law or contrary to international law, since the whole purpose of state immunity is to prevent such issues being litigated in a foreign national court unless the state consents by treaty or otherwise. Chile is merely concerned to assert its national immunity and sole jurisdiction over the illegal acts. Wholly illegal acts can still be public acts: see *Velasquez Rodriguez Case* (1989) 95 I.L.R. 232. B

There are two strands to the cases in international law on the imputed responsibility of the state for acts against aliens. For example, either the state is liable directly for the acts of its soldiers or is liable in a form of negligence for allowing a mob to take over: see *In re United States Diplomatic and Consular Staff in Tehran*, [1980] I.C.J. Rep. 3; 61 I.L.R. 504. These are not cases of vicarious liability but of state responsibility because the state is regarded as having done the deed. C

Although there is no necessary correlation between state responsibility and state immunity the former offers the best guide as to where the immunity starts: see *Brownlie's Principles of Public International Law*, 5th ed. (1998), pp. 450, 454; *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926) 4 U.N.R.I.A.A. 110; *The Maal Case* (1903) 10 U.N.R.I.A.A. 730; *Estate of Jean-Baptiste Caire (France) v. United Mexican States* (1929) 5 U.N.R.I.A.A. 516. D

The State Immunity Act 1978 does not cover the whole issue of immunity. In so far as section 20 and customary international law are not co-extensive customary international law is decisive. E

The prohibition of torture by international law has the character of jus cogens or obligation erga omnes. The limits and application of jus cogens, a mandatory rule from which states cannot by agreement derogate, are controversial: see *Brownlie's Principles of Public International Law*, 5th ed. (1998), pp. 516–517 and *Sinclair, The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), p. 209. It is not a rule of jurisdiction and does not supplant pre-existing customary international law. The concept of obligation erga omnes is used to widen the power of states to complain about the infringement of an obligation in international law but does not confer jurisdiction on international or national tribunals where it does not otherwise exist: see *East Timor (Portugal v. Australia)*, *In re* [1995] I.C.J. Rep. 90, 122, para. 29; *United States of America and Republic of France v. Dollfus Mieg et Cie. S.A. and Bank of England* [1949] Ch. 369; [1950] Ch. 333, C.A.; [1952] A.C. 582 and *The Monetary Gold* [1954] I.C.J. Rep. 19. G

Jus cogens and erga omnes do not impose on questions of immunity, nor is there any connection between those concepts and the personal responsibility of heads of state before international tribunals. The jurisdiction of an international court depends on the will of the parties. The statutes of international tribunals draw a distinction between heads of H

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A state and government officials and the international conventions dealing with jurisdiction of national courts do not affect head of state immunity because they do not expressly override it.

The use of national courts for the trial of war crimes depends on the laws of war. The fact that heads of state or former heads of state can be liable before international tribunals leaves unaffected state immunity before a national court. State immunity is unaffected by the jurisdictional provisions of a treaty unless it is expressly waived. Consequently the Torture Convention and the Hostages Convention leave head of state immunity intact. There is no rule of international law that immunity ceases to be available in cases of violations of peremptory norms.

The law of war crimes is such that no conclusions can be derived from it which are applicable to other emerging international crimes. The basis of the jurisdiction is the right of a belligerent to punish war criminals who fall into its hands: see *Oppenheim's International Law*, vol. II, (1952), pp. 581, 587. The tribunals set up after the Second World War were established by the victors as belligerent or occupying powers assuming the sovereignty of the defeated country: see *Manual of Military Law*, (1958), Part III "The Law of War on Land," ed. Sir Hersch Lauterpacht, pp. 173-184 and Lord Wright "War Crimes under International Law" (1946) L.Q.R. 45.

Article 7 of the Nuremberg Charter under which heads of state could be held liable before the tribunal was preceded by four years of intense discussion: see *Stone, Legal Controls of International Conflict* (1959), p. 357 and *McDougal and Feliciano, The International Law of War: Transnational Coercion and World Public Order*, (1994), p. 707. It is the formula which has been followed only in setting up subsequent war crimes tribunals: see article 7(2) of the Yugoslav Statute, article 6(2) of the Rwanda Statute. The only exception is article 27(1) of the Rome Statute of the International Criminal Court which is unexceptionable as any jurisdiction is based on the consent of the signatories. The powers over an existing or former head of state are exactly the same as they were in 1946: see the International Draft Code of Offences Against the Peace and Security of Mankind 1954 and General Assembly Resolution 3074 (XXVIII) of 3 December 1973. The International Law Commission Draft Code of Crimes 1996 is intended to be a recommendation for the future and is not a statement of present law as it contains almost no citation of state practice. It is prospective in nature and has provision for non-retroactivity.

The Rome Statute of the International Criminal Court is little evidence of customary international law and is mainly a political statement. In any event it has been signed but not ratified. However, it contains in article 98 a clear affirmation of state immunity in national courts, although in the vast majority of cases an accused will be tried before the courts of his own country so immunity will not arise. This is the closest one gets to an international statute dealing with international crimes and it reasserts state and diplomatic immunity.

Chile ratified the Torture Convention on 30 September 1988 and it came into force in October 1988 but has no retrospective effect: see U.N. Committee Against Torture [1990] II, No. 1-2 H.R.L.J. 134. Under the Convention, however, no other state can try a torturer if his home

state claims immunity for him. There is no trace of discussion of immunity being waived before the Convention was opened for signature. Waiver of immunity by treaty must be express: see Yearbook of the International Law Commission 1991, vol. II (Part 2), p. 27; *Argentine Republic v. Amerada Hess Shipping Corporation*, 109 S.Ct. 683 and the discussion in *Oppenheim's International Law*, vol. I, p. 351. A term can only be implied into a treaty for necessity, not to give the treaty maximum effect: see *Oppenheim's International Law*, vol. I, p. 1271. There is no obligation in the Torture Convention to which one can attach the implied waiver. Waiver cannot be implied on the basis that certain provisions of the treaty will not work without it. All the states which are signatories to the convention cannot be taken to have waived jurisdiction over public officials without express words. If that was thought to have been the effect of the Convention it would have been expressly stated.

The scheme of the Convention does encroach on territoriality but extended jurisdiction does not entail a waiver of immunity. The Convention is primarily concerned with the country where the torture took place and issues of third party jurisdiction are marginal to its overall thrust. To have waived immunity in such a marginal area would have been a major step for the parties.

The immunity is the immunity of the state and has to be claimed by the state. This will only occur in exceptional circumstances. The normal procedure will be for the country where the torture occurred to request the return of the alleged torturer or repudiate him, but not to claim immunity. In any event, although the articles concerning criminal responsibility apply to heads of state the provisions do not abrogate head of state immunity.

An application by Spain to extradite a non-Spanish national for acts done outside Spain is not within the Torture Convention. Chile has not requested the extradition of the applicant as he is not a fugitive from Chile—his wish is to return to Chile.

The submissions apply equally to the Hostages Convention. There can have been no implied waiver because the Convention, although applicable to public officials, was not designed to deal with hostages taken by a state: see *In re United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] I.C.J. Rep. 3; 61 I.L.R. 504, 555.

To accept that torture has been prohibited since the 1970s is not to agree that it was also an international crime. It means that there is an obligation on states to ensure that no torture takes place within their territories. It is likely that, today, systematic and state planned torture would be regarded as a crime against humanity resulting in the personal responsibility of the actor and universal jurisdiction in regard to him. There is a growing consensus that crimes against humanity do not necessarily have to be allied to armed conflict. That, however, says nothing about immunity. There is no possible conflict between immunity and universal jurisdiction. There is no rule of customary international law requiring an exception to state immunity for breach of international law. On the contrary, state practice shows that in the United States and the United Kingdom state immunity legislation is subject to no such exception. The most important modern pronouncement of the International Court of Justice on the development of a customary rule is

A to be found in the *North Sea Continental Shelf Case*, Judgment [1969] I.C.J. Rep. 3, 44.

It is clear from the decision in *Argentine Republic v. Amerada Hess Shipping Corporation*, 109 S.Ct. 683 and McDowell, "Contemporary Practise of the United States Relating to International Law" (1976) 70 A.J.I.L.817 that the American Foreign Sovereign Immunities Act 1976 was passed with international law well in mind and that the Departments of State and Justice were involved in drafting the legislation. Consequently the Act can be regarded as declaratory of international law: see also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 and *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536.

B The approach in these cases is equally applicable to claims against agents of the state as it is to the claims against the state itself. There is no rule of customary international law which requires a further exception to the accepted principles of state immunity from foreign national courts for breach of international law: see, Schreuer "State Immunity: Some Recent Developments," Hersch Lauterpacht Memorial Lectures (1988), p. 60.

C *David Lloyd Jones* as amicus curiae. It is still a live issue whether the applicant was head of state from 11 September 1973. In the past such questions have usually been resolved by executive certificate. In the absence of one it is permissible to consider evidence of fact and Chilean law: see *Duff Development Co. Ltd. v. Government of Kelantan* [1924] A.C. 797, 824. Although that passage was criticised in *The Arantzazu Mendi* [1939] A.C. 256, 264, no objection can be taken to admitting secondary evidence in the circumstances of the present case.

D The United Kingdom recognised the new Government of Chile in September 1973. In English law that recognition was retroactive to the date when the government took control: see *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* [1921] 3 K.B. 532.

E There is general consensus that there is a measure of continuing immunity *ratione materiae* for a former head of state in respect of his acts as head of state: see *Satow's Guide to Diplomatic Practice*, pp. 8–10; *Oppenheim's International Law*, vol. 1, para. 456; Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 *Recueil des cours*, pp. 52–58; *Mann, Studies in International Law* (1973), pp. 422–433; *Hatch v. Baez*, 7 Hun 596 and *Marcos and Marcos v. Federal Department of Police*, 102 I.L.R. 198. The rationale of the continuing immunity is that for a national court to exercise jurisdiction over the official acts of a former head of a foreign state would be to exercise jurisdiction over the state itself. The same rationale applies to the immunity granted to diplomats and other state officials. National principles reflect to varying degrees the principle of non-intervention in the internal affairs of other states: see *Oppenheim's International Law* vol. I, pp. 365–370; *Zoernsch v. Waldock* [1964] 1 W.L.R. 675, 692. Dinstein, "Diplomatic Immunity from Jurisdiction *Ratione Materiae*" (1966)

G 15 I.C.L.Q. 76, 81, 83, 86, 87 supports the view that not every act of state commands immunity from jurisdiction. In English law immunity *ratione materiae* and act of state non-justiciability are separate doctrines, but they share the same rationale.

The effect of section 20(1) of the State Immunity Act 1978 and the Vienna Convention on Diplomatic Relations is that a former head of state enjoys immunity from criminal proceedings in the United Kingdom in respect of his official acts performed in the exercise of his functions as head of state. This coincides exactly with the position in customary international law. If section 20 does not apply to the acts of a head of state while not in the United Kingdom and there is no statutory rule covering that situation it becomes easier to argue that any immunity granted by the common law is overridden by the Torture Convention. Section 20 should be interpreted in the light of the international law background and consistently with international law obligations unless the language of the statute compels the opposite conclusion: see *Alcom Ltd. v. Republic of Colombia* [1984] A.C. 580, 597. The statute applies the rules applicable to the head of a diplomatic mission by analogy to the head of state. There is a clear analogy between the two. For this purpose there is no significance in the fact that a diplomat is “received” by the state. Section 20 provides a comprehensive code as to the way a head of state is to be treated by the United Kingdom. Of the possible restrictions, it would be strange if the section 20 immunity only applied to the foreign head of state’s acts in the United Kingdom as hardly any of them are performed here. The provision does not say it is intended only to cover a visiting head of state in his official functions as a dignitary: see Hansard (H.L. Debates), 16 March 1978, col. 1536–1537; Sir Arthur Watts Q.C., Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994-III) 247 *Recueil des cours*, p. 66 and *Lewis, State and Diplomatic Immunity*, 3rd ed. (1999), pp. 87, 89. A limitation to matters arising in the United Kingdom from the private acts of a visiting head of state is not warranted by the wording of the statute or the rules of customary international law. There is no justification for confining the immunity to the representative functions of a head of state. Section 20 imports the whole body of international privileges and immunities.

Section 20 should be read in conjunction with articles 31 and 39(2) of the Vienna Convention on Diplomatic Relations as creating a rule of general application on immunities for heads of state. A former head of state enjoys immunity from the criminal jurisdiction of the United Kingdom in respect of his official acts performed in the exercise of his functions as head of state. This does not connote a requirement of legality in the municipal law of the head of state. That law cannot be decisive of the scope of the immunity *ratione materiae* of a former head of state. Article 3 of the Vienna Convention was not incorporated into English law, but the immunities of a head of state under international law still apply. The difference in position between a head of state and a head of government can be met by supplementing the head of government’s immunity. If section 20 does not apply to a former head of state, then under the common law reflecting international law he enjoys immunity *ratione materiae* to the same extent as under the proposed reading of section 20.

The starting point in considering whether the applicable rule of immunity is that at the date of the extradition request or the date of the conduct is that immunity is a procedural exception to jurisdiction and in

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A general current law applies: see *Denza, Diplomatic Law*, pp. 256–257 and *Empson v. Smith* [1966] 1 Q.B. 426. However, different considerations may apply where the applicable rule of immunity depends on the legality of the conduct itself. That question should be answered by reference to the law in force at the date of the conduct: see *per* Lord Slynn of Hadley [2000] 1 A.C. 61, 81G–82A; cf. *per* Lord Steyn, at p. 117E–F.

B If torture by a head of state is now outlawed under international law and therefore justiciable before foreign courts it is necessary for that point to have been reached at the time of the conduct. It is not enough to say that the conduct is illegal today. On the inter-temporal law see *Jennings, The Acquisition of Territory in International Law*, (1963), pp. 28–31 and article 28 of the Vienna Convention on the Law of Treaties.

C There is no absolute rule that waiver of immunity must be express: see *Frolova v. Union of Soviet Socialist Republics* (1985) 761 F. 2d 370. When parties enter into a later conflicting treaty it may expressly or impliedly vary its predecessor: article 59 of the Vienna Convention on the Law of Treaties. The parties to the Torture Convention may be taken to have restricted immunity *ratione materiae* with prospective effect.

D When considering the scope of the official acts of a head of state the legality of the conduct in question under the law of that state or the scope of his actual authority under that law cannot be the governing considerations. An act may be *ultra vires* but nevertheless be official for the purpose of immunity if performed in ostensible exercise of the actor's public authority: see *Republic of Philippines v. Marcos*, 806 F.2d 344; *Jaffe v. Miller* (1993) 13 O.R.(3d) 745. [Reference was made to Sir Arthur Watts Q.C., Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 *Recueil des cours*, pp., 56–57; *Jimenez v. Aristeguieta* (1962) 311 F.2d 547 and *Duke of Brunswick v. King of Hanover*, 2 H.L.Cas. 1.] If legality under the law of the state concerned were determinative, the more repugnant its laws the greater would be the extent of the immunity to which the former head of state would be entitled. An act may be attributed to the state for purposes of state responsibility but is not necessarily regarded as an act of state: contrast *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926) 4 U.N.R.I.A.A. 110 and *United States of America v. Noriega* (1990) 746 F.Supp. 1506. As to a possible exception to the act of state doctrine in relation to illegality in international law see *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported), 29 July 1998. When considering whether the acts of a head of state are public or private it is necessary to look at the purpose and motive of the action. The United States authorities support the proposition that official acts are those taken on behalf of the state and do not include private acts of the actor himself and also the proposition that the fact that a head of state is alleged to have utilised his official position to engage in criminal activity does not necessarily make that activity a public act: see *United States of America v. Noriega* (1990) 746 F.Supp. 1506; *Underhill v. Hernandez*, 168 U.S. 250 and *Jimenez v. Aristeguieta* (1962) 311 F.2d 547.

H In considering the offences alleged to have taken place outside Chile, a literal approach to the statutory provisions and a purposive approach based on the rationale for the immunity produce different results. On the

literal approach the acts done abroad are none the less official: see *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 W.L.R. 1147, 1163A. On the purposive approach the rationale for the immunity, non-interference in the internal affairs of another state, no longer applies. Accordingly, although in one sense acts outside Chile can be regarded as official acts, the rule does not extend to grant immunity as acts which are not within the proper jurisdiction of the state cannot attract immunity: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1; *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] 2 Lloyd's Rep. 171; *Underhill v. Hernandez*, 168 U.S. 250 and *Liu v. Republic of China*, 892 F.2d 1419.

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There is a growing body of authority supporting the proposition that the act of state doctrine does not legitimately exempt every sovereign act from jurisdiction: see, Dinstein "Diplomatic Immunity from Jurisdiction Ratione Materiae" (1966) 15 I.C.L.Q., 87; *In re Goering* (1946) 13 I.L.R. 203; *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 5; *Prosecutor v. Blaškić (Subpoena)* (1997) 110 I.L.R. 607.

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In the United States the domestic act of state doctrine, at least in its initial form, reflected notions of the independence of sovereign states: *Underhill v. Hernandez* (1897) 168 U.S. 250; *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398; *Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International*, 110 S.Ct. 701; *Kadic v. Karadžić* (1995) 70 F.3d 232 and *The Restatement of the Law 3rd: Foreign Relations Law of the United States*, vol. 1, (1986), sections 443–444, pp. 366–389. The Antiterrorism and Effective Death Penalty Act 1996 creates a further exception to the statutory immunity of a foreign state and is in effect a human rights exception to the immunity. The Foreign Sovereign Immunities Act 1976 is not concerned with criminal jurisdiction.

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The United Kingdom act of state non-justiciability doctrine may also admit of exceptions in the case of conduct contrary to public international law: *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported), 29 July 1998 and *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 W.L.R. 1147; cf. *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888, 926, 937, 938. If the applicant enjoys immunity pursuant to section 20(1) of the State Immunity Act 1978 it is not necessary to consider whether, in addition, the issues raised fall within an independent rule of non-justiciability. If however, he is not entitled to the statutory immunity because the conduct in question was not official conduct performed in the exercise of his functions as a head of state or was outside his proper jurisdiction as head of state, the principle of non-justiciability can have no application.

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The Torture Convention creates an offence which can only be committed by an official or a person acting in a public capacity. The Hostages Convention creates an offence which can be committed by an official. The contracting states are required to establish jurisdiction and exercise it in very wide circumstances. They have accepted that courts of other contracting states will exercise jurisdiction over such official acts: articles 5 and 7 of the Torture Convention. The treaties have widespread support and have almost certainly become customary international law. Their provisions have been incorporated into United Kingdom law by

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A section 134 of the Criminal Justice Act 1988 and section 1(1) of the Taking of Hostages Act 1982. Consequently allegations of torture and, probably, hostage taking by an official of a foreign state in the purported performance of his official duties are justiciable before the English courts. This might suggest that the proposed rationale for the subsisting immunity of a former head of state is absent in each case.

B The argument that the Torture Convention has an overriding effect which removes all immunities goes further than the appellants need to go and perhaps goes too far. The Convention is concerned primarily with criminal offences in municipal law and the exercise of jurisdiction. It does not deal directly with immunity. There is no clear indication that it intends to override or carve out exceptions to the immunities of currently serving diplomats or heads of state. The Convention would not be unworkable if those immunities remained, i.e., if it affected immunity *ratione materiae* but not *ratione personae*.

C Although Chile is not impleaded in these proceedings the right of immunity the applicant asserts is indeed the right of Chile.

D On their new case alleging pre-coup conspiracy the appellants have to show that the offences alleged are contrary to the law of Spain, that the requirements of the Extradition Act 1989 are satisfied, that the conduct is "official" for the purposes of section 134 of the Criminal Justice Act 1988 and that no principle of immunity or non-justiciability applies. A head of state does not have immunity *ratione materiae* in respect of acts performed before he became head of state although such acts may be attributable to the state for the purposes of state responsibility.

E *Montgomery Q.C.* in reply. The argument that a purposive approach to the act of state doctrine allows for a human rights exception is flawed: *Kuwait Airways Corporation v. Iraqi Airways Co.*, 29 July 1998. Act of state cannot be imported and grafted on to state immunity (in the English sense). Non-justiciability is relevant to act of state and not immunity: see *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82. Waiver of immunity must be express: *Frolova v. Union of Soviet Socialist Republics* (1985) 761 F. 2d 370.

F *Jones Q.C.* in reply. Two propositions of fundamental importance to modern extradition law and practice in relation to the definition of "extradition crime" in section 2(1) of the Extradition Act 1989 apply to all European Convention on Extradition (1957) requests falling within Part III of the Act. First, it is necessary that the conduct of which the defendant is accused would constitute, at the time when a decision-maker considers the matter in the United Kingdom proceedings, the crime specified in the authority to proceed in corresponding circumstances in the United Kingdom, whether or not the conduct constituted that crime when it had been committed. Second, it is necessary to examine, not the foreign law, but only the facts submitted by the requesting state under section 7(2) of the Act, article 12 of the European Convention on Extradition and further particulars submitted in accordance with article 13, in order to identify the conduct of which a defendant is accused within the meaning of section 1(1)(a) of the Act.

H The issue whether the criminal conduct alleged amounts to an extradition crime has not previously been argued in depth by the

appellants because it was believed that it had been settled in the Divisional Court and by dicta of Lord Lloyd of Berwick [2000] 1 A.C. 88^{E-F}. No argument was presented by the applicant on this question at the first hearing of the appeal.

The plain and literal language of section 2 of the Act of 1989 requires an examination as to whether the conduct is criminal in the United Kingdom at the time the decision maker considers the matter. An extradition crime according to section 2(1)(a) of the Act is one that “would constitute” rather than one that “would have constituted” a crime in the United Kingdom and section 7(5) refers to crimes that “would be constituted” not “would have been constituted.” The opening words of section 2 expressly state that the definition of extradition crime in Schedule 1 to the Act is excluded. Accordingly the definition in Schedule 1 which is expressly stated in the opening words of the Schedule to be derived from the Extradition Act 1870 cannot apply. The applicant’s reliance on the Act of 1870 as an aid to construction of section 2 is misconceived.

Various other provisions of the Act make it plain that the “extradition crime” test has to be applied by reference to the current state of English law alone: see, sections 2(2), 7(5), 8(3), 9(8)(9) and 22(6). None of the requirements of section 7(1) or article 12 of the Extradition Convention is helpful in the construction of section 2(1) of the Act.

The scheme of extradition under the Act of 1989 is retrospective. A double criminality requirement for conduct to be criminal in both requesting and requested states at the time of the commission of the offence creates anomalies and arbitrary divisions into extraditable and non-extraditable conduct. A simple double criminality test applicable at the time of the extradition proceedings is both desirable and practical.

This view leads to no unfairness so long as the acts alleged are acts which are illegal in England, Spain and Chile now: see *Bassiouni, International Extradition: United States Law and Practice*. It is also consistent with the Act being phrased in the present tense.

It has been held in the Divisional Court that crimes committed in a foreign state before the coming into force of the Act of 1989 create a liability to be extradited although no express provision of the Act declares that it is to have retrospective effect. Crimes committed in a foreign country at a time that the foreign country was not included under the Act of 1989 create a liability to be extradited: see *Reg. v. Secretary of State for the Home Department, Ex parte Hill* [1999] Q.B. 886 All conduct of which the applicant is accused was universally recognised as criminal when committed.

The Act of 1989 consolidated Acts containing contrasting approaches to double criminality all of which inform the construction of “extradition crime.” The Extradition Act 1870 was rooted in a list system. The function of the magistrate was to perform a single composite test. He simply examined the conduct, including the time and place of commission and asked himself whether that conduct amounted to a listed crime when it had been committed.

The Fugitive Offenders Act 1881, applicable to rendition within Her Majesty’s Dominions, provided a very different scheme which assists with

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A construction of the Fugitive Offenders Act 1967 and the Act of 1989. Unlike the Act of 1870 the magistrate had a two stage function. Section 9 gave a definition of crimes for which a defendant was extraditable requiring that under the law of the requesting country the crime was punishable by 12 months' imprisonment or more. A person might be extradited for conduct which was not criminal in the United Kingdom at the time it was committed or at all. The second duty of the magistrate, set out in section 5, was to commit the defendant if he found probable cause that, applying the law of the other country and English rules of evidence, he was guilty. The Fugitive Offenders Act 1967, applicable to colonies and designated Commonwealth countries, required that the offence in the requesting and requested states be effectively identical. However it did not require that the crime was a crime in the United Kingdom at the time it was committed. The magistrate had a two stage function in contrast to the one stage function under the Act of 1870.

C Section 3(1)(c) which used the words "would constitute an offence" has plainly mutated into the easier requirements of the Act of 1989 in section 2(1)(a) and (b). Section 7(5) has similarly mutated into section 9(8) of the Act of 1989.

D The Australian Extradition Act 1988 provides an international precedent for the plain construction of the term "extradition crime:" see sections 7 and 19(2). The relevant time is specified to be the time when the request is made. The use of the present tense in the Act of 1989 allows the same inference to be drawn as is expressly stated in the Australian statute.

E The Extradition Act 1989 was brought into effect to fulfill the United Kingdom's obligations under the Extradition Convention which the United Kingdom signed in 1957: see the European Convention on Extradition Order 1990 (S.I. 1990 No. 1507). In enacting the Act of 1989 Parliament was trying to pull together under one statute the three different things which were covered by the earlier Acts. It was easier to fit the Convention provisions into an area where the 12 month sentence rule already applied. Parliament was trying to give a looser definition of extradition crime. The result was a simple double criminality test.

F Parts I and II of the Act have different tests. The date of the commission of the crime is applicable for Schedule 1 cases. For other cases the only relevant date is the date of the request.

G In *In re Nielsen* [1984] A.C. 606, it was held that under the Act of 1870 there was no need under the definition of extradition crime for the magistrate to consult the treaty or foreign law at all to determine whether the fugitive criminal was accused of an extradition crime. By contrast the interpretation of the Fugitive Offenders Act 1967 led to the conclusion that the particulars in the foreign warrant had to be consulted independently of the evidence in the case in order to determine the "act or omission" of which the defendant was accused according to the foreign law and then to inquire whether that amounted to an English crime: see *Government of Canada v. Aronson* [1990] 1 A.C. 579. The two tests under that Act are two completely different tests unlike the one test of the Act of 1870.

H The government papers preceding the enactment of the Act of 1989 ("A Review of the Law and Practice of Extradition in the United Kingdom: Report of the Interdepartmental Working Party" (May 1982),

the Green Paper on “Extradition” of 1985 (Cmnd. 9421) and the White Paper on “Criminal Justice: Plans for Legislation” of 1986 (Cmnd. 9658)) show that it was intended that: in order to satisfy the double criminality requirement a new simplified conduct test would be established eliminating the need to consult the foreign law and replacing the rule in the *Aronson* case, the list-based system of defining extraditable conduct would disappear and, in respect of states party to the European Convention on Extradition, the prima facie case requirement would be abrogated. Nothing in those preparatory works suggest that double criminality requires an evidential finding in respect of the dates at which conduct occurred in Convention countries.

Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886 reasserts that the definition of “extradition crime” in section 2(1) calls for no examination of the foreign law but simply for an assessment of the conduct alleged.

The appellants’ case pleads a course of conduct which includes murder, torture etc. There can be no possible retrospectivity argument in the light of section 1(4) of the Criminal Justice Act 1977. The allegation is that there was a conspiracy over 18 years which landed in Spain in 1975 when the applicant was in Spain for the funeral of Franco when he met those who took part in a later murder in Italy. Those facts if relating to England would confer jurisdiction on England: see *Reg. v. Doot* [1973] A.C. 807. It does the same for Spain when there is an international conspiracy and something is done in Spain in furtherance of the conspiracy. Spain then has jurisdiction to try the whole conspiracy.

It is impossible to say that extradition for the crimes alleged against the applicant is unfair. If a statute allowing for retrospective extradition infringes no rights, is not penal and does not impose disabilities it is difficult to see that such extradition is inherently unfair: see *L’Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* [1994] 1 A.C. 486, 525. In those cases where there may be unfairness all the safeguards, including section 11(3) of the Act and the discretion of the Secretary of State provide ample protection for the accused. The rule of double criminality is only one of the many safeguards found in the Act of 1989. Those safeguards have been present to differing extents in all the extradition statutes. The rationale behind the double criminality principle is that a country does not send a person under compulsion from its jurisdiction to be tried or punished abroad for crimes alien to its own system of law. There is no need to write into a statute a further artificial safeguard which that rationale does not call for.

Extradition is primarily an executive act. All the legislation has ever provided for is a series of procedural safeguards to ensure that certain conditions of legality and fairness are fulfilled before this executive act can take place. Extradition proceedings do not expose the applicant to either conviction or penalty. Retrospective extradition does not infringe any rights as there is no right never to be extradited, nor is it inherently unfair. The purpose of the proceedings is simply to enable another government to try a fugitive under laws in force at the time of the offence in the requesting state. Where in an individual case there is injustice or oppression, the provisions of section 11(3) of the Act of 1989 and the

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A unfettered discretion of the Secretary of State under sections 7(4) and 12(1) protect the defendant.

As a matter of law the disappearances alleged constitute continuing offences of torture to this day, providing thousands of torture charges since the Act of 1989 came into force.

B *Greenwood* following. The military junta which took power in Chile on 11 September 1973 left the office of head of state open until either 26 June 1974, when the applicant was appointed Supreme Chief of the Nation and invested with the sash of office previously worn by the Presidents of Chile, or 17 December 1974 when he was appointed President. If he was already head of state it is difficult to comprehend to what he was appointed on those dates.

C The question whether the United Kingdom is under a duty to Chile to accord immunity to the applicant in respect of all or any of the draft charges has to be decided by reference to the common law as, it is now accepted, section 20(1) of the State Immunity Act 1978 is not applicable.

D While immunity and act of state are separate concepts it is only immunity *ratione personae* which is clearly and invariably distinguished from act of state. Many cases are cited in relation to both immunity *ratione materiae* and act of state: see, e.g., *Duke of Brunswick v. King of Hanover*, 2 H.L.Cas. 1 and *Underhill v. Hernandez*, 168 U.S. 250. If the applicant is not immune there is no place for application of the act of state doctrine. However, the converse is true. If the act of state doctrine would not apply then there is no reason or duty to accord immunity *ratione materiae*.

E The Torture Convention and section 134 of the Criminal Justice Act 1988 do not operate to override all immunity. Neither operates to remove the immunity *ratione personae* of a serving diplomat. Immunity *ratione personae* is a question of status. To say he cannot be prosecuted for torture is merely to say that his office shields him. A diplomat is not immune from the jurisdiction of his home state and if he were to return to the host state after leaving office he would be open to prosecution. However, once a diplomat has ceased to be accredited, he has only immunity *ratione materiae* for acts performed in the exercise of his functions as a diplomat. It is that immunity which cannot extend to torture.

F Since section 20(1)(a) of the Act of 1978 accords immunity *ratione personae* to a serving head of state while he is in the United Kingdom, in practice the United Kingdom could not exercise criminal jurisdiction over a serving head of state in the absence of waiver. It is immunity *ratione materiae* alone which is affected by the Torture Convention and other international instruments of that kind.

G The supposed immunity of all officials and former officials of one state from the criminal jurisdiction of other states is not supported by the practice of states. The very idea of a state being subject to the criminal process is almost, if not wholly theoretical. Neither *In re Honecker*, 80 I.L.R. 365 nor *Marcos and Marcos v. Federal Department of Police*, 102 I.L.R. 198 is directly in point. There have been no cases in which former heads of state have been prosecuted before the national courts of another state, but as the Permanent Court of International Justice held in

The Case of the S.S. Lotus Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10, the fact that states do not prosecute a particular category of offence or defendant does not in itself establish that they may not do so. The reaction of other states to the proceedings against the applicant, particularly the extradition requests from France and Switzerland, suggest that those countries have formed a prima facie opinion that the applicant has no immunity.

There is a substantial body of state practice in other contexts asserting the right to exercise jurisdiction over the officials and former officials of foreign states. States have always exercised criminal jurisdiction over foreign officials and former officials in respect of crimes committed on the territory of the forum state: see *In re Former Syrian Ambassador to the German Democratic Republic*, 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96.

States have asserted a broad extraterritorial jurisdiction over offences which are frequently committed by officials of foreign states. Whatever misgivings might exist about the Nuremberg trial the principle that states could try officials of foreign states for war crimes was the subject of unanimous confirmation by the U.N. General assembly in 1946. Cases regarding immunity from civil jurisdiction such as *Argentine Republic v. Amerada Hess Shipping Corporation*, 109 S.Ct. 683; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 and *Al-Adsani v. Government of Kuwait*,) 107 I.L.R. 536 are not in point.

The thesis that the official act of a state official is an act of state in the non-technical sense and is accordingly imputable to the state, which alone can be held liable for it, confuses the idea that the act is attributable to the state so that the state can be held responsible for it with the concept of criminal responsibility. The conclusion does not follow since the criminal responsibility of the individual is in addition to, not in substitution for, the responsibility (which is civil in character and which can normally be enforced only on the international plane) of the state. The proposition is the act of state defence put forward in numerous war crimes cases and rejected.

The principle of par in parem non habet imperium is not absolute and has to be balanced against other factors, including the fact that states have accepted through agreements such as the Torture Convention that certain conduct of their officials will be the subject of adjudication in other states. The principle of non-intervention is undoubtedly important but it presupposes that the matters in question do fall within the internal affairs of a particular state. Acts of murder or torture committed by the agents of state A in the territory of state B cannot be regarded as part of the internal affairs of state A. Moreover, during the course of the century the treatment by a state of its own citizens, at least in certain areas of fundamental importance, has ceased to be regarded as a matter of internal affairs. The violation of a norm of jus cogens certainly is not so regarded.

In *In re United States Diplomatic and Consular Staff in Tehran* [1980] I.C.J. Rep. 3; 61 I.L.R. 504 the International Court did not exonerate Iran of all responsibility. It found that the Iranian government was not responsible for the take-over of the embassy itself but concluded that,

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A within days, the government was supporting the students in their continued occupation.

B It is common ground that torture, hostage taking and murder were at no time part of the functions of the head of state of Chile. The Chilean Constitution prohibited torture at all relevant times and the military government always denied that there had been any departure from this prohibition. This is to be contrasted with the attitude of the United States government to the death row phenomenon which it has always maintained does not amount to cruel and unusual punishment contrary to the Constitution.

C The conduct alleged falls within the scope of an international crime whether one applies the Torture Convention or the customary law of crimes against humanity. The allegations clearly suggest widespread or systematic use of torture against a civilian population—a crime against humanity. The supposed requirement of a nexus with armed conflict, if it was ever part of international law, ceased to be so many years ago: see the International Law Commission Draft Code of 1954; *Prosecutor v. Tadić* (unreported), 7 May 1997, International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-T and article 3 of the Statute of the Rwanda Tribunal.

D Torture under the Torture Convention can only be committed by an official and the Convention is therefore totally inconsistent with the notion of immunity for officials in respect of torture.

E *Nicholls Q.C.* in reply. It is a fallacy to read “would constitute” in section 2(1) and 2(2) of the Act as “would have constituted.” “Conduct” in section 2 means the acts alleged in the foreign state together with their associated geographical and temporal components. Section 2 requires the conduct to have been criminal at the time it was committed.

F The references in section 22(4) of the Act of 1989 to offences of torture and hostage-taking and other “Convention cases” are related to their parent Conventions (which are and were intended to be prospective) and suggest that those offences are to be construed by reference to their temporal element and that extradition ought not to be allowed for such offences if committed prior to the coming into force of the Convention.

G If “conduct” is devoid of any geographical and temporal components, section 9(8) leads to the principle of double criminality operating in different ways depending on whether the request is from a Convention country or a country in respect of which a prima facie case needs to be established. That produces absurd results which Parliament cannot have intended. While the applicant could, on that interpretation, be extradited to Spain he could not be extradited to Chile, the United States or any Commonwealth country. The appellants have failed to address this absurdity.

H If the European Convention on Extradition had removed the evidence requirement the scheme of the Convention would have demonstrated that double criminality was irrelevant. The contrary is the case. The scheme makes clear that double criminality is to be preserved. The removal of the requirement of a prima facie case was a significant weakening of protection for the accused. The Convention would not also have removed

the other significant protection of double criminality without express words to that effect. A

It is clear that it was the intention of the Convention that the requested state consider the time at which the offence was committed in the course of deciding whether an offence was extraditable.

Although there is no need for the extradition treaty to have been in force at the date of the conduct nevertheless double criminality requires the conduct to have been criminal in the requested state at the time of its commission. For the distinction between the two principles see the *Restatement of the Law 3d: The Foreign Relations Law of the United States* (s. 476) and *Bassiouni, International Extradition: United States Law and Practice*, pp. 497, 500, 598. B

Reg. v. Secretary of State for the Home Department, Ex parte Hill [1999] Q.B. 886 was concerned with conduct prior to the coming into force of the Act enabling extradition and is therefore irrelevant to the instant issue. C

The Act of 1989 was a consolidating Act. As such it is presumed not to have changed the law. It would therefore be surprising if the Act introduced a wholly new test for double criminality when both the Fugitive Offenders Act 1967 and the Extradition Act 1870 required the conduct to have been criminal in the United Kingdom at the date of its commission in the foreign state or colony. There is nothing in the legislative history of the provisions which became the Act of 1989 (which were included originally in the Criminal Justice Act 1988 but were never brought into force) to suggest that Parliament intended the Act to enact a significantly altered double criminality principle. D

In any event, to allow extradition for conduct which was not criminal in the United Kingdom at the time of its commission and which could not be tried there would be unfair and would breach article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. E

Their Lordships took time for consideration.

24 March. LORD BROWNE-WILKINSON. My Lords, as is well known, this case concerns an attempt by the Government of Spain to extradite Senator Pinochet from this country to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was head of state in Chile. The interaction between the various legal issues which arise is complex. I will therefore seek, first, to give a short account of the legal principles which are in play in order that my exposition of the facts will be more intelligible. G

Outline of the law

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an "extradition crime" is now contained in the Extradition Act 1989. That Act defines what H

A constitutes an “extradition crime.” For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

B Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm. 1775). The obligations placed on the United Kingdom by that Convention (and on C the other 110 or more signatory states who have adopted the Convention) were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention “all” torture D wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires E an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*. If, on the other hand, the double criminality rule only requires the conduct to be criminal under U.K. law *at the date of extradition* the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or F after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

In these circumstances, the first question that has to be answered is whether or not the definition of an “extradition crime” in the Act of 1989 requires the conduct to be criminal under U.K. law at the date of commission or only at the date of extradition.

G This question, although raised, was not decided in the Divisional Court. At the first hearing in this House [2000] 1 A.C. 61 it was apparently conceded that all the matters charged against Senator Pinochet were extradition crimes. It was only during the hearing before your Lordships that the importance of the point became fully apparent. As will appear, in my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since H most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under U.K. law. It follows that the main question discussed at the earlier stages of this

case—is a former head of state entitled to sovereign immunity from arrest or prosecution in the U.K. for acts of torture—applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes. But first I must state shortly the relevant facts.

The facts

On 11 September 1973 a right-wing coup evicted the left-wing regime of President Allende. The coup was led by a military junta, of whom Senator (then General) Pinochet was the leader. At some stage he became head of state. The Pinochet regime remained in power until 11 March 1990 when Senator Pinochet resigned.

There is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals, all on a large scale. Although it is not alleged that Senator Pinochet himself committed any of those acts, it is alleged that they were done in pursuance of a conspiracy to which he was a party, at his instigation and with his knowledge. He denies these allegations. None of the conduct alleged was committed by or against citizens of the United Kingdom or in the United Kingdom.

In 1998 Senator Pinochet came to the United Kingdom for medical treatment. The judicial authorities in Spain sought to extradite him in order to stand trial in Spain on a large number of charges. Some of those charges had links with Spain. But most of the charges had no connection with Spain. The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the State of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasise too strongly that that is no concern of your Lordships. Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.

A On 16 October 1998 an international warrant for the arrest of Senator Pinochet was issued in Spain. On the same day, a magistrate in London issued a provisional warrant (“the first warrant”) under section 8 of the Extradition Act 1989. He was arrested in a London hospital on 17 October 1998. On 18 October the Spanish authorities issued a second international warrant. A further provisional warrant (“the second warrant”) was issued by the magistrate at Bow Street Magistrates’ Court

B on 22 October 1998 accusing Senator Pinochet of:

“(1) 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; (2) 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; (3) between 1 January 1982 and 31 January 1992 he detained 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; (4) between 1 January 1982 and 31 January 1992 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; (5) between January 1976 and December 1992 conspired together with persons unknown to commit murder in a Convention country.”

E Senator Pinochet started proceedings for habeas corpus and for leave to move for judicial review of both the first and the second provisional warrants. Those proceedings came before the Divisional Court (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) which on 28 October 1998 quashed both warrants. Nothing turns on the first warrant which was quashed since no appeal was brought to this House. The grounds on which the Divisional Court quashed the second warrant were that Senator Pinochet (as former head of state) was entitled to state immunity in respect of the acts with which he was charged. However, it had also been argued before the Divisional Court that certain of the crimes alleged in the second warrant were not “extradition crimes” within the meaning of the Act of 1989 because they were not crimes under U.K. law at the date they were committed. Whilst not determining this point directly, Lord Bingham of Cornhill C.J. held that, in order to be an extradition crime, it was not necessary that the conduct should be criminal at the date of the conduct

G relied upon but only at the date of request for extradition.

The Crown Prosecution Service (acting on behalf of the Government of Spain) appealed to this House with the leave of the Divisional Court. The Divisional Court certified the point of law of general importance as being “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.” Before the appeal came on for hearing in this House for the first time, on 4 November 1998 the Government of Spain submitted a formal request for extradition which greatly expanded the list of crimes alleged in the second

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provisional warrant so as to allege a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, such conduct taking place primarily in Chile but also elsewhere.

The appeal first came on for hearing before this House between 4 and 12 November 1998. The Committee heard submissions by counsel for the Crown Prosecution Service as appellants (on behalf of the Government of Spain), Senator Pinochet, Amnesty International as interveners and an independent amicus curiae. Written submissions were also entertained from Human Rights Watch. That Committee entertained argument based on the extended scope of the case as put forward in the request for extradition. It is not entirely clear to what extent the Committee heard submissions as to whether all or some of those charges constituted "extradition crimes." There is some suggestion in the judgments that the point was conceded. Certainly, if the matter was argued at all it played a very minor role in that first hearing. Judgment was given on 25 November 1998. The appeal was allowed [2000] 1 A.C. 61 by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) on the grounds that Senator Pinochet was not entitled to immunity in relation to crimes under international law. On 15 January 1999 that judgment of the House was set aside [2000] 1 A.C. 119 on the grounds that the Committee was not properly constituted. The appeal came on again for rehearing on 18 January 1999 before your Lordships. In the meantime the position had changed yet again. First, the Home Secretary had issued to the magistrate authority to proceed under section 7 of the Act of 1989. In deciding to permit the extradition to Spain to go ahead he relied in part on the decision of this House at the first hearing that Senator Pinochet was not entitled to immunity. He did not authorise the extradition proceedings to go ahead on the charge of genocide: accordingly no further arguments were addressed to us on the charge of genocide which has dropped out of the case.

Secondly, the Republic of Chile applied to intervene as a party. Up to this point Chile had been urging that immunity should be afforded to Senator Pinochet, but it now wished to be joined as a party. Any immunity precluding criminal charges against Senator Pinochet is the immunity not of Senator Pinochet but of the Republic of Chile. Leave to intervene was therefore given to the Republic of Chile. The same amicus, Mr. Lloyd Jones, was heard as at the first hearing as were counsel for Amnesty International. Written representations were again put in on behalf of Human Rights Watch.

Thirdly, the ambit of the charges against Senator Pinochet had widened yet again. Spain had put in further particulars of the charges which they wished to advance. In order to try to bring some order to the proceedings, Mr. Alun Jones, for the Crown Prosecution Service, prepared a schedule of the 32 U.K. criminal charges which correspond to the allegations made against Senator Pinochet under Spanish law, save that the genocide charges are omitted. The charges in that schedule are fully analysed and considered in the speech of my noble and learned friend, Lord Hope of Craighead, who summarises the charges as follows: charges

A 1, 2 and 5: conspiracy to torture between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990; charge 3: conspiracy to take hostages between 1 August 1973 and 1 January 1990; charge 4: conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990; charges 6 and 8: torture between 1 August 1973 and 8 August 1973 and on 11 September 1973; charges 9 and 12: conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975; Charges 10 and 11: attempted murder in Italy on 6 October 1975; charges 13–29; and 31–32: torture on various occasions between 11 September 1973 and May 1977; charge 30: torture on 24 June 1989. I turn then to consider which of those charges are extradition crimes.

C *Extradition crimes*

D As I understand the position, at the first hearing in the House of Lords the Crown Prosecution Service did not seek to rely on any conduct of Senator Pinochet occurring before 11 September 1973 (the date on which the coup occurred) or after 11 March 1990 (the date when Senator Pinochet retired as head of state). Accordingly, as the case was then presented, if Senator Pinochet was entitled to immunity such immunity covered the whole period of the alleged crimes. At the second hearing before your Lordships, however, the Crown Prosecution Service extended the period during which the crimes were said to have been committed: for example, see charges 1 and 4 where the conspiracies are said to have started on 1 January 1972, i.e. at a time before Senator Pinochet was head of state and therefore could be entitled to immunity. In consequence at the second hearing counsel for Senator Pinochet revived the submission that certain of the charges, in particular those relating to torture and conspiracy to torture, were not “extradition crimes” because *at the time the acts were done* the acts were not criminal under the law of the United Kingdom. Once raised, this point could not be confined simply to the period (if any) before Senator Pinochet became head of state. If the double criminality rule requires it to be shown that at the date of the conduct such conduct would have been criminal under the law of the United Kingdom, any charge based on torture or conspiracy to torture occurring before 29 September 1988 (when section 134 of the Criminal Justice Act 1988 came into force) could not be an “extradition crime” and therefore could not in any event found an extradition order against Senator Pinochet.

G Under section 1(1) of the Act of 1989 a person who is accused of an “extradition crime” may be arrested and returned to the state which has requested extradition. Section 2 defines “extradition crime” so far as relevant as follows:

H “(1) In this Act, except in Schedule 1, ‘extradition crime’ means—
(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment,

and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law; (b) an extraterritorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies—(i) the condition specified in subsection (2) below; or (ii) all the conditions specified in subsection (3) below. (2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment. (3) The conditions mentioned in subsection (1)(b)(ii) above are—(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender; (b) that the conduct constituting the offence occurred outside the United Kingdom; and (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.”

The question is whether the references to conduct “which, if it occurred in the United Kingdom, would constitute an offence” in section 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition (“the request date”) or the date of the actual conduct (“the conduct date”). In the Divisional Court, Lord Bingham of Cornhill C.J. held that the words required the acts to be criminal only at the request date. He said:

“I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in section 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months’ imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the relevant time ‘have constituted’ an offence and section 2(3)(c) would have said ‘would have constituted.’ I therefore reject this argument.”

Lord Lloyd (who was the only member of the Committee to express a view on this point at the first hearing) took the same view. He said, at p. 88:

“But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act 1989. 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*.”

My Lords, if the words of section 2 are construed in isolation there is room for two possible views. I agree with Lord Bingham of Cornhill C.J. and Lord Lloyd that, if read in isolation, the words “if it occurred . . . would constitute” read more easily as a reference to a hypothetical event

A happening now, i.e. at the request date, than to a past hypothetical event, i.e. at the conduct date. But in my judgment the right construction is not clear. The word “it” in the phrase “if it occurred . . .” is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be “would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom.” The answer to that question would depend upon the B United Kingdom law at that date.

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

C First, extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the European Convention on Extradition. In this class of case (which is not the present one) the procedure under Part III of the Act of 1989 requires the extradition request to be accompanied by evidence sufficient to justify arrest under the Act: section 7(2)(b). The Secretary of State then issues his authority to proceed which has to specify the offences under U.K. law which “would be constituted by equivalent conduct in the United Kingdom:” section 7(5). D Under section 8 the magistrate is given power to issue a warrant of arrest if he is supplied with such evidence “as would in his opinion justify the issue of a warrant for the arrest of a person accused:” section 8(3). The committal court then has to consider, amongst other things, whether “the evidence would be sufficient to warrant his trial if the extradition crime *had* taken place within jurisdiction of the court:” section 9(8)(a) (emphasis E added). In my judgment these provisions clearly indicate that the conduct must be criminal under the law of the United Kingdom at the conduct date and not only at the request date. The whole process of arrest and committal leads to a position where under section 9(8) the magistrate has to be satisfied that, under the law of the United Kingdom, if the conduct “*had* occurred” the evidence was sufficient to warrant his trial. This is a clear reference to the position at the date when the conduct in fact F occurred. Moreover, it is in my judgment compelling that the evidence which the magistrate has to consider has to be sufficient “to warrant his trial.” Here what is under consideration is not an abstract concept whether a hypothetical case is criminal but a hard practical matter—would this case in relation to this defendant be properly committed for trial if the conduct in question had happened in the United Kingdom? The answer to G that question must be “No” unless at that date the conduct was criminal under the law of the United Kingdom.

H The second class of case dealt with by the Act of 1989 is where extradition is sought by a foreign state which, like Spain, is a party to the European Extradition Convention. The requirements applicable in such a case are the same as those I have dealt with above in relation to the first class of case save that the requesting state does not have to present evidence to provide the basis on which the magistrate can make his order to commit. The requesting state merely supplies the information. But this provides no ground for distinguishing Convention cases from the first class

of case. The double criminality requirement must be the same in both classes of case.

Finally, the third class of case consists of those cases where there is an Order in Council in force under the Extradition Act 1870 (33 & 34 Vict. c. 52). In such cases, the procedure is not regulated by Part III of the Act of 1989 but by Schedule 1 to the Act of 1989: see section 1(3). Schedule 1 contains, in effect, the relevant provisions of the Act of 1870, which subject to substantial amendments had been in force down to the passing of the Act of 1989. The scheme of the Act of 1870 was to define “extradition crime” as meaning “a crime which, if committed in England . . . would be one of the crimes described in the first schedule to this Act.” section 26. The first schedule to the Act of 1870 contains a list of crimes and is headed: “The following list of crimes is to be construed according to the law existing in England . . . at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act.” (Emphasis added.)

It is therefore quite clear from the words I have emphasised that under the Act of 1870 the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date. Paragraph 20 of Schedule 1 to the Act of 1989 provides:

“‘extradition crime,’ in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order.”

Therefore in this class of case regulated by Schedule 1 to the Act of 1989 the same position applies as it formerly did under the Act of 1870, i.e. the conduct has to be a crime under English law at the conduct date. It would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another. But the case is stronger than that. We were taken through a trawl of the travaux préparatoires relating to the Extradition Convention and the departmental papers leading to the Act of 1989. They were singularly silent as to the relevant date. But they did disclose that there was no discussion as to changing the date on which the criminality under English law was to be demonstrated. It seems to me impossible that the legislature can have intended to change that date from the one which had applied for over a hundred years under the Act of 1870 (i.e. the conduct date) by a side wind and without investigation.

The charges which allege extradition crimes

The consequences of requiring torture to be a crime under U.K. law at the date the torture was committed are considered in Lord Hope’s speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which section 134 came into effect) are not extraditable, i.e. only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and

A the single act of torture alleged in charge 30 are extradition crimes relating to torture.

B Lord Hope also considers, and I agree, that the only charge relating to hostage-taking (charge 3) does not disclose any offence under the Taking of Hostages Act 1982. The statutory offence consists of taking and detaining a person (the hostage), so as to compel someone who is not the hostage to do or abstain from doing some act: section 1. But the only conduct relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offence. The hostage charges therefore are bad and do not constitute extradition crimes.

C Finally, Lord Hope's analysis shows that the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4 are extradition crimes.

I must therefore consider whether, in relation to these two surviving categories of charge, Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

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Torture

E Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Nuremberg Charter: Charter of the International Military Tribunal, adopted by the Big Four Powers (1945) in my judgment those doubts were stilled by the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (G.A. Res. 95, 1st Sess., 1144; U.N. Doc. A/236 (1946)). That affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see *Oppenheim's International Law*, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.), p. 996; note 6 to article 18 of the International

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Law Commission Draft Code of Crimes Against the Peace and Security of Mankind; *Prosecutor v. Furundzija* (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for the Former Yugoslavia (article 5) and Rwanda (article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, i.e. one of those rules of international law which have a particular status. In the *Furundzija* case, at paragraphs 153 and 154, the tribunal said:

“Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force . . . Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”

See also the cases cited in note 170 to the *Furundzija* case.

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution:” *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571.

It was suggested by Miss Montgomery, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see the *Demjanjuk* case; *Attorney-General of Israel v. Eichmann* (1962) 36 I.L.R. 5. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had

A engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over

B 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed

C not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal—the torturer—could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say, in their *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), p. 131, that

D it was “an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his acts by going to another country.”

The Torture Convention

E Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and article 4

F requires each state party to ensure that “all” acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under

G article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in article 5(1) and to indicate whether it intends to exercise jurisdiction. Under article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in article 5(1), submit him to its authorities for

H the purpose of prosecution. Under article 8(1) torture is to be treated as an extraditable offence and under article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in article 5(1).

Who is an "official" for the purposes of the Torture Convention?

The first question on the Convention is whether acts done by a head of state are done by "a public official or other person acting in an official capacity" within the meaning of article 1. The same question arises under section 134 of the Criminal Justice Act 1988. The answer to both questions must be the same. In his judgment at the first hearing Lord Slynn, at pp. 1476–1477, held that a head of state was neither a public official nor a person acting in an official capacity within the meaning of article 1: he pointed out that there are a number of international conventions (for example the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) and the Statute of the International Criminal Tribunal for Rwanda (1994)) which refer specifically to heads of state when they intend to render them liable. Lord Lloyd apparently did not agree with Lord Slynn on this point since he thought that a head of state who was a torturer could be prosecuted in his own country, a view which could not be correct unless such head of state had conducted himself as a public official or in an official capacity.

It became clear during the argument that both the Republic of Chile and Senator Pinochet accepted that the acts alleged against Senator Pinochet, if proved, were acts done by a public official or person acting in an official capacity within the meaning of article 1. In my judgment these concessions were correctly made. Unless a head of state authorising or promoting torture is an official or acting in an official capacity within article 1, then he would not be guilty of the international crime of torture even within his own state. That plainly cannot have been the intention. In my judgment it would run completely contrary to the intention of the Convention if there was anybody who could be exempt from guilt. The crucial question is not whether Senator Pinochet falls within the definition in article 1: he plainly does. The question is whether, even so, he is procedurally immune from process. To my mind the fact that a head of state can be guilty of the crime casts little, if any, light on the question whether he is immune from prosecution for that crime in a foreign state.

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in article 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the article 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle *aut dedere aut punire*—either you extradite or you punish: *Burgers and Danelius, Handbook*, p. 131. Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an article 5(1) state. However, at a session in 1984 all objections to the principle of *aut dedere aut punire* were withdrawn. "The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation." Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26. If

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A there is no prosecution by, or extradition to, an article 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under article 6) must exercise the jurisdiction under article 5(2) by prosecuting him under article 7(1).

I gather the following important points from the Torture Convention: (1) torture within the meaning of the Convention can only be committed by "a public official or other person acting in an official capacity," but these words include a head of state. A single act of official torture is "torture" within the Convention; (2) superior orders provide no defence; (3) if the states with the most obvious jurisdiction (the article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction; (4) there is no express provision dealing with state immunity of heads of state, ambassadors or other officials; (5) since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

D *State immunity*

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore "contractually" bound to give effect to its provisions from 8 December 1988 at the latest.

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

attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*.

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What then when the ambassador leaves his post or the head of state is deposed? The position of the ambassador is covered by the Vienna Convention on Diplomatic Relations (1961). After providing for immunity from arrest (article 29) and from criminal and civil jurisdiction (article 31), article 39(1) provides that the ambassador's privileges shall be enjoyed from the moment he takes up post; and paragraph (2) provides:

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“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.”

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The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed *ratione personae* while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his *official* acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under article 39(2) the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, *ratione materiae*, is to be contrasted with the former immunity *ratione personae* which gave complete immunity to all activities whether public or private.

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In my judgment at common law a former head of state enjoys similar immunities, *ratione materiae*, once he ceases to be head of state. He too loses immunity *ratione personae* on ceasing to be head of state: see Sir Arthur Watts Q.C., Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers” 1994-III 247 *Recueil des cours*, p. 88 and the cases there cited. He can be sued on his private obligations: *Ex-King Farouk of Egypt v. Christian Dior* (1957) 24 I.L.R. 228; *Jimenez v. Aristeguieta* (1962) 311 F.2d 547. As ex-head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch v. Baez* (1876) 7 Hun 596. Thus, at common law, the position of the former ambassador and the former head of state appears to be much the same: both enjoy immunity for acts done in performance of their respective functions whilst in office.

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I have belaboured this point because there is a strange feature of the United Kingdom law which I must mention shortly. The State Immunity Act 1978 modifies the traditional complete immunity normally afforded by the common law in claims for damages against foreign states. Such modifications are contained in Part I of the Act. Section 16(1) provides

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A that nothing in Part I of the Act is to apply to criminal proceedings. Therefore Part I has no direct application to the present case. However, Part III of the Act contains section 20(1), which provides:

B “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 . . . as it applies to a head of a diplomatic mission.”

C The correct way in which to apply article 39(2) of the Vienna Convention to a former head of state is baffling. To what “functions” is one to have regard? When do they cease since the former head of state almost certainly never arrives in this country let alone leaves it? Is a former head of state’s immunity limited to the exercise of the functions of a member of the mission, or is that again something which is subject to “necessary modification?” It is hard to resist the suspicion that something has gone wrong. A search was done on the parliamentary history of the section. From this it emerged that the original section 20(1)(a) read “a sovereign or other head of state *who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom.*” On that basis the section would have been intelligible. However it was changed by a government amendment the mover of which said that the clause as introduced “leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom;” he said that the amendment was to ensure that heads of state would be treated like heads of diplomatic missions “irrespective of presence in the United Kingdom.” The parliamentary history, therefore, discloses no clear indication of what was intended. However, in my judgment it does not matter unduly since Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law. Accordingly, “the necessary modifications” which need to be made will produce the result that a former head of state has immunity in relation to acts done as part of his official functions when head of state. Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state.

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

H Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function. This is the view taken by Sir Arthur Watts Q.C. in his Hague Lecture who said, at p. 82:

“While generally international law . . . does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community. States are artificial legal persons: they can only act through the institutions and agencies of the state, which means, ultimately, through its officials and other individuals acting on behalf of the state. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law. Problems in this area—such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this purpose—have not affected the general acceptance of the principle of individual responsibility for international criminal conduct.”

Later he said, at p. 84: “It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.”

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

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *ius cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment

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A the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed “by or with the acquiescence of a public official or other person acting in an official capacity.” As a result all

B defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

C Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity *ratione materiae*, this produces bizarre results. Immunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the

D doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that

E there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials’ immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will

F have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

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

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

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of

torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

In issuing to the magistrate an authority to proceed under section 7 of the Extradition Act 1989, the Secretary of State proceeded on the basis that the whole range of torture charges and murder charges against Senator Pinochet would be the subject matter of the extradition proceedings. Your Lordships' decision excluding from consideration a very large number of those charges constitutes a substantial change in the circumstances. This will obviously require the Secretary of State to reconsider his decision under section 7 in the light of the changed circumstances.

LORD GOFF OF CHIEVELEY. My Lords,

I. Introduction

The background to the present appeal is set out, with economy and lucidity, in the opinion of my noble and learned friend Lord Browne-Wilkinson, which I have had the opportunity of reading in draft. I gratefully adopt his account and, to keep my own opinion as short as reasonably possible, I do not propose to repeat it. The central question in the appeal is whether Senator Pinochet is entitled as former head of state to the benefit of state immunity *ratione materiae* in respect of the charges advanced against him, as set out in the schedule of charges prepared by Mr. Alun Jones on behalf of the Government of Spain.

II. The principal issue argued on the appeal

Before the Divisional Court, and again before the first Appellate Committee, it was argued on behalf of the Government of Spain that Senator Pinochet was not entitled to the benefit of state immunity basically on two grounds, viz. first, that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the international law principle of state immunity; and second, that the crimes with which he is charged are crimes against international law, in respect of which state immunity is not available. Both arguments were rejected by the Divisional Court, but a majority of the first Appellate Committee accepted the second argument. The leading opinion was delivered by Lord Nicholls of Birkenhead, whose reasoning was of great simplicity. He said [2000] 1 A.C. 61, 108–109:

“In my view, article 39(2) of the Vienna Convention, as modified and applied to former heads of state by section 20 of the Act of 1978, 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

A states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.”

Lord Hoffmann agreed, and Lord Steyn delivered a concurring opinion to the same effect.

C Lord Slynn of Hadley and Lord Lloyd of Berwick, however, delivered substantial dissenting opinions. In particular, Lord Slynn, at pp. 77E-82A, considered in detail the “developments in international law relating to what are called international crimes.” On the basis of the material so reviewed by him, he concluded, at p. 79C-D:

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

E He went on to consider whether international law now recognises that some crimes, and in particular crimes against humanity, are outwith the protection of head of state immunity. He referred to the relevant material, and observed, at p. 81:

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

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

H I have no doubt that, in order to consider the validity of the argument advanced on behalf of the Government of Spain on this point, it was necessary to carry out the exercise so performed by Lord Slynn; and I am therefore unable, with all respect, to accept the simple approach of the majority of the first Appellate Committee. Furthermore, I wish to record my respectful agreement with the analysis, and conclusions, of Lord Slynn set out in the passages from his opinion to which I have referred. I intend no disrespect to the detailed arguments advanced before your Lordships on behalf of the appellants in this matter, when I say that in my opinion

they did not succeed in shaking the reasoning, or conclusions, of Lord Slynn which I have set out above. However, having regard to (1) the extraordinary impact on this case of the double criminality rule, to which I will refer in a moment, and (2) the fact that a majority of your Lordships have formed the view that, in respect of the very few charges (of torture or conspiracy to torture) which survive the impact of the double criminality rule, the effect of the Torture Convention is that in any event Senator Pinochet is not entitled to the benefit of state immunity, the present issue has ceased to have any direct bearing on the outcome of the case. In these circumstances, I do not consider it necessary or appropriate to burden this opinion with a detailed consideration of the arguments addressed to the Appellate Committee on this issue. However, I shall return to the point when I come to consider the topic of state immunity later in this opinion.

III. The double criminality rule

During the course of the hearing before your Lordships, two new issues emerged or acquired an importance which they had not previously enjoyed. The first of these is the issue of double criminality, to which I now turn.

At the hearing before your Lordships Mr. Alun Jones, for the appellants, sought to extend backwards the period during which the crimes charged were alleged to have been committed, with the effect that some of those crimes could be said to have taken place before the coup following which Senator Pinochet came into power. The purpose was obviously to enable the appellants to assert that, in respect of these crimes, no immunity as former head of state was available to him. As a result Miss Clare Montgomery, for Senator Pinochet, revived the submission that certain of the charges related to crimes which were not extradition crimes because they were not, at the time they were alleged to have been committed, criminal under the law of this country, thus offending against the double criminality rule. Mr. Alun Jones replied to this argument but, for the reasons given by my noble and learned friend, Lord Browne-Wilkinson, with which I am respectfully in complete agreement, I, too, am satisfied that Miss Montgomery's submission was well founded.

The appellants did not, however, analyse the consequences of this argument, if successful, in order to identify the charges against Senator Pinochet which would survive the application of the double criminality rule. That substantial task has, however, been undertaken by my noble and learned friend, Lord Hope of Craighead, to whom your Lordships owe a debt of gratitude. His analysis I respectfully accept. As he truly says, the impact upon the present case is profound. The great mass of the offences with which Senator Pinochet is charged must be excluded, as must also be the charge of hostage-taking which does not disclose an offence under the Taking of Hostages Act 1982. The principal charges which survive are those which relate to acts of torture alleged to have been committed, or conspiracies to torture which are alleged to have been active, after 29 September 1988, the date on which section 134 of the Criminal Justice Act 1988 (which gave effect to the Torture Convention in this country) came into effect. These are: charge 30, which relates to a

A single act of torture alleged to have been committed on 24 June 1989; and charges 2 and 4, which allege conspiracies to torture between 1 August 1973 and 1 January 1972 respectively, and 1 January 1990, in so far as they relate to the relatively brief period between 29 September 1988 and 1 January 1990. In addition, however, the charge of conspiracy to commit murder in Spain (charge 9), and such conspiracies to commit murder in Spain as can be shown to form part of the allegations in charge 4, also survive.

IV. State immunity

C Like my noble and learned friend, Lord Browne-Wilkinson, I regard the principles of state immunity applicable in the case of heads of state and former heads of state as being relatively non-controversial, though the legislation on which they are now based, the State Immunity Act 1978, is in a strange form which can only be explained by the legislative history of the Act.

D There can be no doubt, in my opinion, that the Act is intended to provide the sole source of English law on this topic. This is because the long title to the Act provides, inter alia, that the Act is “to make *new* provision with regard to the immunities and privileges of heads of state.” Since in the present case we are concerned with immunity from criminal process, we can ignore Part I (which does not apply to criminal proceedings) and turn straight to Part III, and in particular to section 20. Section 20(1) provides: “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 . . . as it applies to the head of a diplomatic mission.”

F The function of the Diplomatic Privileges Act 1964 is to give effect to the Vienna Convention on Diplomatic Relations in this country, the relevant articles of which are scheduled to the Act. The problem is, of course, how to identify the “necessary modifications” when applying the Vienna Convention to heads of state. The nature of the problem is apparent when we turn to article 39 of the Convention, which provides:

G “(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.”

H At first this seems very strange, when applied to a head of state. However, the scales fall from our eyes when we discover from the legislative history of the Act that it was originally intended to apply only to a sovereign or

other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country—hence the form of the long title, which was amended to apply simply to heads of state. We have, therefore, to be robust in applying the Vienna Convention to heads of state “with the necessary modifications.” In the case of a head of state, there can be no question of tying article 39(1) or (2) to the territory of the receiving state, as was suggested on behalf of the appellants. Once that is realised, there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set: see *Alcom Ltd. v. Republic of Colombia* [1984] A.C. 580, 597G, *per* Lord Diplock. The effect is that a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* “in respect of acts performed [by him] in the exercise of his functions [as head of state],” the critical question being “whether the conduct was engaged in under colour of or in ostensible exercise of the head of state’s public authority:” see Sir Arthur Watts Q.C., “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers,” (1994-III) 247 *Recueil des cours*, at p. 56. In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not.

There can be no doubt that the immunity of a head of state, whether *ratione personae* or *ratione materiae*, applies to both civil and criminal proceedings. This is because the immunity applies to any form of legal process. The principle of state immunity is expressed in the Latin maxim *par in parem non habet imperium*, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state. That the principle applies in criminal proceedings is reflected in the Act of 1978, in that there is no equivalent provision in Part III of the Act to section 16(4) which provides that Part I does not apply to criminal proceedings.

However, a question arises whether any limit is placed on the immunity in respect of criminal offences. Obviously the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character. It follows, in my opinion, that the mere fact that the crime in question is torture does not exclude state immunity. It has however been stated by Sir Arthur Watts, at pp. 81–84, that a head of state may be personally responsible:

“for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community.”

A He then referred to a number of instruments, including the Charter of
the Nuremberg Tribunal (1945), the Tokyo Convention: Charter of the
International Military Tribunal for the trial of major war criminals in the
Far East (1946), the International Law Commission's Draft Code of
Crimes Against the Peace and Security of Mankind (provisionally adopted
in 1988), and the Statute of the International Criminal Tribunal for the
Former Yugoslavia (1993), all of which expressly provide for the
B responsibility of heads of state, apart from the Charter of the Tokyo
Tribunal which contains a similar provision regarding the official position
of the accused. He concluded, at p. 84:

C "It can no longer be doubted that as a matter of general customary
international law a head of state will personally be liable to be called
to account if there is sufficient evidence that he authorised or
perpetrated such serious international crimes."

D So far as torture is concerned, however, there are two points to be
made. The first is that it is evident from this passage that Sir Arthur is
referring not just to a specific crime as such, but to a crime which offends
against the public order of the international community, for which a head
of state may be *internationally* (his emphasis) accountable. The instruments
cited by him show that he is concerned here with crimes against peace, war
crimes and crimes against humanity. Originally these were limited to
crimes committed in the context of armed conflict, as in the case of the
Nuremberg and Tokyo Charters, and still in the case of the Yugoslavia
Statute, though there it is provided that the conflict can be international or
internal in character. Subsequently, the context has been widened to
E include, inter alia, torture "when committed as part of a widespread or
systematic attack against a civilian population" on specified grounds.
A provision to this effect appeared in the International Law Commission's
Draft Code of Crimes of 1996 (which was, I understand, provisionally
adopted in 1988), and also appeared in the Statute of the International
Tribunal for Rwanda (1994), and in the Rome Statute of the International
F Criminal Court (adopted by the United Nations Diplomatic Conference on
Plenipotentiaries on the Establishment of an International Criminal Court
on 17 July 1998); and see also the view expressed obiter by the U.S. Court
of Appeals in *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d
699, 716. I should add that these developments were foreshadowed in the
International Law Commission's Draft Code of Crimes of 1954; but this
was not adopted, and there followed a long gap of about 35 years before
G the developments in the 1990s to which I have referred. It follows that
these provisions are not capable of evidencing any settled practice in
respect of torture outside the context of armed conflict until well after
1989 which is the latest date with which we are concerned in the present
case. The second point is that these instruments are all concerned with
international responsibility before international tribunals, and not with the
H exclusion of state immunity in criminal proceedings before national courts.
This supports the conclusion of Lord Slynn [1998] 3 W.L.R. 1456, 1474
that "except in regard to crimes in particular situations before
international tribunals these measures did not in general deal with the

question whether otherwise existing immunities were taken away,” with which I have already expressed my respectful agreement. A

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

V. Torture Convention B

I turn now to the Torture Convention of 1984, which lies at the heart of the present case. This is concerned with the jurisdiction of national courts, but its “essential purpose” is to ensure that a torturer does not escape the consequences of his act by going to another country: see the *Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* by Burgers (the Chairman-Rapporteur of the Convention) and Danelius, at p. 131. The articles of the Convention proceed in a logical order. Article 1 contains a very broad definition of torture. For present purposes, it is important that torture has to be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 2 imposes an obligation on each state party to take effective measures to prevent acts of torture in any territory under its jurisdiction. Article 3 precludes refoulement of persons to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Article 4 provides for the criminalisation of torture by each state party. Article 5 is concerned with jurisdiction. Each state party is required to establish its jurisdiction over the offences referred to in article 4 in the following cases: “(a) When the offences are committed in any territory under its jurisdiction . . . (b) When the alleged offender is a national of that state; (c) When the victim is a national of that state if that state considers it appropriate” and also “over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . .” C

Article 7 is concerned with the exercise of jurisdiction. Article 7(1) provides: D

“The state party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.” E

This provision reflects the principle *aut dedere aut punire*, designed to ensure that torturers do not escape by going to another country. G

I wish at this stage to consider briefly the question whether a head of state, if not a public official, is at least a “person acting in a public capacity” within article 1(1) of the Torture Convention. It was my first reaction that he is not, on the ground that no one would ordinarily describe a head of state such as a monarch or the president of a republic as a “public official,” and the subsidiary words “other person acting in a public capacity” appeared to be intended to catch a person who, while not a public official, has fulfilled the role of a public official, for example, on a H

A temporary or ad hoc basis. Miss Montgomery, for Senator Pinochet, submitted that the words were not apt to include a head of state relying in particular on the fact that in a number of earlier conventions heads of state are expressly mentioned in this context in addition to responsible government officials. However, Dr. Collins for the Republic of Chile conceded that, in the Torture Convention, heads of state must be regarded as falling within the category of "other person acting in a public capacity,"

B and in these circumstances I am content to proceed on that basis. The effect of Dr. Collins's concession is that a head of state could be held responsible for torture committed during his term of office, although (as Dr. Collins submitted) the state of which he was head would be able to invoke the principle of state immunity, *ratione personae* or *materiae*, in proceedings brought against him in another national jurisdiction if it

C thought right to do so. Accordingly, on the argument now under consideration, the crucial question relates to the availability of state immunity.

It is to be observed that no mention is made of state immunity in the Convention. Had it been intended to exclude state immunity, it is reasonable to assume that this would have been the subject either of a separate article, or of a separate paragraph in article 7, introduced to

D provide for that particular matter. This would have been consistent with the logical framework of the Convention, under which separate provision is made for each topic, introduced in logical order.

VI. The issue whether immunity ratione materiae has been excluded under the Torture Convention

E (a) *The argument*

I now come to the second of the two issues which were raised during the hearing of the appeal, viz. whether the Torture Convention has the effect that state parties to the Convention have agreed to exclude reliance on state immunity *ratione materiae* in relation to proceedings brought against their public officials, or other persons acting in an official capacity,

F in respect of torture contrary to the Convention. In broad terms I understand the argument to be that, since torture contrary to the Convention can only be committed by a public official or other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity *ratione materiae*, it would be inconsistent with the obligations of state parties under the

G Convention for them to be able to invoke state immunity *ratione materiae* in cases of torture contrary to the Convention. In the case of heads of state this objective could be achieved on the basis that torture contrary to the Convention would not be regarded as falling within the functions of a head of state while in office, so that although he would be protected by immunity *ratione personae* while in office as head of state, no immunity *ratione materiae* would protect him in respect of allegations of such

H torture after he ceased to hold office. There can, however, be no doubt that, before the Torture Convention, torture by public officials could be the subject of state immunity. Since therefore exclusion of immunity is said to result from the Torture Convention and there is no express term of the

Convention to this effect, the argument has, in my opinion, to be formulated as dependent upon an implied term in the Convention. It is a matter of comment that, for reasons which will appear in a moment, the proposed implied term has not been precisely formulated; it has not therefore been exposed to that valuable discipline which is always required in the case of terms alleged to be implied in ordinary contracts. In any event, this is a different argument from that which was advanced to your Lordships by the appellants and those supporting them, which was that both torture contrary to the Torture Convention, and hostage-taking contrary to the Taking of Hostages Convention, constituted crimes under international law, and that such crimes cannot be part of the functions of a head of state as a matter of international law.

The argument now under consideration was not advanced before the Divisional Court; nor can it have been advanced before the first Appellate Committee, or it would have been considered by both Lord Slynn of Hadley and Lord Lloyd of Berwick in their dissenting opinions. It was not advanced before your Lordships by the appellants and those supporting them, either in their written cases, or in their opening submissions. In fact, it was introduced into the present case as a result of interventions by members of the Appellate Committee in the course of the argument. This they were, of course, fully entitled to do; and subsequently the point was very fairly put both to Miss Montgomery for Senator Pinochet and to Dr. Collins for the Government of Chile. It was subsequently adopted by Mr. Lloyd Jones, the *amicus curiae*, in his oral submissions to the Committee. The appellants, in their written submissions in reply, restricted themselves to submitting that "The conduct alleged in the present case is not conduct which amounts to official acts performed by the [applicant] in the exercise of his functions [as head of state]." They did not at that stage go so far as to submit that any torture contrary to the Torture Convention would not amount to such an official act. However, when he came to make his final oral submissions on behalf of the appellants, Professor Greenwood, following the lead of Mr. Lloyd Jones, and perhaps prompted by observations from the Committee to the effect that this was the main point in the case, went beyond his clients' written submissions in reply and submitted that, when an offence of torture is committed by an official within the meaning of section 134 of the Criminal Justice Act 1988 and article 1 of the Torture Convention, no immunity *ratione materiae* can attach in respect of that act.

It is surprising that an important argument of this character, if valid, should previously have been overlooked by the fourteen counsel (including three distinguished Professors of International Law) acting for the appellants, and for Amnesty International and Human Rights Watch which are supporting the appellants in this litigation. The concern thereby induced as to the validity of the argument is reinforced by the fact that it receives no support from the literature on the subject and, on the material before your Lordships, appears never to have been advanced before. At all events, having given the matter the most careful consideration, I am satisfied that it must be rejected as contrary to principle and authority, and indeed contrary to common sense.

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A (b) *Waiver of immunity by treaty must be express*

On behalf of the Government of Chile Dr. Collins's first submission was that a state's waiver of its immunity by treaty must always be express. With that submission, I agree.

I turn first to *Oppenheim's International Law*, vol. I. The question of waiver of state immunity is considered, at pp. 351–355, from which I quote the following passage:

B “A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement . . . A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case . . .”

D It is significant that, in this passage, the only examples given of implied waiver of immunity relate to actual submission by a state to the jurisdiction of a court or tribunal by instituting or intervening in proceedings, or by taking a step in proceedings.

E A similar approach is to be found in the Report of the International Law Commission on the Jurisdictional Immunities of States and their Property reported in 1991 Y.B.I.L.C., vol. II, Part 2, in which a fuller exposition of the subject is to be found. Article 7 of the Commission's Draft Articles on this subject is entitled “*Express consent to exercise of jurisdiction.*” Article 7(1) provides:

F “A state cannot invoke immunity from jurisdiction in a proceeding before a court of another state with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding.”

I turn to the commentary on article 7(1), from which I quote paragraph (8) in full:

G “In the circumstances under consideration, that is, in the context of the state against which legal proceedings have been brought, there appear to be several recognisable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of ‘implied consent’ as a possible exception to the general principles of state immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, including by the means provided in article 8”—which is concerned with the effect of participation in a proceeding before a court—“It remains to be

seen how consent would be given or expressed so as to remove the obligation of the court of another state to refrain from the exercise of its jurisdiction against an equally sovereign state.”

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The two examples then provided of how such consent would be given or expressed are (i) consent given in a written contract, or by a declaration or a written communication in a specific proceeding, and (ii) consent given in advance by international agreement. In respect of the latter, reference is made, in paragraph (10), to such consent being *expressed* in a provision of a treaty concluded by states; there is no reference to such consent being implied.

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The general effect of these passages is that, in a treaty concluded between states, consent by a state party to the exercise of jurisdiction against it must, as Dr. Collins submitted, be express. In general, moreover, implied consent to the exercise of such jurisdiction is to be regarded only as an added explanation or justification for an otherwise valid and recognised exception, of which the only example given is actual submission to the jurisdiction of the courts of another state.

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The decision of the Supreme Court of the United States in *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S.Ct. 683 is consistent with the foregoing approach. In an action brought by a shipowner against the Argentine Republic for the loss of a ship through an attack by aircraft of the Argentine Air Force, the defendant relied upon state immunity. Among other arguments the plaintiff suggested that the defendant had waived its immunity under certain international agreements to which the United States was party. For this purpose, the plaintiff invoked paragraph 1605(a)(1) of the Foreign Sovereign Immunities Act 1976, which specifies, as one of a number of exceptions to immunity of foreign states, a case in which the foreign state has waived its immunity either explicitly or by implication. It was the plaintiff's contention that there was an implicit waiver in the relevant international agreements. This submission was tersely rejected by Rehnquist C.J., at p. 693, who delivered the judgment of the court, in the following words: “Nor do we see how a foreign state can waive its immunity under paragraph 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts . . .” Once again, the emphasis is on the need for an express waiver of immunity in an international agreement. This cannot be explained away as due to the provisions of the United States Act. On the contrary, the Act contemplates the possibility of waiver by implication; but in the context of a treaty the Supreme Court was only prepared to contemplate express waiver.

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I turn next to the State Immunity Act 1978, the provisions of which are also consistent with the principles which I have already described. In Part I of the Act (which does not apply to criminal proceedings: see section 16(4)) it is provided by section 1(1) that “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.” For the present purposes, the two relevant provisions are section 2, concerned with submission to the jurisdiction, and section 9, concerned with submissions to arbitration by an agreement in writing. Section 2(2) recognises that a state may submit to

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A the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity; but my reading of the Act leads me to understand that such a submission to the jurisdiction is here regarded as an express rather than an implied waiver of immunity or agreement to submit to the jurisdiction. This is consistent with Part III of the Act, which by section 20 provides that, subject to the provisions of that section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state. Among the articles of the Vienna Convention on Diplomatic Relations so rendered applicable by section 2 of the Act of 1964 is article 32 concerned with waiver of immunity, paragraph 2 of which provides that such waiver must always be express, which I read as including an actual submission to the jurisdiction, as well as an express agreement in advance to submit. Once again, there is no provision for an implied agreement.

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D In the light of the foregoing it appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must, as Dr. Collins submitted, always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.

E *(c) The functions of public officials and others acting in an official capacity*

However it is, as I understand it, suggested that this well established principle can be circumvented in the present case on the basis that it is not proposed that state parties to the Torture Convention have agreed to waive their state immunity in proceedings brought in the states of other parties in respect of allegations of torture within the Convention. It is rather that, for the purposes of the Convention, such torture does not form part of the functions of public officials or others acting in an official capacity including, in particular, a head of state. Moreover since state immunity *ratione materiae* can only be claimed in respect of acts done by an official in the exercise of his functions as such, it would follow, for example, that the effect is that a former head of state does not enjoy the benefit of immunity *ratione materiae* in respect of such torture after he has ceased to hold office.

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H In my opinion, the principle which I have described cannot be circumvented in this way. I observe first that the meaning of the word "functions" as used in this context is well established. The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is as true of a serious crime, such as murder or torture, as it is of a lesser crime. As Lord Bingham of Cornhill C.J. said in the Divisional Court:

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

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It was in answer to that question that the appellants advanced the theory that one draws the line at crimes which may be called “international crimes.” If, however, a limit is to be placed on governmental functions so as to exclude from them acts of torture within the Torture Convention, this can only be done by means of an implication arising from the Convention itself. Moreover, as I understand it, the only purpose of the proposed implied limitation upon the functions of public officials is to deprive them, or as in the present case a former head of state, of the benefit of state immunity; and in my opinion the policy which requires that such a result can only be achieved in a treaty by express agreement, with the effect that it cannot be so achieved by implication, renders it equally unacceptable that it should be achieved indirectly by means of an implication such as that now proposed.

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(d) An implication must in any event be rejected

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In any event, however, even if it were possible for such a result to be achieved by means of an implied term, there are, in my opinion, strong reasons why any such implication should be rejected.

I recognise that a term may be implied into a treaty, if the circumstances are such that “the parties must have intended to contract on the basis of the inclusion in the treaty of a provision whose effect can be stated with reasonable precision;” see *Oppenheim’s International Law*, vol. I, pp. 1271–1272, n. 4. It would, however, be wrong to assume that a term may be implied into a treaty on the same basis as a term may be implied into an ordinary commercial contract, for example to give the contract business efficacy (as to which see *Treitel, The Law of Contract*, 9th ed. (1995), pp. 185 et seq.). This is because treaties are different in origin, and serve a different purpose. Treaties are the fruit of long negotiation, the purpose being to produce a draft which is acceptable to a number, often a substantial number, of state parties. The negotiation of a treaty may well take a long time, running into years. Draft after draft is produced of individual articles, which are considered in depth by national representatives, and are the subject of detailed comment and consideration. The agreed terms may well be the fruit of “horse-trading” in order to achieve general agreement, and proposed articles may be amended, or even omitted in whole or in part, to accommodate the wishes or anxieties of some of the negotiating parties. In circumstances such as these, it is the text of the treaty itself which provides the only safe guide to its terms, though reference may be made, where appropriate, to the travaux préparatoires. But implied terms cannot, except in the most obvious cases, be relied on as binding the state parties who ultimately sign the treaty, who will in all probability include those who were not involved in the preliminary negotiations.

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A In this connection, however, I wish first to observe that the assumption underlying the present argument, viz. that the continued availability of state immunity is inconsistent with the obligations of state parties to the Convention, is in my opinion not justified. I have already summarised the principal articles of the Convention; and at this stage I need only refer to article 7 which requires that a state party under whose jurisdiction a person alleged to have committed torture is found, shall, in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. I wish to make certain observations on these provisions. First of all, in the majority of cases which may arise under the Convention, no question of state immunity will arise at all, because the public official concerned is likely to be present in his own country. Even when such a question does arise, there is no reason to assume that state immunity will be asserted by the state of which the alleged torturer is a public official; on the contrary, it is only in unusual cases, such as the present, that this is likely to be done. In any event, however, not only is there no mention of state immunity in the Convention, but in my opinion it is not inconsistent with its express provisions that, if steps are taken to extradite him or to submit his case to the authorities for the purpose of prosecution, the appropriate state should be entitled to assert state immunity. In this connection, I comment that it is not suggested that it is inconsistent with the Convention that immunity *ratione personae* should be asserted; if so, I find it difficult to see why it should be inconsistent to assert immunity *ratione materiae*.

E The danger of introducing the proposed implied term in the present case is underlined by the fact that there is, as Dr. Collins stressed to your Lordships, nothing in the negotiating history of the Torture Convention which throws any light on the proposed implied term. Certainly the travaux préparatoires shown to your Lordships reveal no trace of any consideration being given to waiver of state immunity. They do however show that work on the draft Convention was on foot as long ago as 1979, five years before the date of the Convention itself. It is surely most unlikely that during the years in which the draft was under consideration no thought was given to the possibility of the state parties to the Convention waiving state immunity. Furthermore, if agreement had been reached that there should be such a waiver, express provision would inevitably have been made in the Convention to that effect. Plainly, however, no such agreement was reached. There may have been recognition at an early stage that so many states would not be prepared to waive their immunity that the matter was not worth pursuing; if so, this could explain why the topic does not surface in the travaux préparatoires. In this connection it must not be overlooked that there are many reasons why states, although recognising that in certain circumstances jurisdiction should be vested in another national court in respect of acts of torture committed by public officials within their own jurisdiction, may nevertheless have considered it imperative that they should be able, if necessary, to assert state immunity.

H The Torture Convention applies not only to a series of acts of systematic torture, but to the commission of, even acquiescence in, a single act of physical or mental torture. Extradition can nowadays be sought, in some parts of the world, on the basis of a simple allegation unsupported by

prima facie evidence. In certain circumstances torture may, for compelling political reasons, be the subject of an amnesty, or some other form of settlement, in the state where it has been, or is alleged to have been, committed.

Furthermore, if immunity *ratione materiae* was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of a different political persuasion. In this connection, it is a mistake to assume that state parties to the Convention would only wish to preserve state immunity in cases of torture in order to shield public officials guilty of torture from prosecution elsewhere in the world. Such an assumption is based on a misunderstanding of the nature and function of state immunity, which is a rule of international law restraining one sovereign state from sitting in judgment on the sovereign behaviour of another. As Lord Wilforce said in *I Congreso del Partido* [1983] 1 A.C. 244, 272: “The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another.” State immunity *ratione materiae* operates therefore to protect former heads of state, and (where immunity is asserted) public officials, even minor public officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, including accusation and arrest in respect of alleged crimes. It can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious—a matter which can be of great significance where, for example, a former head of state is concerned and political passions are aroused. Preservation of state immunity is therefore a matter of particular importance to powerful countries whose heads of state perform an executive role, and who may therefore be regarded as possible targets by governments of states which, for deeply felt political reasons, deplore their actions while in office. But, to bring the matter nearer home, we must not overlook the fact that it is not only in the United States of America that a substantial body of opinion supports the campaign of the I.R.A. to overthrow the democratic government of Northern Ireland. It is not beyond the bounds of possibility that a state whose government is imbued with this opinion might seek to extradite from a third country, where he or she happens to be, a responsible Minister of the Crown, or even a more humble public official such as a police inspector, on the ground that he or she has acquiesced in a single act of physical or mental torture in Northern Ireland. The well known case of *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25 provides an indication of circumstances in which this might come about.

Reasons such as these may well have persuaded possible state parties to the Torture Convention that it would be unwise to give up the valuable protection afforded by state immunity. Indeed, it would be strange if state parties had given up the immunity *ratione materiae* of a head of state which is regarded as an essential support for his immunity *ratione personae*. In the result, the subject of waiver of state immunity could well not have been pursued, on the basis that to press for its adoption would only imperil the very substantial advantages which could be achieved by

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A the Convention even if no waiver of state immunity was included in it. As I have already explained, in cases arising under the Convention, state immunity can only be relevant in a limited number of cases. This is because the offence is normally committed in the state to which the official belongs. There he is unprotected by immunity, and under the Convention the state has simply to submit the case to the competent authorities. In practice state immunity is relevant in only two cases—where the offender is present in a third state, or where the offender is present in a state one of whose nationals was the victim, that state being different from the state where the offence was committed. A case such as the present must be regarded as most unusual. Having regard to considerations such as these, not to press for exclusion of state immunity as a provision of the Convention must have appeared to be a relatively small price to pay for the major achievement of widespread agreement among states (your Lordships were informed that 116 states had signed the Convention) in respect of all the other benefits which the Convention conferred. After all, even where it was possible for a state to assert state immunity, in many cases it would not wish to expose itself to the opprobrium which such a course would provoke; and in such cases considerable diplomatic or moral pressure could be exerted upon it to desist.

D I wish to stress the implications of the fact that there is no trace in the travaux préparatoires of any intention in the Convention to exclude state immunity. It must follow, if the present argument is correct, first that it was so obvious that it was the intention that immunity should be excluded that a term could be implied in the Convention to that effect, and second that, despite that fact, during the negotiating process none of the states involved thought it right to raise the matter for discussion. This is remarkable. Moreover, it would have been the duty of the responsible senior civil servants in the various states concerned to draw the attention of their governments to the consequences of this obvious implication, so that they could decide whether to sign a Convention in this form. Yet nothing appears to have happened. There is no evidence of any question being raised, still less of any protest being made, by a single state party.

F The conclusion follows either that every state party was content without question that state immunity should be excluded sub silentio, or that the responsible civil servants in all these states, including the United Kingdom, failed in their duty to draw this very important matter to the attention of their governments. It is difficult to imagine that either of these propositions can be correct. In particular it cannot, I suspect, have crossed the minds of the responsible civil servants that state immunity was excluded sub silentio in the Convention.

G The cumulative effect of all these considerations is, in my opinion, to demonstrate the grave difficulty of recognising an implied term, whatever its form, on the basis that it must have been agreed by all the state parties to the Convention that state immunity should be excluded. In this connection it is particularly striking that, in *Burgers and Danelius, Handbook on the Torture Convention*, it is recognised, at p. 31, that the obligation of a state party, under article 5(1) of the Convention, to establish jurisdiction over offences of torture committed within its territory, is subject to an exception in the case of those benefiting from

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special immunities, including foreign diplomats. It is true that this statement could in theory be read as limited to immunity *ratione personae*; but in the absence of explanation it should surely be read in the ordinary way as applicable both to immunity *ratione personae* and its concomitant immunity *ratione materiae*, and in any event the total silence in this passage on the subject of waiver makes it highly improbable that there was any intention that immunity *ratione materiae* should be regarded as having been implicitly excluded by the Convention. Had there been such an intention, the authors would have been bound to refer to it. They do not do so.

The background against which the Torture Convention is set adds to the improbability of the proposition that the state parties to the Convention must have intended, directly or indirectly, to exclude state immunity *ratione materiae*. Earlier Conventions made provision for an international tribunal. In the case of such Conventions, no question of *par in parem non habet imperium* arose; but heads of state were expressly mentioned, so ensuring that they are subject to the jurisdiction of the international tribunal. In the case of the Taking of Hostages Convention and the Torture Convention, jurisdiction was vested in the national courts of state parties to the Convention. Here, therefore, for the first time the question of waiver of state immunity arose in an acute form. Curiously, the suggestion appears to be that state immunity was waived only in the case of the Torture Convention. Apart from that curiosity, however, for state parties to exclude state immunity in a Convention of this kind would be a remarkable surrender of the basic protection afforded by international law to all sovereign states, which underlines the necessity for immunity to be waived in a treaty, if at all, by express provision; and, having regard in particular to the express reference to heads of state in earlier Conventions, state parties would have expected to find an express provision in the Torture Convention if it had been agreed that state immunity was excluded. That it should be done by implication in the Torture Convention seems, in these circumstances, to be most improbable.

I add that the fact that 116 states have become party to the Torture Convention reinforces the strong impression that none of them appreciated that, by signing the Convention, each of them would silently agree to the exclusion of state immunity *ratione materiae*. Had it been appreciated that this was so, I strongly suspect that the number of signatories would have been far smaller. It should not be forgotten that national representatives involved in the preliminary discussions would have had to report back to their governments about the negotiation of an important international convention of this kind. Had such a representative, or indeed a senior civil servant in a country whose government was considering whether the country should become a party to the Convention, been asked by his Secretary of State the question whether state immunity would be preserved, it is unlikely that a point would have occurred to him which had been overlooked by all the 14 counsel (including, as I have said, three distinguished professors of international law) appearing for the appellants and their supporters in the present case. It is far more probable that he would have had in mind the clear and simple words of Rehnquist C.J. in the *Amerada Hess* case, 109 S.Ct. 683 and have answered that, since there

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A was no mention of state immunity in the Convention, it could not have been affected. This demonstrates how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio. Common sense therefore supports the conclusion reached by principle and authority that this cannot be done.

B *(e) Conclusion*

For these reasons I am of the opinion that the proposed implication must be rejected not only as contrary to principle and authority, but also as contrary to common sense.

C *VII. The conclusion of Lord Hope of Craighead*

D My noble and learned friend, Lord Hope of Craighead, having concluded that, so far as torture is concerned, only charges 2 and 4 (in so far as they apply to the period after 29 September 1988) and charge 30 survive the application of the double criminality point, has nevertheless concluded that the benefit of state immunity is not available to Senator Pinochet in respect of these three charges. He has reached this conclusion on the basis that (1) the two conspiracy charges, having regard to paragraph 9(3) of the extradition request, reveal charges that Senator Pinochet was party to a conspiracy to carry out a systematic, if not a widespread, attack on a section of the civil population, i.e. to torture those who opposed or might oppose his government, which would constitute a crime against humanity (see, e.g., article 7(1) of the Rome Statute of the International Criminal Court 1998); and (2) the single act of torture alleged in charge 30 shows that an alleged earlier conspiracy to carry out such torture, constituting a crime against humanity, was still alive when that act was perpetrated after 29 September 1988. Furthermore, although he is (as I understand the position) in general agreement with Lord Slynn of Hadley's analysis, he considers that such a crime against humanity, or a conspiracy to commit such a crime, cannot be the subject of a claim to state immunity in a national court, even where it is alleged to have taken place before 1 January 1990.

E I must first point out that, apart from the single act of torture alleged in charge 30, the only other cases of torture alleged to have occurred since 29 September 1988 are two cases, referred to in the extradition request but not made the subject of charges, which are alleged to have taken place in October 1988. Before that, there is one case alleged in 1984, before which it is necessary to go as far back as 1977. In these circumstances I find it very difficult to see how, after 29 September 1988, it could be said that there was any systematic or widespread campaign of torture, constituting an attack on the civilian population, so as to amount to a crime against humanity. Furthermore, in so far as it is suggested that the single act of torture alleged in charge 30 represents the last remnant of a campaign which existed in the 1970s, there is, quite apart from the factual difficulty of relating the single act to a campaign which is alleged to have been in existence so long ago, the question whether it would be permissible, in the context of extradition, to have regard to the earlier charges of torture,

excluded under the double criminality rule, in order to establish that the single act of torture was part of a campaign of systematic torture which was still continuing in June 1989. This raises a question under section 6(4)(b) and (5) of the Extradition Act 1989, provisions which are by no means clear in themselves or easy to apply in the unusual circumstances of the present case.

In truth, however, the real problem is that, since the appellants did not consider the position which would arise if they lost the argument on the double criminality point, they did not address questions of this kind. If they had done so, the matter would have been argued out before the Appellate Committee, and Miss Montgomery and Dr. Collins would have had an opportunity to reply and would no doubt have had a good deal to say on the subject. This is after all a criminal matter, and it is no part of the function of the court to help the prosecution to improve their case. In these circumstances it would not, in my opinion, be right to assist the prosecution by now taking such a point as this, when they have failed to do so at the hearing, in order to decide whether or not this is a case in which it would be lawful for extradition to take place.

I wish to add that, in any event, for the reasons given by Lord Slynn of Hadley to which I have already referred, I am of the opinion that in 1989 there was no settled practice that state immunity *ratione materiae* was not available in criminal proceedings before a national court concerned with an alleged crime against humanity, or indeed as to what constituted a crime against humanity: see [2000] 1 A.C. 61, 79C–D and 80–81. This is a matter which I have already considered in Part IV of this opinion.

For all these reasons I am, with great respect, unable to accompany the reasoning of my noble and learned friend on these particular points.

VIII. Conclusion

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

LORD HOPE OF CRAIGHEAD. My Lords, this is an appeal against the decision of the Divisional Court to quash the provisional warrants of 16 and 22 October 1998 which were issued by the metropolitan stipendiary magistrate under section 8(1)(b) of the Extradition Act 1989. The application to quash had been made on two grounds. The first was that Senator Pinochet as a former head of state of the Republic of Chile was entitled to immunity from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state. The second was that the charges which had been made against him specified conduct which would not have been punishable in England when the acts

A were done, with the result that these were not extradition crimes for which it would be lawful for him to be extradited.

The Divisional Court quashed the first warrant, in which it was alleged that Senator Pinochet had murdered Spanish citizens in Chile, on the ground that it did not disclose any offence for which he could be extradited to Spain. Its decision on that point has not been challenged in this appeal. It also quashed the second warrant, in which it was alleged that Senator Pinochet was guilty of torture, hostage-taking, conspiracy to take hostages and conspiracy to commit murder. It did so on the ground that Senator Pinochet was entitled to immunity as a former head of state from the process of the English courts. The court held that the question whether these were offences for which, if he had no immunity, it would be lawful for him to be extradited was not a matter to be considered in that court at that stage. But Lord Bingham of Cornhill C.J. said that it was not necessary for this purpose that the conduct alleged constituted a crime which would have been punishable in this country at the time when it was alleged to have been committed abroad.

When this appeal was first heard in your Lordships' House the argument was directed almost entirely to the question whether Senator Pinochet was entitled as a former head of state to claim sovereign immunity in respect of the charges alleged against him in the second provisional warrant. It was also argued that the offences of torture and hostage-taking were not offences for which he could be extradited until these became offences for which a person could be prosecuted extraterritorially in the United Kingdom. But the second argument appears to have been regarded as no more than a side issue at that stage. This is not surprising in view of the terms of the second provisional warrant. The offences which it specified extended over periods lasting well beyond the date when the conduct became extraterritorial offences in this country. Only Lord Lloyd of Berwick dealt with this argument in his speech, and he confined himself to one brief comment. He said that it involved a misunderstanding of section 2 of the Extradition Act 1989, as in his view section 2(1)(a) referred to conduct which would constitute an offence in the United Kingdom now, not to conduct which would have constituted an offence then: [2000] 1 A.C. 61, 88D-E.

The offences alleged against Senator Pinochet

Four offences were set out in the second provisional warrant of 22 October 1998. These were: (1) torture between 1 January 1988 and December 1992; (2) conspiracy to torture between 1 January 1988 and 31 December 1992; (3) (a) hostage-taking and (b) conspiracy to take hostages between 1 January 1982 and 31 January 1992; and (4) conspiracy to commit murder between January 1976 and December 1992.

These dates must be compared with the date of the coup which brought Senator Pinochet to power in Chile, which was 11 September 1973, and the date when he ceased to be head of state, which was 11 March 1990. Taking the dates in the second provisional warrant at their face value, it appears (a) that he was not being charged with any acts of torture prior to 1 January 1988, (b) that he was not being charged with

any acts of hostage-taking or conspiracy to take hostages prior to I January 1982 and (c) that he was not being charged with any conspiracy to commit murder prior to January 1976. On the other hand he was being charged with having committed these offences up to December 1992, well after the date when he ceased to be head of state in Chile.

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The Government of Spain has taken the opportunity of the interval between the end of the first hearing of this appeal and the second hearing to obtain further details from the Spanish judicial authorities. It has explained that the provisional warrant was issued under circumstances of urgency and that the facts are more developed and complex than first appeared. And a number of things have happened since the date of the first hearing which, it is submitted, mean that the provisional warrant no longer has any life or effect. On 9 December 1998 the Secretary of State issued an authority to proceed under section 7(4) of the Act of 1989. On 10 December 1998 the Spanish indictment was preferred in Madrid, and on 24 December 1998 further particulars were drafted in accordance with article 13 of the European Convention on Extradition for furnishing with the extradition request.

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Mr. Alun Jones for the appellants said that it would be inappropriate for your Lordships in these circumstances to confine an examination of the facts to those set out in the provisional warrant and that it would be unfair to deprive him of the ability to rely on material which has been served within the usual time limits imposed in the extradition process. He invited your Lordships to examine all the material which was before the Secretary of State in December, including the formal request which was signed at Madrid on 3 November 1998 and the further material which has now been submitted by the Spanish Government. Draft charges have been prepared, of the kind which are submitted in extradition proceedings as a case is presented to the magistrate at the beginning of the main hearing under section 9(8) of the Act. This has been done to demonstrate how the charges which are being brought by the Spanish judicial authorities may be expressed in terms of English criminal law, to show the offences which he would have committed by his conduct against the law of this country.

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The crimes which are alleged in the Spanish request are murder on such a scale as to amount to genocide and terrorism, including torture and hostage-taking. The Secretary of State has already stated in his authority to proceed that Senator Pinochet is not to be extradited to Spain for genocide. So that part of the request must now be left out of account. But my impression is that the omission of the allegation of genocide is of little consequence in view of the scope which is given in Spanish law to the allegations of murder and terrorism.

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It is not our function to investigate the allegations which have been made against Senator Pinochet, and it is right to place on record the fact that his counsel, Miss Montgomery, told your Lordships that they are all strenuously denied by him. It is necessary to set out the nature and some of the content of these allegations, on the assumption that they are supported by the information which the Spanish judicial authorities have made available. This is because they form an essential part of the background to the issues of law which have been raised in this appeal. But the following summary must not be taken as a statement that the

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A allegations have been shown to be true by the evidence, because your Lordships have not considered the evidence.

The material which has been gathered together in the extradition request by the Spanish judicial authorities alleges that Senator Pinochet was party to a conspiracy to commit the crimes of murder, torture and hostage-taking, and that this conspiracy was formed before the coup. He is said to have agreed with other military figures that they would take over the functions of government and subdue all opposition to their control of it by capturing and torturing those who opposed them, who might oppose them or who might be thought by others to be likely to oppose them. The purpose of this campaign of torture was not just to inflict pain. Some of those who were to be tortured were to be released, to spread words of the steps that would be taken against those who opposed the conspirators. Many of those who were to be tortured were to be subjected to various other forms of atrocity, and some of them were to be killed. The plan was to be executed in Chile and in several other countries outside Chile.

When the plan was put into effect victims are said to have been abducted, tortured and murdered pursuant to the conspiracy. This was done first in Chile, and then in other countries in South America, in the United States and in Europe. Many of the acts evidencing the conspiracy are said to have been committed in Chile before 11 September 1973. Some people were tortured at a naval base in August 1973. Large numbers of persons were abducted, tortured and murdered on 11 September 1973 in the course of the coup before the junta took control and Senator Pinochet was appointed its President. These acts continued during the days and weeks after the coup. A period of repression ensued, which is said to have been at its most intense in 1973 and 1974. The conspiracy is said to have continued for several years thereafter, but to have declined in intensity during the decade before Senator Pinochet retired as head of state on 11 March 1990. It is said that the acts committed in other countries outside Chile are evidence of the primary conspiracies and of a variety of sub-conspiracies within those states.

The draft charges which have been prepared in order to translate these broad accusations into terms of English law may be summarised as follows: (1) conspiracy to torture between 1 January 1972 and 10 September 1973 and between 1 August 1973 and 1 January 1990—charges 1, 2 and 5; (2) conspiracy to take hostages between 1 August 1973 and 1 January 1990—charge 3; (3) conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal between 1 January 1972 and 1 January 1990—charge 4; (4) torture between 1 August 1973 and 8 August 1973 and on 11 September 1973—charges 6 and 8 (there is no charge 7); (5) conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975—charges 9 and 12; (6) attempted murder in Italy on 6 October 1975—charges 10 and 11; (7) torture on various occasions between 11 September 1973 and May 1977—charges 13 to 29 and 31 to 32; and (8) torture on 24 June 1989—charge 30.

This summary shows that some of the alleged conduct relates to the period before the coup when Senator Pinochet was not yet head of state. Charges 1 and 5 (conspiracy to torture) and charge 6 (torture) relate

exclusively to that period. Charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) relate to conduct over many years including the period before the coup. None of the conduct now alleged extends beyond the period when Senator Pinochet ceased to be head of state.

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Only one charge (charge 30—torture on 24 June 1989) relates exclusively to the period after 29 September 1988 when section 134 of the Criminal Justice Act 1988, to which I refer later, was brought into effect. But charges 2 and 4 (conspiracy to torture) and charge 3 (conspiracy to take hostages) which relate to conduct over many years extend over this period also. Two acts of torture which are said to have occurred between 21 and 28 October 1988 are mentioned in the extradition request. They have not been included as separate counts in the list of draft charges, but it is important not to lose sight of the fact that the case which is being made against Senator Pinochet by the Spanish judicial authorities is that each act of torture has to be seen in the context of a continuing conspiracy to commit torture. As a whole, the picture which is presented is of a conspiracy to commit widespread and systematic torture and murder in order to obtain control of the government and, having done so, to maintain control of government by those means for as long as might be necessary.

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Against that background it is necessary first to consider whether the relevant offences for the purposes of this appeal are those which were set out in the second provisional warrant or those which are set out in the draft charges which have been prepared in the light of the further information which has been obtained from the Spanish judicial authorities.

On one view it might be said that, as the appeal is against the decision of the Divisional Court to quash the second provisional warrant, your Lordships should be concerned only with the charges which were set out in that document. If that warrant was bad on the ground that the charges which it sets out are charges in respect of which Senator Pinochet has immunity, everything else that has taken place in reliance upon that warrant must be bad also. If he was entitled to immunity, no order should have been made against him in the committal proceedings and the Secretary of State should not have issued an authority to proceed. But article 13 of the European Convention on Extradition (1957) which, following the enactment of the Extradition Act 1989, the United Kingdom has now ratified (see the European Convention on Extradition Order 1990 (S.I. 1990 No. 1507)), provides that if the information communicated by the requesting party is found to be insufficient to allow the requested party to make a decision in pursuance of the Convention the requested party may ask for the necessary supplementary information to be provided to it by the requesting party.

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It is clear that the first provisional warrant was prepared in circumstances of some urgency, as it was believed that Senator Pinochet was about to leave the United Kingdom in order to return to Chile. Once begun, the procedure was then subject to various time limits. There was also the problem of translating the Spanish accusations, which cover so many acts over so long a period, into the terms of English criminal law. I do not think that it is surprising that the full extent of the allegations

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A which were being made was not at first appreciated. In my opinion the Spanish judicial authorities were entitled to supplement the information which was originally provided in order to define more clearly the charges which were the subject of the request. On this view it would be right to regard the material which is now available as explanatory of the charges which the second provisional warrant was intended to comprise. Mr. Clive Nicholls for Senator Pinochet said that he was content with this approach

B in the interests of finality.

Are the alleged offences "extradition crimes?"

If your Lordships are willing, as I suggest we should be, to examine this material it is necessary to subject it to further analysis. The starting point is section 1(1) of the Extradition Act 1989, which provides that a

C person who is accused in a foreign state of the commission of an extradition crime may be arrested and returned to that state in accordance with the extradition procedures in Part III of the Act. The expression "extradition crime" is defined in section 2 of the Act under two headings. The first, which is set out in section 2(1)(a), refers to:

D "conduct in the territory of a foreign state . . . which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law."

The second, which is set out in section 2(1)(b) read with section 2(2), refers to an extraterritorial offence against the law of a foreign state which is

E punishable under that law with imprisonment for a term of 12 months or any greater punishment, and which in corresponding circumstances would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment.

For reasons which have been explained by my noble and learned

F friend, Lord Browne-Wilkinson, the critical issue on the question of sovereign immunity relates to the effect of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and the offences which allege torture. As to those alleged offences which do not fall within the scope of the Torture Convention and which could not be prosecuted here under section 134 of the Criminal Justice Act 1988, any loss of immunity would have to be

G decided on other grounds. But there is no need to examine this question in the case of those alleged offences for which Senator Pinochet could not in any event be extradited. The purpose of the following analysis is to remove from the list of draft charges those charges which fall into that category either because they are not extradition crimes as defined by section 2 of the Extradition Act 1989 or because for any other reason other than on

H grounds of immunity they are charges on which Senator Pinochet could not be extradited.

This analysis proceeds on the basis that the definition of the expression "extradition crime" in section 2 of the Act of 1989 requires the conduct

which is referred to in section 2(1)(a) to have been an offence which was punishable in the United Kingdom when that conduct took place. It also proceeds on the basis that it requires the extraterritorial offence which is referred to in section 2(1)(b) to have been an extraterritorial offence in the United Kingdom on the date when the offence took place. The principle of double criminality would suggest that this was the right approach, in the absence of an express provision to the contrary. The tenses used in section 2 seem to me to be equivocal on this point. They leave it open to examination in the light of the provisions of the Act as a whole. The argument in favour of the date when the conduct took place has particular force in the case of those offences listed in section 22(4) of the Act. These have been made extraterritorial offences in order to give effect to international conventions, but neither the conventions nor the provisions which gave effect to them were intended to operate retrospectively.

I respectfully agree with the reasons which my noble and learned friend, Lord Browne-Wilkinson, has given for construing the definition as requiring that the conduct must have been punishable in the United Kingdom when it took place, and that it is not sufficient for the appellants to show that it would be punishable here were it to take place now.

Hostage-taking

An offence under the Taking of Hostages Act 1982 is one of those offences, wherever the act takes place, which is deemed by section 22(6) of the Extradition Act 1989 to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the International Convention against the Taking of Hostages of 18 December 1979 (1983) (Cmnd. 9100). Under section 1 of the Act of 1982 hostage-taking is an extraterritorial offence against the law of the United Kingdom. Section 1(1) of that Act 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 to abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence.”

Mr. Jones accepted that he did not have particulars of any case of hostage-taking. He said that his case was that Senator Pinochet was involved in a conspiracy to take hostages for the purposes which were made unlawful by section 1 of the Act. Charge 3 of the draft charges, which is the only charge which alleges conspiracy to take hostages, states that the course of conduct which was to be pursued was to include the abduction and torture of persons as part of a campaign to terrify and subdue those who were disposed to criticise or oppose Senator Pinochet or his fellow conspirators. Those who were not detained were to be intimidated, through the accounts of survivors and by rumour, by fear that they might suffer the same fate. Those who had been detained were to be compelled to divulge information to the conspirators by the threatened

A injury and detention of others known to the abducted persons by the conspirators.

But there is no allegation that the conspiracy was to threaten to kill, injure or detain those who were being detained in order to compel others to do or to abstain from doing any act. The narrative shows that the alleged conspiracy was to subject persons already detained to threats that others would be taken and that they also would be tortured. This does not seem to me to amount to a conspiracy to take hostages within the meaning of section 1 of the Act of 1982. The purpose of the proposed conduct, as regards the detained persons, was to subject them to what can best be described as a form of mental torture.

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C One of the achievements of the Torture Convention was to provide an internationally agreed definition of torture which includes both physical and mental torture in the terms set out in article 1:

“For the purposes of this Convention, ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind . . .”

D The offence of torture under English law is constituted by section 134(1) of the Criminal Justice Act 1988, which provides:

E “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.”

F Section 134(3) provides that it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission. So, in conformity with the Convention, the offence includes mental as well as physical torture. It seems to me that the conspiracy which charge 3 alleges against Senator Pinochet was a conspiracy to inflict mental torture, and not a conspiracy to take hostages.

G I would hold therefore that it is not necessary for your Lordships to examine the Hostage Convention in order to see whether its terms were such as to deprive a former head of state of any immunity from a charge that he was guilty of hostage-taking. In my opinion Senator Pinochet is not charged with the offence of hostage-taking within the meaning of section 1(1) of the Taking of Hostages Act 1982.

Conspiracy to murder and attempted murder

H The charges of conspiracy to torture include allegations that it was part of the conspiracy that some of those who were abducted and tortured would thereafter be murdered. Charge 4 alleges that in furtherance of that agreement about four thousand persons of many nationalities were murdered in Chile and in various other countries outside Chile. Two other

charges, charges 9 and 12, allege conspiracy to murder—in one case of a man in Spain and in the other of two people in Italy. Charge 9 states that Senator Pinochet agreed in Spain with others who were in Spain, Chile and France that the proposed victim would be murdered in Spain. Charge 12 does not say that anything was done in Spain in furtherance of the alleged conspiracy to murder in Italy. There is no suggestion in either of these charges that the proposed victims were to be tortured. Two further charges, charges 10 and 11, allege the attempted murder of the two people in Italy who were the subject of the conspiracy to commit murder there. Here again there is no suggestion that they were to be tortured before they were murdered.

Murder is a common law crime which, before it became an extra-territorial offence if committed in a convention country under section 4 of the Suppression of Terrorism Act 1978, could not be prosecuted in the United Kingdom if it was committed abroad except in the case of a murder committed abroad by a British citizen: Offences against the Person Act 1861 (24 & 25 Vict. c. 100), section 9, as amended. A murder or attempted murder committed by a person in Spain, whatever his nationality, is an extradition crime for the purposes of his extradition to Spain from the United Kingdom under section 2(1)(a) of the Extradition Act 1989 as it is conduct which would be punishable here if it occurred in this country. But the allegation relating to murders in Spain and elsewhere which is made against Senator Pinochet is not that he himself murdered or attempted to murder anybody. It is that the murders were carried out, or were to be carried out, in Spain and elsewhere as part of a conspiracy and that he was one of the conspirators.

Section 1 of the Criminal Law Act 1977 created a new statutory offence of conspiracy to commit an offence triable in England and Wales. The offence of conspiracy which was previously available at common law was abolished by section 5. Although the principal offence was defined in the statute more narrowly, in other respects it codified the pre-existing law. It came into force on 1 December 1977 (S.I. 1977 No. 1682 (C.58)). Subsection (4) of that section provides:

“In this Part of this Act ‘offence’ means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intention of the parties to the agreement.”

The effect of that subsection is that a person, whatever his nationality, who agrees in England to a course of conduct which will involve the offence of murder abroad may be prosecuted here for the offence of conspiracy to murder even although the murder itself would not have been triable in this country. It re-enacted a provision to the same effect in section 4 of the Offences against the Person Act 1861, which it in part repealed: see Schedule 13 to the Act of 1977. Section 4 of the Act of 1861 was in these terms:

“All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen’s Dominions or not, and whosoever

A shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's Dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than 10 and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour.”

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C So the conduct which is alleged against Senator Pinochet in charge 9—that between 1 January 1975 and 31 December 1976 he was a party to a conspiracy in Spain to murder someone in Spain—is an offence for which he could, unless protected by immunity, be extradited to Spain under reference to section 4 of the Act of 1861, as it remained in force until the relevant part of it was repealed by the Act of 1977. This is because his participation in the conspiracy in Spain was conduct by him in Spain for the purposes of section 2(1)(a) of the Extradition Act 1989.

D The conduct which is alleged against him in charge 4 is that he was a party to a conspiracy to murder, in furtherance of which about four thousand people were murdered in Chile and in various countries outside Chile including Spain. It is implied that this conspiracy was in Chile, so I would hold that this is *not* conduct by him in Spain for the purposes of section 2(1)(a) of Act of 1989. The question then is whether it is an extraterritorial offence within the meaning of section 2(1)(b) of that Act.

E A conspiracy to commit a criminal offence in England is punishable here under the common law rules as to extraterritorial conspiracies even if the conspiracy was formed outside England and nothing was actually done in this country in furtherance of the conspiracy: *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225. In that case it was held by the Judicial Committee, applying the English common law, that a conspiracy to traffic in a dangerous drug in Hong Kong entered into in Thailand could be tried in Hong Kong although no act pursuant to that conspiracy was done in Hong Kong. Lord Griffiths, delivering the judgment of the Board, said, at p. 251:

F “Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.”

G In *Reg. v. Sansom* [1991] 2 Q.B. 130 the appellants had been charged with conspiracy contrary to section 1 of the Criminal Law Act 1977, which does not in terms deal with extraterritorial conspiracies. The Court of Appeal rejected the argument that the principle laid down in the *Somchai* case referred only to the common law and that it could not be applied to conspiracies charged under the Act of 1977. Taylor L.J. said, at p. 138B, that it should now be regarded as the law of England on this point.

H As Lord Griffiths observed in the *Somchai* case, at p. 244c, it is still true, as a broad general statement, that English criminal law is local in its effect and that the criminal law does not concern itself with crimes committed abroad. But I consider that the common law of England

would, applying the rule laid down in the *Somchai* case, also regard as justiciable in England a conspiracy to commit an offence anywhere which was triable here as an extraterritorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. I do not think that this would be an unreasonable extension of the rule. It seems to me that on grounds of comity it would make good sense for the rule to be extended in this way in order to promote the aims of the Convention.

Prior to the coming into force of the Suppression of Terrorism Act 1978, a conspiracy which was formed outside this country to commit murder in some country other than England in pursuance of which nothing was done in England to further that conspiracy would not be punishable in England, as it was not the intention that acts done in pursuance of the conspiracy would result in the commission of a criminal offence in this country. The presumption against the extraterritorial application of the criminal law would have precluded such conduct from being prosecuted here. Section 4(1) of the Act of 1978 gives the courts of the United Kingdom jurisdiction over a person who does any act in a convention country which, if he had done that act in a part of the United Kingdom, would have made him guilty in that part of the United Kingdom of an offence mentioned in some, but not all, of the paragraphs of Schedule 1 to that Act. Murder is one of the offences to which that provision applies. But that Act, which was passed to give effect to the European Convention on the Suppression of Terrorism of 27 January 1977, did not come into force until 21 August 1978 (S.I. 1978 No. 1063 (C.28)). And Chile is not a Convention country for the purposes of that Act, nor is it one of the non-Convention countries to which its provisions have been applied by section 5 of the Act of 1978. Only two non-Convention countries have been so designated. These are the United States (S.I. 1986 No. 2146) and India (S.I. 1993 No. 2533).

Applying these principles, the only conduct alleged against Senator Pinochet as conspiracy to murder in charge 4 for which he could be extradited to Spain is that part of it which alleges that he was a party to a conspiracy in Spain to commit murder in Spain prior to 21 August 1978. As for the allegation that he was a party to a conspiracy in Spain or elsewhere to commit murder in a country which had been designated as a convention country after that date, the extradition request states that acts in furtherance of the conspiracy took place in France in 1975, in Spain in 1975 and 1976 and in the United States and Portugal in 1976. These countries have now been designated as countries to which the Suppression of Terrorism Act 1978 applies. But the acts which are alleged to have taken place there all predate the coming into force of that Act. So the extraterritorial jurisdiction cannot be applied to them.

The alleged offences of attempted murder in Italy are not, as such, offences for which Senator Pinochet could be extradited to Spain under reference to section 2(1)(a) of the Act of 1989 because the alleged conduct did not take place in Spain and because he is not of Spanish nationality. But for their date they would have been offences for which he could have been extradited from the United Kingdom to Spain under reference to section 2(1)(b), on the grounds, first, that murder is now an extraterritorial

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A offence under section 4(1)(a) of the Suppression of Terrorism Act 1978 as it is an offence mentioned in paragraph 1 of Schedule 1 to that Act, Italy has been designated as a Convention country (S.I. 1986 No. 1137) and, second, that an offence of attempting to commit that offence is an extraterritorial offence under section 4(1)(b) of the Act of 1978. But the attempted murders in Italy which are alleged against Senator Pinochet are said to have been committed on 6 October 1975. As the Act of 1978 was not in force on that date, these offences are not capable of being brought within the procedures laid down by that Act.

B Finally, to complete the provisions which need to be reviewed under this heading, mention should be made of an amendment which was made to Schedule 1 to the Suppression of Terrorism Act 1978 by section 22 of the Criminal Justice Act 1988, which includes within the list of offences set out in that schedule the offence of conspiracy. That section appears in Part I of the Act of 1988, most of which was repealed before having been brought into force following the enactment of the Extradition Act 1989. But section 22 was not repealed. It was brought into force on 5 June 1990 (S.I. 1990 No. 1145 (C.32)). It provides that there shall be added at the end of the Schedule a new paragraph in these terms: "21. An offence of conspiring to commit any offence mentioned in a preceding paragraph of this Schedule." At first sight it might seem that the effect of this amendment was to introduce a statutory extraterritorial jurisdiction in regard to the offence of conspiracy, wherever the agreement was made to participate in the conspiracy. But this offence does not appear in the list of offences in that Schedule in respect of which section 4(1) of the Suppression of Terrorism Act 1978 gives jurisdiction, if committed in a Convention country, as extraterritorial offences. In any event section 22 was not brought into force until 5 June 1990 (S.I. 1990 No. 1145 (C.32)). This was after the last date when Senator Pinochet is alleged to have committed the offence of conspiracy.

Torture and conspiracy to torture

F Torture is another of those offences, wherever the act takes place, which is deemed by section 22(6) of the Extradition Act 1989 to be an offence committed within the territory of any other state against whose law it is an offence. This provision gives effect to the Torture Convention of 10 December 1984. But section 134 of the Criminal Justice Act 1988 also gave effect to the Torture Convention. It made it a crime under English law for a public official or a person acting in an official capacity to commit acts of both physical and mental torture: see subsection (3). And it made such acts of torture an extraterritorial offence wherever they were committed and whatever the nationality of the perpetrator: see subsection (1). Read with the broad definition which the expression "torture" has been given by article 1 of the Convention and in accordance with ordinary principles, the offence which section 134 lays down must be taken to include the ancillary offences of counselling, procuring, commanding and aiding or abetting acts of torture and of being an accessory before or after the fact to such acts. All of these offences became extraterritorial offences against the law of the United Kingdom within the

meaning of section 2(2) of the Extradition Act 1989 as soon as section 134 was brought into force on 29 September 1988.

Section 134 does not mention the offence of conspiracy to commit torture, nor does article 1 of the Convention, nor does section 22(6) of the Extradition Act 1989. So, while the courts of the United Kingdom have extraterritorial jurisdiction under section 134 over offences of official torture wherever in the world they were committed, that section does not give them extraterritorial jurisdiction over a conspiracy to commit torture in any other country where the agreement was made outside the United Kingdom and no acts in furtherance of the conspiracy took place here. Nor is it conduct which can be deemed to take place in the territory of the requesting country under section 22(6) of the Act of 1989.

However, the general statutory offence of conspiracy under section 1 of the Criminal Law Act 1977 extends to a conspiracy to commit any offence which is triable in England and Wales. Among those offences are all the offences over which the courts in England and Wales have extraterritorial jurisdiction, including the offence under section 134 of the Act of 1988. And, for reasons already mentioned, I consider that the common law rule as to extraterritorial conspiracies laid down in *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225 applies if a conspiracy which was entered into abroad was intended to result in the commission of an offence, wherever it was intended to be committed, which is an extraterritorial offence in this country. Accordingly the courts of this country could try Senator Pinochet for acts of torture in Chile and elsewhere after 29 September 1988, because they are extraterritorial offences under section 134 of the Act of 1988. They could also try him here for conspiring in Chile or elsewhere after that date to commit torture, wherever the torture was to be committed, because torture after that date is an extraterritorial offence and the courts in England have jurisdiction over such a conspiracy at common law.

Torture prior to 29 September 1989

Section 134 of the Criminal Law Act 1988 did not come into force until 29 September 1988. But acts of physical torture were already criminal under English law. Among the various offences against the person which would have been committed by torturing would have been the common law offence of assault occasioning actual bodily harm or causing injury and the statutory offence under section 18 of the Offences against the Person Act 1861 of wounding with intent to cause grievous bodily harm. A conspiracy which was entered into in England to commit these offences in England was an offence at common law until the common law offence was replaced on 1 December 1977 by the statutory offence of conspiracy in section 1 of the Criminal Law Act 1977 which remains in force and available. As I have said, I consider that a conspiracy which was entered into abroad to commit these offences in England would be triable in this country under the common law rule as to extraterritorial conspiracies which was laid down in *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225 applies if they were extraterritorial offences at the time of the alleged conspiracy.

A However none of these offences, if committed prior to the coming into force of section 134 of the Criminal Justice Act 1988, could be said to be extraterritorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Extradition Act 1989 as there is no basis upon which they could have been tried extraterritorially in this country. The offences listed in Schedule 1 to the Suppression of Terrorism Act 1978 include the common law offence of assault and the statutory offences B under the Offences against the Person Act 1861. But none of these offences are included in the list of offences which are made extraterritorial offences if committed in a convention country by section 4(1) of the Extradition Act 1989. So the rule laid down in the *Somchai* case cannot be applied to any conspiracy to commit these offences in any country outside England, as it would not be an extraterritorial conspiracy according to English law. C Senator Pinochet could only be extradited to Spain for such offences under reference to section 2(1)(a) of the Act of 1989 if he was accused of conduct in Spain which, if it occurred in the United Kingdom, would constitute an offence which would be punishable in this country. Section 22(6) of the Act of 1989 is of no assistance, because torture contrary to the Torture Convention had not yet become an offence in this country.

D None of the charges of conspiracy to torture and none of the various torture charges allege that Senator Pinochet did anything in Spain which might qualify under section 2(1)(a) of the Act of 1989 as conduct in that country. All one can say at this stage is that, if the information presented to the magistrate under section 9(8) of the Act of 1989 in regard to charge 4 were to demonstrate (i) that he did something *in Spain* prior to 29 September 1988 to commit acts of torture there, or (ii) that he was party to a conspiracy *in Spain* to commit acts of torture *in Spain*, that E *would* be conduct in Spain which would meet the requirements of section 2(1)(a) of that Act.

Torture after 29 September 1989

F The effect of section 134 of the Criminal Justice Act 1988 was to make acts of official torture, wherever they were committed and whatever the nationality of the offender, an extraterritorial offence in the United Kingdom. The section came into force two months after the passing of the Act on 29 September 1988, and it was not retrospective. As from that date official torture was an extradition crime within the meaning of section 2(1) of the Extradition Act 1989 because it was an extraterritorial offence against the law of the United Kingdom.

G The general offence of conspiracy which was introduced by section 1 of the Criminal Law Act 1977 applies to any offence triable in England and Wales: section 1(4). So a conspiracy which took place here after 29 September 1988 to commit offences of official torture, wherever the torture was to be carried out and whatever the nationality of the alleged torturer, is an offence for which Senator Pinochet could be tried in this country if H he has no immunity. This means that a conspiracy to torture which he entered into in Spain after that date is an offence for which he could be extradited to Spain, as it would be an extradition offence under section 2(1)(a) of the Act of 1989. But, as I have said, I consider that the

common law of England would, applying the rule laid down in *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225, also regard as justiciable in England a conspiracy to commit an offence which was triable here as an extraterritorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. This means that he could be extradited to Spain under reference to section 2(1)(b) of the Act of 1989 on charges of conspiracy to torture entered into anywhere which related to periods after that date. But, as section 134 of the Act of 1988 does not have retrospective effect, he could not be extradited to Spain for any conduct in Spain or elsewhere amounting to a conspiracy to commit torture, wherever the torture was to be carried out, which occurred before 29 September 1988.

The conduct which is alleged against Senator Pinochet under the heading of conspiracy in charge 4 is not confined to the allegation that he was a party to an agreement that people were to be tortured. Included in that charge is the allegation that many people in various countries were murdered after being tortured in furtherance of the conspiracy that they would be tortured and then killed. So this charge includes charges of torture as well as conspiracy to torture. And it is broad enough to include the ancillary offences of counselling, procuring, commanding, aiding or abetting, or of being accessory before or after the fact to, these acts of torture. Ill-defined as this charge is, I would regard it as including allegations of torture and of conspiracy to torture after 29 September 1988 for which, if he has no immunity, Senator Pinochet could be extradited to Spain on the ground that, as they were extraterritorial offences against the law of the United Kingdom, they were extradition crimes within the meaning of section 2(1) of the Act of 1989.

What is the effect of the qualification which I have just mentioned, as to the date on which these allegations of torture and conspiracy to torture first became offences for which, at the request of Spain, Senator Pinochet could be extradited? In the circumstances of this case its effect is a profound one. It is to remove from the proceedings the entire course of such conduct in which Senator Pinochet is said to have engaged from the moment he embarked on the alleged conspiracy to torture in January 1972 until 29 September 1988. The only offences of torture and conspiracy to torture which are punishable in this country as extraterritorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Act of 1989 are those offences of torture and conspiracy to torture which he is alleged to have committed on or after 29 September 1988. But almost all the offences of torture and murder, of which there are alleged to have been about 4,000 victims, were committed during the period of repression which was at its most intense in 1973 and 1974. The extradition request alleges that during the period from 1977 to 1990 only about 130 such offences were committed. Of that number only three have been identified in the extradition request as having taken place after 29 September 1988. Of the various offences which are listed in the draft charges only charge 30, which refers to one act of official torture in Chile on 24 June 1989, relates exclusively to the period after 29 September 1988. Two of the charges of conspiracy to commit torture extend in part over

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A the period after that date. Charge 2 alleges that Senator Pinochet committed this offence during the period from 1 August 1973 to 1 January 1990, but it does not allege that any acts of torture took place in furtherance of that conspiracy. Charge 4 alleges that he was party to a conspiracy to commit torture in furtherance of which acts of murder following torture were committed in various countries including Spain during the period from 1 January 1972 to 1 January 1990. The only conduct alleged in charges 2 and 4 for which Senator Pinochet could be extradited to Spain is that part of the alleged conduct which relates to the period after 29 September 1988.

B Although the allegations of conspiracy to torture in charge 2 and of torture and conspiracy to torture in charge 4 must now be restricted to the period from 29 September 1988 to 1 January 1990, the fact that these allegations remain available for the remainder of the period is important because of the light which they cast on the single act of torture alleged in charge 30. For reasons which I shall explain later, I would find it very difficult to say that a former head of state of a country which is a party to the Torture Convention has no immunity against an allegation of torture committed in the course of governmental acts which related only to one isolated instance of alleged torture. But that is not the case which the Spanish judicial authorities are alleging against Senator Pinochet. Even when reduced to the period from 29 September 1988 until he left office as head of state, which the provisions for specialty protection in section 6(4) of the Extradition Act 1989 would ensure was the only period in respect of which the Spanish judicial authorities would be entitled to bring charges against him if he were to be extradited, the allegation is that he was a party to the use of torture as a systematic attack on all those who opposed or who might oppose his government.

C D E F G H The extradition request states that between August 1977, when the National Intelligence Directorate (D.I.N.A.) was dissolved and replaced by the National Intelligence Bureau (C.N.I.), the C.N.I., the Directorate of Communications of the Militarised Police (D.I.C.O.M.C.A.R.) and the Avenging Martyrs Commando (C.O.V.E.R.M.A.), while engaged in a policy of repression acting on orders emanating from Augusto Pinochet, systematically performed torture on detainees. Among the methods which are said to have been used was the application of electricity to sensitive parts of the body, and it is alleged that the torture sometimes led to the victim's death. Charge 30 alleges that the victim died after having been tortured by inflicting electric shock. The two victims of an incident in October 1988, which is mentioned in the extradition request but is not the subject of a separate count in the list of draft charges, are said to have shown signs of the application of electricity after autopsy. It appears that the evidence has revealed only these three instances after 29 September 1988 when acts of official torture were perpetrated in pursuance of this policy. Even so, this does not affect the true nature and quality of those acts. The significance of charges 2 and 4 may be said to lie in the fact that they show that a policy of systematic torture was being pursued when those acts were perpetrated.

I must emphasise that it is not our function to consider whether or not the evidence justifies this inference, and I am not to be taken as saying that

it does. But it is plain that the information which is before us is capable of supporting the inference that the acts of torture which are alleged during the relevant period were of that character. I do not think that it would be right to approach the question of immunity on a basis which ignores the fact that this point is at least open to argument. So I consider that the argument that Senator Pinochet has no immunity for this reduced period is one which can properly be examined in the light of developments in customary international law regarding the use of widespread or systematic torture as an instrument of state policy.

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Charges which are relevant to the question of immunity

The result of this analysis is that the only charges which allege extradition crimes for which Senator Pinochet could be extradited to Spain if he has no immunity are: (1) those charges of conspiracy to torture in charge 2, of torture and conspiracy to torture in charge 4 and of torture in charge 30 which, irrespective of where the conduct occurred, became extraterritorial offences as from 29 September 1988 under section 134 of the Criminal Justice Act 1988 and under the common law as to extra territorial conspiracies; (2) the conspiracy *in Spain* to murder *in Spain* which is alleged in charge 9; (3) such conspiracies *in Spain* to commit murder *in Spain* and such conspiracies *in Spain* prior to 29 September 1988 to commit acts of torture *in Spain*, as can be shown to form part of the allegations in charge 4.

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So far as the law of the United Kingdom is concerned, the only country where Senator Pinochet could be put on trial for the full range of the offences which have been alleged against him by the Spanish judicial authorities is Chile.

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State immunity

Section 20(1)(a) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 applies, subject to "any necessary modifications," to a head of state as it applies to the head of a diplomatic mission. The generality of this provision is qualified by section 20(5), which restricts the immunity of the head of state in regard to civil proceedings in the same way as Part I of the Act does for diplomats. This reflects the fact that section 14 already provides that heads of state are subject to the restrictions in Part I. But there is nothing in section 20 to indicate that the immunity from criminal proceedings which article 31(1) of the Vienna Convention as applied by the Act of 1964 gives to diplomats is restricted in any way for heads of state. Section 23(3), which provides that the provisions of Parts I and II of the Act do not operate retrospectively, makes no mention of Part III. I infer from this that it was not thought that Part III would give rise to the suggestion that it might operate in this way.

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It seems to me to be clear therefore that what section 20(1) did was to give statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts. *Marcos and Marcos v. Federal Department of Police* (1989) 102 I.L.R 198, 203 supports

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A this view, as it was held in that case that the article 39(2) immunity was available under customary international law to the former head of State of the Republic of the Philippines.

The question then is to what extent does the immunity which article 39(2) gives to former diplomats have to be modified in its application to former heads of state? The last sentence of article 39(2) deals with the position after the functions of the diplomat have come to an end.

B It provides that “with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.” It is clear that this provision is dealing with the residual immunity of the former diplomat *ratione materiae*, and not with the immunity *ratione personae* which he enjoys when still serving as a diplomat. In its application to a former head of state this provision raises

C two further questions: (1) does it include functions which the head of state performed outside the receiving state from whose jurisdiction he claims immunity, and (2) does it include acts of the kind alleged in this case—which Mr. Alun Jones accepts were not private acts but were acts done in the exercise of the state’s authority?

As to the first of these two further questions, it is plain that the functions of the head of state will vary from state to state according to the

D acts which he is expected or required to perform under the constitution of that state. In some countries which adhere to the traditions of constitutional monarchy these will be confined largely to ceremonial or symbolic acts which do not involve any executive responsibility. In others the head of state is head of the executive, with all the resources of the state at his command to do with as he thinks fit within the sphere of action

E which the constitution has given to him. I have not found anything in customary international law which would require us to confine the expression “his functions” to the lowest common denominator. In my opinion the functions of the head of state are those which his own state enables or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state. These may include instructing or authorising acts to be done

F by those under his command at home or abroad in the interests of state security. It would not be right therefore to confine the immunity under article 39(2) to acts done in the receiving state. I would not regard this as a “necessary modification” which has to be made to it under section 20(1) of the Act of 1978.

As to the second of those questions, I consider that the answer to it is well settled in customary international law. The test is whether they were

G private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other. It is whether the act was done to promote the state’s interests—whether it was done for his own benefit or gratification or was done for the state: *United States of America v. Noriega* (1990) 746 F.Supp. 1506, 1519–1521. Sir Arthur Watts Q.C. in his Hague Lectures, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994-III) 247

H *Recueil des cours*, p. 56, said: “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.” The sovereign or governmental acts of

one state are not matters upon which the courts of other states will adjudicate: *I Congreso del Partido* [1983] 1 A.C. 244, 262c, per Lord Wilberforce. The fact that acts done for the state have involved conduct which is criminal does not remove the immunity. Indeed the whole purpose of the residual immunity *ratione materiae* is to protect the former head of state against allegations of such conduct after he has left office. A head of state needs to be free to promote his own state's interests during the entire period when he is in office without being subjected to the prospect of detention, arrest or embarrassment in the foreign legal system of the receiving state: see *United States v. Noriega*, at p. 1519; *Lafontant v. Aristide* (1994) 844 F.Supp. 128, 132. The conduct does not have to be lawful to attract the immunity.

It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The examples which Lord Steyn [2000] 1 A.C. 61, 115c-e gave of the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of *jus cogens*. This compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct. As Sir Arthur Watts Q.C. said in his Hague Lectures, p. 89, n. 198, in respect of conduct constituting an international crime, such as war crimes, special considerations apply.

But even in the field of such high crimes as have achieved the status of *jus cogens* under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts. There is plenty of source material to show that war crimes and crimes against humanity have been separated out from the generality of conduct which customary international law has come to regard as criminal. These developments were described by Lord Slynn of Hadley [2000] 1 A.C. 61, 80e-81a and I respectfully agree with his analysis. As he said, at p. 81a-b, except in regard to crimes in particular situations where international tribunals have been set up to deal with them and it is part of the arrangement that heads of state should not have any immunity, there is no general recognition that there has been a loss of immunity from the jurisdiction of foreign national courts. This led him to sum the matter up in this way, at p. 81:

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A “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 conditions and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.”

D That is the background against which I now turn to the Torture Convention. As all the requirements which Lord Slynn laid out in the passage at p. 81D–F save one are met by it, when read with the provisions of sections 134 and 135 of the Criminal Justice Act 1988 which gave the force of law to the Convention in this country, I need deal only with the one issue which remains. Did it make it clear that a former head of state has no immunity in the courts of a state which has jurisdiction to try the crime?

The Torture Convention and loss of immunity

F The Torture Convention is an international instrument. As such, it must be construed in accordance with customary international law and against the background of the subsisting residual former head of state immunity. Article 32(2) of the Vienna Convention, which forms part of the provisions in the Diplomatic Privileges Act 1964 which are extended to heads of state by section 20(1) of the State Immunity Act 1978, subject to “any necessary modifications,” states that waiver of the immunity accorded to diplomats “must always be express.” No modification of that provision is needed to enable it to apply to heads of state in the event of it being decided that there should be a waiver of their immunity. The Torture Convention does not contain any provision which deals expressly with the question whether heads of state or former heads of state are or are not to have immunity from allegations that they have committed torture.

G But there remains the question whether the effect of the Torture Convention was to remove the immunity by necessary implication. Although article 32(2) says that any waiver must be express, we are required nevertheless to consider whether the effect of the Convention was necessarily to remove the immunity. This is an exacting test. Section 1605(a)(1) of the United States Federal Sovereignty Immunity Act provides for an implied waiver, but this section has been narrowly

construed: *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720; *Princz v. Federal Republic of Germany* (1994) 26 F.3d 1166, 1174; *Argentine Republic v. Amerada Hess Shipping Corporation*, 109 S.Ct. 683, 693. In international law the need for clarity in this matter is obvious. The general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states.

The preamble to the Torture Convention explains its purpose. After referring to article 5 of the Universal Declaration of Human Rights which provides that no one shall be subjected to torture or other cruel, inhuman or degrading treatment and to the United Nations Declaration of 9 December 1975 regarding torture and other cruel, inhuman or degrading treatment or punishment, it states that it was desired “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” There then follows in article 1 a definition of the term “torture” for the purposes of the Convention. It is expressed in the widest possible terms. It means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted” for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. It is confined however to official torture by its concluding words, which require such pain or suffering to have been “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

This definition is so broadly framed as to suggest on the one hand that heads of state must have been contemplated by its concluding words, but to raise the question on the other hand whether it was also contemplated that they would by necessary implication be deprived of their immunity. The words “public official” might be thought to refer to someone of lower rank than the head of state. Other international instruments suggest that where the intention is to include persons such as the head of state or diplomats they are mentioned expressly in the instrument: see article 27 of the Rome Statute of the International Criminal Court which was adopted on 17 July 1998. But a head of state who resorted to conduct of the kind described in the exercise of his function would clearly be “acting in an official capacity.” It would also be a strange result if the provisions of the Convention could not be applied to heads of state who, because they themselves inflicted torture or had instigated the carrying out of acts of torture by their officials, were the persons primarily responsible for the perpetration of these acts.

Yet the idea that the framing of the definition in these terms in itself was sufficient to remove the immunity from prosecution for all acts of torture is also not without difficulty. The jus cogens character of the immunity enjoyed by serving heads of state *ratione personae* suggests that, on any view, that immunity was not intended to be affected by the Convention. But once one immunity is conceded it becomes harder, in the absence of an express provision, to justify the removal of the other immunities. It may also be noted that *Burgers and Danelius, Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at p. 131, make this comment on article 5(1) of the Convention which sets out the measures which each state party is

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A required to take to establish its jurisdiction over the offences of torture which it is required by article 4 to make punishable under its own criminal law:

B “This means, first of all, that the state shall have jurisdiction over the offence when it has been committed in its territory. Under international or national law, there may be certain limited exceptions to this rule, e.g. in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted in so far as they apply to criminal acts in general and are not unduly extensive.”

C These observations, although of undoubted weight as Jan Herman Burgers of the Netherlands was a Chairman-Rapporteur to the Convention, may be thought to be so cryptic as to defy close analysis. But two points are worth making about them. The first is that they recognise that the provisions of the Convention are not inconsistent with at least some of the immunities in customary international law. The second is that they make no mention of any exception which would deprive heads of state or former heads of state of their customary international law immunities. The absence of any reference to this matter suggests that the framers of the Convention did not consider it. The Reports of the Working Group on the Draft Convention to the Economic and Social Council of the Commission on Human Rights show that many meetings were held to complete its work. These extended over several years, and many issues were raised and discussed before the various delegations were content with its terms. If the issue of head of state and former head of state immunity was discussed at any of these meetings, it would without doubt have been mentioned in the reports. The issue would have been recognised as an important one on which the delegations would have to take instructions from their respective governments. But there is no sign of this in any of the reports which have been shown to us.

F The absence of any discussion of the issue is not surprising, once it is appreciated that the purpose of the Convention was to put in place as widely as possible the machinery which was needed to make the struggle against torture more effective throughout the world. There was clearly much to be done, as the several years of discussion amply demonstrate. According to *Burgers and Danelius*, p. 1, the principal aim was to strengthen the existing position by a number of supportive measures. A basis had to be laid down for legislation to be enacted by the contracting states. An agreed definition of torture, including mental torture, had to be arrived at for the adoption by states into their own criminal law. Provisions had to be agreed for the taking of extraterritorial jurisdiction to deal with these offences and for the extradition of offenders to states which were seeking to prosecute them. As many states do not extradite their own citizens and the Convention does not oblige states to extradite, they had to undertake to take such measures as might be necessary to establish jurisdiction over these offences in cases where the alleged offender was present within their territory but was not to be extradited. For many, if not all, states these arrangements were innovations upon their domestic law. Waiver of immunities was not

mentioned. But, as Yoram Dinstein, “Diplomatic Immunity from Jurisdiction Ratione Materiae” (1966) 15 I.C.L.Q. 76, 80 had already pointed out it would be entirely meaningless to waive the immunity unless local courts were able, as a consequence, to try the offender.

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These considerations suggest strongly that it would be wrong to regard the Torture Convention as having by necessary implication removed the immunity *ratione materiae* from former heads of state in regard to every act of torture of any kind which might be alleged against him falling within the scope of article 1. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–717 it was held that the alleged acts of official torture, which were committed in 1976 before the making of the Torture Convention, violated international law under which the prohibition of official torture had acquired the status of *jus cogens*. Cruel acts had been perpetrated over a period of seven days by men acting under the direction of the military governor. Argentina was being ruled by an anti-semitic military junta, and epithets were used by those who tortured him which indicated that Jose Siderman was being tortured because of his Jewish faith. But the definition in article 1 is so wide that any act of official torture, so long as it involved “severe” pain or suffering, would be covered by it.

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As *Burgers and Danelius* point out at p. 122, although the definition of torture in article 1 may give the impression of being a very precise and detailed one, the concept of “severe pain and suffering” is in fact rather a vague concept, on the application of which to a specific case there may be very different views. There is no requirement that it should have been perpetrated on such a scale as to constitute an international crime in the sense described by Sir Arthur Watts in his Hague Lectures at p. 82, that is to say a crime which offends against the public order of the international community. A single act of torture by an official against a national of his state within that state’s borders will do. The risks to which former heads of state would be exposed on leaving office of being detained in foreign states upon an allegation that they had acquiesced in an act of official torture would have been so obvious to governments that it is hard to believe that they would ever have agreed to this. Moreover, even if your Lordships were to hold that this was its effect, there are good reasons for doubting whether the courts of other states would take the same view. An express provision would have removed this uncertainty.

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Nevertheless there remains the question whether the immunity can survive Chile’s agreement to the Torture Convention if the torture which is alleged was of such a kind or on such a scale as to amount to an international crime. Sir Arthur Watts Q.C. in his Hague Lectures, p. 82 states that the idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. The international agreements to which states have been striving in order to deal with this problem in international criminal courts have been careful to set a threshold for such crimes below which the jurisdiction of those courts will not be available. The Statute of the International Tribunal for the Former Yugoslavia (1993) includes torture in article 5 as one of the crimes against humanity. In paragraph 48 of his Report to the United Nations the Secretary-General explained that crimes

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A against humanity refer to inhuman acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population. Similar observations appear in paragraphs 131 to 135 of the Secretary-General's Report of 9 December 1994 on the Rwanda conflict. Article 3 of the Statute of the International Criminal Tribunal for Rwanda (1994) included torture as one of the crimes against humanity "when committed as part of a

B widespread or systematic attack against any civilian population" on national, political, ethnic or other grounds. Article 7 of the Rome Statute contains a similar limitation to acts of widespread or systematic torture.

The allegations which the Spanish judicial authorities have made against Senator Pinochet fall into that category. As I sought to make clear in my analysis of the draft charges, we are not dealing in this case—even upon the restricted basis of those charges on which Senator Pinochet could

C lawfully be extradited if he has no immunity—with isolated acts of official torture. We are dealing with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an *international* crime. This is because he is said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic torture within Chile and elsewhere as an

D instrument of government. On the other hand it is said that, for him to lose his immunity, it would have to be established that there was a settled practice for crime of this nature to be so regarded by customary international law at the time when they were committed. I would find it hard to say that it has been shown that any such settled practice had been established by 29 September 1988. But we must be careful not to attach

E too much importance to this point, as the opportunity for prosecuting such crimes seldom presents itself.

Despite the difficulties which I have mentioned, I think that there are sufficient signs that the necessary developments in international law were in place by that date. The careful discussion of the *jus cogens* and *erga omnes* rules in regard to allegations of official torture in *Siderman de Blake v. Republic of Argentina*, 26 F.2d 699, 714–718, which I regard as

F persuasive on this point, shows that there was already widespread agreement that the prohibition against official torture had achieved the status of a *jus cogens* norm. Articles which were published in 1988 and 1989 are referred to, at p. 717, in support of this view. So I think that we can take it that that was the position by 29 September 1988. Then there is the Torture Convention of 10 December 1984. Having secured a sufficient

G number of signatories, it entered into force on 26 June 1987. In my opinion, once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the Convention to invoke the immunity *ratione materiae* in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other

H person acting in an official capacity.

As Sir Arthur Watts Q.C. has explained in his Hague Lectures, at p. 82, the general principle in such cases is that of individual responsibility for international criminal conduct. After a review of various general

international instruments relating mainly but not exclusively to war crimes, of which the most recent was the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind of 1988, he concludes, at p. 84, that it can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes. A head of state is still protected while in office by the immunity *ratione personae*, but the immunity *ratione materiae* on which he would have to rely on leaving office must be denied to him.

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

I consider that the date as from which the immunity *ratione materiae* was lost was 30 October 1988, which was the date when Chile's ratification of the Torture Convention on 30 September 1988 took effect. Spain had already ratified the Convention. It did so on 21 October 1987. The Convention was ratified by the United Kingdom on 8 December 1988 following the coming into force of section 134 of the Criminal Justice Act 1988. On the approach which I would take to this question the immunity *ratione materiae* was lost when Chile, having ratified the Convention to which section 134 gave effect and which Spain had already ratified, was deprived of the right to object to the extraterritorial jurisdiction which the United Kingdom was able to assert over these offences when the section came into force. But I am content to accept the view of my noble and learned friend, Lord Saville of Newdigate, that Senator Pinochet continued to have immunity until 8 December 1988 when the United Kingdom ratified the Convention.

Conclusion

It follows that I would hold that, while Senator Pinochet has immunity *ratione materiae* from prosecution for the conspiracy in Spain to murder in Spain which is alleged in charge 9 and for such conspiracies in Spain to murder in Spain and such conspiracies in Spain prior to 8 December 1988 to commit acts of torture in Spain as could be shown to be part of the allegations in charge 4, he has no immunity from prosecution for the charges of torture and of conspiracy to torture which relate to the period after that date. None of the other charges which are made against him are extradition crimes for which, even if he had no immunity, he could be extradited. On this basis only I, too, would allow the appeal, to the extent necessary to permit the extradition to proceed on the charges of torture and conspiracy to torture relating to the period after 8 December 1988.

A The profound change in the scope of the case which can now be made for the extradition to Spain of Senator Pinochet will require the Secretary of State to reconsider his decision to give authority to proceed with the extradition process under section 7(4) of the Extradition Act 1989 and, if he decides to renew that authority, with respect to which of the alleged crimes the extradition should be authorised. It will also make it necessary for the magistrate, if renewed authority to proceed is given, to pay very careful attention to the question whether the information which is laid before him under section 9(8) of the Act supports the allegation that torture in pursuance of a conspiracy to commit systematic torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

C LORD HUTTON. My Lords, the rehearing of this appeal has raised a number of separate issues which have been fully considered in the speech of my noble and learned friend, Lord Browne-Wilkinson, which I have had the benefit of reading in draft. I am in agreement with his reasoning and conclusion that the definition of an “extradition crime” in the Extradition Act 1989 requires the conduct to be criminal under United Kingdom law at the date of commission. I am also in agreement with the analysis and conclusions of my noble and learned friend, Lord Hope of Craighead as to the alleged crimes in respect of which Senator Pinochet could be extradited apart from any issue of immunity. I further agree with the view of Lord Browne-Wilkinson that Senator Pinochet is entitled to immunity in respect of charges of murder and conspiracy to murder, but I wish to make some observations on the issue of immunity claimed by Senator Pinochet in respect of charges of torture and conspiracy to torture.

D Senator Pinochet ceased to be head of state of Chile on 11 March 1990, and he claims immunity as a former head of state. The distinction between the immunity of a serving head of state and the immunity of a former head of state is discussed by Sir Arthur Watts Q.C. in his monograph, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers.” He states, at p. 53:

E “It is well established that, put broadly, a head of state enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other states. This immunity—to the extent that it exists—becomes effective upon his assumption of office, even in respect of events occurring earlier. A head of state’s immunity is enjoyed in recognition of his very special status as a holder of his state’s highest office.”

And, at p. 88:

H “A former head of state is entitled under international law to none of the facilities, immunities and privileges which international law accords to heads of states in office. After his loss of office he may be sued in relation to his private activities, both those taking place while he was still head of state, as well as those occurring before becoming head of state or since ceasing to be head of state.”

And, at p. 89:

“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. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador’s appointment has come to an end.”

Section 20 in Part III of the State Immunity Act 1978 provides that, subject to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state, and section 2 of the Act of 1964 provides that the articles of the Vienna Convention on Diplomatic Relations set out in Schedule 1 to the Act shall have the force of law in the United Kingdom. The articles set out in Schedule 1 include articles 29, 31 and 39. Article 29 provides: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.” Article 31 provides: “(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.” Article 39 provides:

“(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 continue to subsist.”

One of the issues raised before your Lordships is whether section 20 of the State Immunity Act 1978 relates only to the functions carried out by a foreign head of state when he is present within the United Kingdom, or whether it also applies to his actions in his own state or in another country. Section 20 is a difficult section to construe, but I am of opinion that, with the necessary modifications, the section applies the provisions of the Diplomatic Privileges Act, and therefore the articles of the Vienna Convention, to the actions of a head of state in his own country or elsewhere, so that, adopting the formulation of Lord Nicholls of Birkenhead [1998] 3 W.L.R. 1456, 1499E in the earlier hearing, with the addition of seven words, the effect of section 20 of the Act of 1978, section 2 of the Diplomatic Privileges Act and of the articles of the Vienna Convention is that: “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, whether in his own country or elsewhere, in the exercise of his functions as a head of state.”

A I consider, however, that section 20 did not change the law in relation to the immunity from criminal jurisdiction to which a former head of state was entitled in the United Kingdom but gave statutory form to the relevant principle of international law which was part of the common law.

B Therefore the crucial question for decision is whether, if committed, the acts of torture (in which term I include acts of torture and conspiracy to commit torture) alleged against Senator Pinochet were carried out by him in the performance of his functions as head of state. I say “if committed” because it is not the function of your Lordships in this appeal to decide whether there is evidence to substantiate the allegations and Senator Pinochet denies them. Your Lordships had the advantage of very learned and detailed submissions from counsel for the parties and the interveners and from the amicus curiae (to which submissions I would wish to pay tribute) and numerous authorities from many jurisdictions were cited.

C It is clear that the acts of torture which Senator Pinochet is alleged to have committed were not acts carried out in his private capacity for his personal gratification. If that had been the case they would have been private acts and it is not disputed that Senator Pinochet, once he had ceased to be head of state, would not be entitled to claim immunity in respect of them. It was submitted on his behalf that the acts of torture were carried out for the purposes of protecting the state and advancing its interests, as Senator Pinochet saw them, and were therefore governmental functions and were accordingly performed as functions of the head of state. It was further submitted that the immunity which Senator Pinochet claimed was the immunity of the state of Chile itself. In the present proceedings Chile intervened on behalf of Senator Pinochet and in paragraph 10 of its written case Chile submitted:

E “the immunity of a head of state (or former head of state) is an aspect of state immunity . . . Immunity of a head of state in his public capacity is equated with state immunity in international law . . . Actions against representatives of a foreign government in respect of their governmental or official acts are in substance proceedings against the state which they represent, and the immunity is for the benefit of the state.”

G Moreover, it was submitted that a number of authorities established that the immunity which a state is entitled to claim in respect of the acts of its former head of state or other public officials applies to acts which are unlawful and criminal.

H My Lords, in considering the authorities it is necessary to have regard to a number of matters. First, it is a principle of international law that a state may not be sued in the courts of another state without its consent (although this principle is now subject to exceptions—the exceptions in the law of the United Kingdom being set out in the State Immunity Act 1978). *Halsbury’s Laws of England*, 4th ed., vol. 18 (1977), p. 794, para. 1548 states:

“An independent sovereign state may not be sued in the English courts against its will and without its consent. This immunity from

the jurisdiction is derived from the rules of international law, which in this respect have become part of the law of England. It is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity.”

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Secondly, many of the authorities cited by counsel were cases where an action in tort for damages was brought against a state. Thirdly, a state is responsible for the actions of its officials carried out in the ostensible performance of their official functions notwithstanding that the acts are performed in excess of their proper functions. *Oppenheim's International Law*, vol. I, pp. 545–546, para. 165 states:

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“In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are prima facie attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior.”

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Fourthly, in respect of the jurisdiction of the courts of the United Kingdom, foreign states are now expressly given immunity in civil proceedings (subject to certain express exceptions) by statute. Part I of the State Immunity Act 1978 relating to civil proceedings provides in section 1(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.” But Part I of the Act has no application to criminal jurisdiction and section 16(4) in Part I provides: “This Part of this Act does not apply to criminal proceedings.” In the United States of America section 1604 of the Foreign Sovereign Immunities Act 1976 provides:

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“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter.”

H

1 A.C. **Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.))** Lord Hutton

A Counsel for Senator Pinochet and for Chile relied on the decision of the Court of Appeal in *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536 where the plaintiff brought an action for damages in tort against the government of Kuwait claiming that he had been tortured in Kuwait by officials of that government. The Court of Appeal upheld a claim by the government of Kuwait that it was entitled to immunity. Counsel for the plaintiff submitted that the rule of international law prohibiting torture is so fundamental that it is jus cogens which overrides all other principles of international law, including the principle of sovereign immunity. This submission was rejected by the Court of Appeal on the ground that immunity was given by section 1 of the State Immunity Act 1978 and that the immunity was not subject to an overriding qualification in respect of torture or other acts contrary to international law which did not fall within one of the express exceptions contained in the succeeding sections of the Act. Ward L.J. stated, at pp. 549–550:

“Unfortunately, the Act is as plain as plain can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity *is* afforded in respect of acts of torture committed outside this jurisdiction.”

A similar decision was given by the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 where an Argentine family brought an action for damages in tort against Argentina and one of its provinces for acts of torture by military officials. Argentina claimed that it was entitled to immunity under the Foreign Sovereign Immunities Act and the Court of Appeals, with reluctance, upheld this claim. The argument advanced on behalf of the plaintiffs was similar to that advanced in the *Al-Adsani* case, but the court ruled that it was obliged to reject it because of the express provisions of the Foreign Sovereign Immunities Act, stating at pp. 718–719:

“The Sidermans argue that since sovereign immunity itself is a principle of international law, it is trumped by jus cogens. In short, they argue that when a state violates jus cogens, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. As a matter of international law, the Sidermans’ argument carries much force . . . Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the F.S.I.A. We must interpret the F.S.I.A. through the prism of *Amerada Hess*. Nothing in the text or legislative history of the F.S.I.A. explicitly addresses the effect violations of jus cogens might have on the F.S.I.A.’s cloak of immunity. Argentina contends that the Supreme Court’s statement in *Amerada Hess* that the F.S.I.A. grants immunity ‘in those cases involving alleged violations of international law that do not come within one of the F.S.I.A.’s exceptions,’ 109 S.Ct. 683, 688, precludes the Sidermans’ reliance on jus cogens in this case. Clearly, the F.S.I.A. does not specifically provide for an exception to sovereign immunity based on jus cogens. In *Amerada Hess*, the court had no occasion to

consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of jus dispositivum, the norms derived from international agreements or customary international law with which the *Amerada Hess* court dealt. However, the court was so emphatic in its pronouncement ‘that immunity is granted in those cases involving alleged violations of international law that do not come within one of the F.S.I.A.’s exceptions,’ *Amerada Hess*, at p. 688, and so specific in its formulation and method of approach, at p. 690 (‘Having determined that the F.S.I.A. provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here’), that we conclude that if violations of jus cogens committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of jus cogens does not confer jurisdiction under the F.S.I.A.”

It has also been decided that where an action for damages in tort is brought against officials of a foreign state for actions carried out by them in ostensible exercise of their governmental functions, they can claim state immunity, notwithstanding that their actions were illegal. The state itself, if sued directly for damages in respect of their actions would be entitled to immunity and this immunity would be impaired if damages were awarded against the officials and then the state was obliged to indemnify them. In *Jaffe v. Miller* (1993) 13 O.R.(3d) 745 government officials were sued in tort for laying false criminal charges and for conspiracy for kidnap, and it was held that they were entitled to claim immunity. Finlayson J.A., delivering the judgment of the Ontario Court of Appeal, stated at pp. 758–759:

“I also agree with the reasoning on this issue put forward by counsel for the respondents. Counsel submitted that to confer immunity on a government department of a foreign state but to deny immunity to the functionaries, who in the course of their duties performed the acts, would render the State Immunity Act ineffective. To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. Counsel submitted that when functionaries are acting within the scope of their official duties, as in the present case, they come within the definition of ‘foreign state.’”

In my opinion these authorities and similar authorities relating to claims for damages in tort against states and government officials do not support the claim of Senator Pinochet to immunity from criminal proceedings in the United Kingdom because the immunity given by Part I of the State Immunity Act 1978 does not apply to criminal proceedings.

Counsel for Senator Pinochet and for Chile further submitted that under the rules of international law courts recognise the immunity of a

A former head of state in respect of criminal acts committed by him in the purported exercise of governmental authority. In *Marcos and Marcos v. Federal Department of Police*, 102 I.L.R. 198 the United States instituted criminal proceedings against Ferdinand Marcos, the former President of the Philippines, and his wife, who had been a minister in the Philippine Government. They were accused of having abused their positions to acquire for themselves public funds and works of art. The United States authorities sought legal assistance from the Swiss authorities to obtain banking and other documents in order to clarify the nature of certain transactions which were the subject of investigation. Mr. Marcos and his wife claimed immunity as the former leaders of a foreign state. In its judgment the Swiss federal tribunal stated, at p. 203:

C “The immunity in relation to their functions which the appellants enjoyed therefore subsisted for those criminal acts which were allegedly committed while they were still exercising their powers in the Republic of the Philippines. The proceedings brought against them before the United States courts could therefore only be pursued pursuant to an express waiver by the State of the Philippines of the immunity which public international law grants them not as a personal advantage but for the benefit of the state over which they ruled.”

The tribunal then held that the immunity could not be claimed by Mr. and Mrs. Marcos in Switzerland because there had been an express waiver by the State of the Philippines. However I would observe that in that case Mr. and Mrs. Marcos were not accused of violating a rule of international law which had achieved the status of jus cogens.

E Counsel also relied on the decision of the Federal Constitutional Court of the Federal Republic of Germany *In re Former Syrian Ambassador to the German Democratic Republic* (unreported), 10 June 1997, Federal Constitutional Court, Case No. 2 BvR 1516/96. In that case the former Syrian ambassador to the German Democratic Republic was alleged to have failed to prevent a terrorist group from removing a bag of explosives from the Syrian Embassy, and a few hours later the explosives were used in an attack which left one person dead and more than 20 persons seriously injured. Following German unification and the demise of the German Democratic Republic in 1990 a District Court in Berlin issued an arrest warrant against the former ambassador for complicity in murder and the causing of an explosion. The Provincial Court quashed the warrant but the Court of Appeal overruled the decision of the Provincial Court and restored the validity of the warrant, holding that “The complainant was held to have contributed to the attack by omission. He had done nothing to prevent the explosives stored at the embassy building from being removed.” The former ambassador then lodged a constitutional complaint claiming that he was entitled to diplomatic immunity.

H The Constitutional Court rejected the complaint and held that the obligation limited to the former German Democratic Republic to recognise the continuing immunity of the complainant, according to article 39(2) of

the Vienna Convention, was not transferred to the Federal Republic of Germany by the international law of state succession.

Counsel for Senator Pinochet and for Chile relied on the following passage in the judgment of the constitutional court:

“For the categorisation as an official act, it is irrelevant whether the conduct is legal according to the legal order of the Federal Republic of Germany (see above B.II.2.a(bb)) and whether it fulfilled diplomatic functions in the sense of article 3 of the V.C.D.R. (see also the position taken by the [Swiss] Federal Political Department on 12 May 1961, *Schweizerisches Jahrbuch für internationales Recht* (‘S.J.I.R.’) 21 (1964) 171; however, a different position was taken by the Federal Political Department on 31 January 1979, reproduced in S.J.I.R. 36 (1980) 210, 211 *f.*). The commission of criminal acts does not simply concern the functions of the mission. If a criminal act was never considered as official, there would be no substance to continuing immunity. In addition, there is no relevant customary international law exception from diplomatic immunity here (see Preamble to the V.C.D.R., 5th paragraph) . . . Diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law. The diplomat can in such situations only be declared *persona non grata*.”

However, two further parts of the judgment are to be noted. First, it appears that the explosives were left in the embassy when the ambassador was absent, and his involvement began after the explosives had been left in the embassy. The report states:

“The investigation conducted by the Public Prosecutor’s Office concluded that the bombing attack was planned and carried out by a terrorist group. The complainant’s sending state had, in a telegram, instructed its embassy in East Berlin to provide every possible assistance to the group. In the middle of August 1983 a member of the terrorist group appeared in the embassy while the complainant was absent and requested permission from the then third secretary to deposit a bag in the embassy. In view of the telegram, which was known to him, the third secretary granted that permission. “Later, the member of the terrorist group returned to the embassy and asked the third secretary to transport the bag to West Berlin for him in an embassy car. At the same time, he revealed that there were explosives in the bag. The third secretary informed the complainant of the request. The complainant first ordered the third secretary to bring him the telegram, in order to read through the text carefully once again, and then decided that the third secretary could refuse to provide the transportation. After the third secretary had returned and informed the terrorist of this, the terrorist took the bag, left the embassy and conveyed the explosive in an unknown manner towards West Berlin.”

It appears that these facts were taken into account by the constitutional court when it stated:

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A “The complainant acted in the exercise of his official functions as a
 B member of the mission, within the meaning of article 39(2)(2) of the
 V.C.D.R., because he is charged with an omission that lay within the
 sphere of his responsibility as ambassador, and which is to that extent
 attributable to the sending state. The complainant was charged with
 having done nothing to prevent the return of the explosive. The Court
 of Appeal derived the relevant obligation of conduct out of the official
 C responsibility of the complainant, as leader of the mission, for objects
 left in the embassy. After the explosive was left in the embassy and
 therefore in the complainant’s sphere of control and responsibility, he
 was obligated, within the framework of his official duties, to decide
 how the explosive would then be dealt with. The complainant made
 such a decision, apparently on the basis of the telegraphed instruction
 D from his sending state, so that private interests are not discernible (on
 the classification of activities on the basis of instructions see the
Bingham case in *McNair, International Law Opinions*, vol. 1 (1956),
 pp. 196, 197; *Denza, Diplomatic Law* (1976), p. 249f.; *Salmon, Manuel
 de Droit Diplomatique* (1994), p. 458ff.). Instead, the complainant
 responded to the third secretary directly, in his position as the
 superior official, and, according to the view of the Court of Appeal,
 sought the best solution for the embassy.”

In addition the constitutional court stated that the rules of diplomatic law constitute a self-contained regime and drew a distinction between the immunity of a diplomat and the immunity of a head of state or governmental official and stated:

E “Article 7 of the Charter of the International Military Tribunal of
 Nuremberg (U.N.T.S. vol. 82, p. 279) and following it article 7(2) of
 the Statute of the International Criminal Tribunal for Yugoslavia
 (I.L.M. 32 (1993) p. 1192), as well as article 6(2) of the Statute for the
 International Criminal Tribunal for Rwanda (I.L.M. 33 (1994),
 p. 1602) state that the official position of an accused, whether as a
 F leader of a state or as a responsible official in a government
 department, does not serve to free him from responsibility or mitigate
 punishment. Exemptions from immunity for cases of war criminals,
 violations of international law and offences against jus cogens under
 international law have been discussed as developments of this rule . . .
 However, as the wording of article 7 of the Charter of the
 International Military Tribunal of Nuremberg makes clear, these
 G exceptions are relevant only to the applicable law of state immunity
 and the immunity of state organs that flows directly from it, in
 particular for members of the government, and not to diplomatic
 immunity. State immunity and diplomatic immunity represent two
 different institutions of international law, each with their own rules, so
 that no inference can be drawn from any restrictions in one sphere as
 to possible effects in the other.”

H Therefore I consider that the passage in the judgment relied on by
 counsel does not give support to the argument that acts of torture,
 although criminal, can be regarded as functions of a head of state.

In 1946 the General Assembly of the United Nations affirmed: “The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal” and gave the following directive to its International Law Commission:

“This Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”

Pursuant to this directive the 1950 Report of the International Law Commission to the General Assembly set out the following principle followed by the commentary contained in paragraph 103:

“The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible government official does not relieve him from responsibility under international law. 103. This principle is based on article 7 of the Charter of the Nuremberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as head of state or responsible government official did not relieve him from international responsibility. ‘The principle of international law which, under certain circumstances, protects the representatives of a state,’ said the Tribunal, ‘cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment . . .’ The same idea was also expressed in the following passage of the findings: ‘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.’”

The 1954 International Law Commission draft code of offences against the peace and security of mankind provided in article III: “The fact that a person acted as head of state or as responsible Government official does not relieve him of responsibility for committing any of the offences defined in the code.” The Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council of the United Nations in 1993 for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 provided in article 7(2): “The official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” The Statute of the International Criminal Tribunal for Rwanda established by the Security Council of the United Nations in 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda in 1994 provided in article 6(2): “The official position of any accused person, whether as

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A head of state or government or as a responsible government official shall not relieve such person of criminal responsibility nor mitigate punishment.” The 1996 Draft Code of the International Law Commission of Crimes Against the Peace and Security of Mankind provided in article 7: “The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of state or government, does not relieve him of criminal responsibility or mitigate punishment.” In July 1998 in Rome the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute of the International Criminal Court. The preamble to the Statute states, inter alia:

C “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognising that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation, D Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, E Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for the enforcement of international justice, Have agreed as follows . . .”

F Article 5 of the Statute provides that jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole which include crimes against humanity. Article 7 states that “crime against humanity” means a number of acts including murder and torture when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 27 provides:

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

Therefore since the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. Torture has been recognised as such a crime. The preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, which has been signed by the United Kingdom, Spain and Chile and by over one hundred other nations, states:

“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognising that those rights derive from the inherent dignity of the human person, Considering the obligation of states under the Charter, in particular article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Having regard also to the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, Have agreed as follows . . .”

Article 1 defines “torture” as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes specified in the article such as punishment or intimidation or obtaining information or a confession, and such pain and suffering is inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The Convention then contains a number of articles designed to make the measures against public officials who commit acts of torture more effective. *Burgers and Danelius, Handbook on the Convention*, stated, at p. 1:

“It is expedient to redress at the outset a widespread misunderstanding as to the objective of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations in 1984. Many people assume that the Convention’s principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct in so far as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above-mentioned practices are already outlawed

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A under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.”

B As your Lordships hold that there is no jurisdiction to extradite Senator Pinochet for acts of torture prior to 29 September 1988, which was the date on which section 134 of the Criminal Justice Act 1988 came into operation, it is unnecessary to decide when torture became a crime against international law prior to that date, but I am of opinion that acts of torture were clearly crimes against international law and that the prohibition of torture had acquired the status of *jus cogens* by that date.

C The appellants accepted that in English courts a serving head of state is entitled (*ratione personae*) to immunity in respect of acts of torture which he has committed. *Burgers and Danelius*, referring to the obligation of a state party to the convention to establish its jurisdiction over offences of torture, recognise that some special immunities may exist in respect of acts of torture and state, at p. 131:

D “Under international or national law, there may be certain limited exceptions to this rule, e.g. in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted in so far as they apply to criminal acts in general and are not unduly extensive.”

It is also relevant to note that article 98 of the 1998 Rome Statute establishing the International Criminal Court provides:

E “The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the co-operation of that third state for the waiver of the immunity.”

F But the issue in the present case is whether Senator Pinochet, as a former head of state, can claim immunity (*ratione materiae*) on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state. In my opinion he is not entitled to claim such immunity. The Torture Convention makes it clear that no state is to tolerate torture by its public officials or by persons acting in an official capacity and article 2 requires that: “(1) Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

G Article 2 further provides that: “(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 4 provides:

H “(1) Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each state party shall make

these offences punishable by appropriate penalties which take into account their grave nature.”

A

Article 7 provides:

“(1) The state party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

B

I do not accept the argument advanced by counsel on behalf of Senator Pinochet that the provisions of the Convention were designed to give one state jurisdiction to prosecute a public official of another state in the event of that state deciding to waive state immunity. I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present in another state.

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Therefore having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime. It is relevant to observe that in 1996 the military government of Chile informed a United Nations working group on human rights violations in Chile that torture was unconditionally prohibited in Chile, that the constitutional prohibition against torture was fully enforced and that:

D

“It is therefore apparent that the practice of inflicting unlawful ill-treatment has not been instituted in our country as is implied by the resolution”—a U.N. resolution critical of Chile—“and that such ill-treatment is not tolerated; on the contrary, a serious, comprehensive and coherent body of provisions exist to prevent the occurrence of such ill-treatment and to punish those responsible for any type of abuse.”

F

It is also relevant to note that in his opening oral submissions on behalf of Chile Dr. Lawrence Collins stated:

“the Government of Chile, several of whose present members were in prison or exile during those years, deplors the fact that the governmental authorities of the period of the dictatorship committed major violations of human rights in Chile. It reaffirms its commitment to human rights, including the prohibition of torture.”

G

In its written submissions (which were repeated by Dr. Collins in his oral submissions) Chile stated:

“The Republic intervenes to assert its own interest and right to have these matters dealt with in Chile. The purpose of the intervention is not to defend the actions of Senator Pinochet whilst he was head of

H

A state. Nor is the purpose to prevent him from being investigated and tried for any crime he is alleged to have committed whilst in office, provided that any investigation and trial takes place in the only appropriate courts, namely those of Chile. The democratically elected Government of the Republic of Chile upholds the commitment of the Republic under international conventions to the maintenance and promotion of human rights. The position of the Chilean Government on state immunity is not intended as a personal shield for Senator Pinochet, but is intended to defend Chilean national sovereignty, in accordance with generally accepted principles of international law. Its plea, therefore, does not absolve Senator Pinochet from responsibility in Chile if the acts alleged against him are proved.”

C My Lords, the position taken by the democratically elected Government of Chile that it desires to defend Chilean national sovereignty and considers that any investigation and trial of Senator Pinochet should take place in Chile is understandable. But in my opinion that is not the issue which is before your Lordships; the issue is whether the commission of acts of torture taking place after 29 September 1988 was a function of the head of state of Chile under international law. For the reasons which I have given D I consider that it was not.

Article 32(2) of the Vienna Convention set out in Schedule 1 to the Diplomatic Privileges Act 1964 provides that: “waiver must always be express.” I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not under international law a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture.

F A number of international instruments define a crime against humanity as one which is committed on a large scale. Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind 1996 provides:

G “A crime against humanity means any of the following acts, when committed in a systematic manner or a large scale and instigated or directed by a government or by any organisation or group: (a) murder; (b) extermination; (c) torture . . .”

And article 7 of the 1998 Rome Statute of the International Criminal Court provides:

H “For the purposes of this statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination . . . (f) torture . . .”

However, article 4 of the Torture Convention provides that: “Each state party shall ensure that *all* acts of torture are offences under its criminal law.” (Emphasis added.)

Therefore I consider that a single act of torture carried out or instigated by a public official or other person acting in an official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale. Accordingly I am of opinion that Senator Pinochet cannot claim that a single act of torture or a small number of acts of torture carried out by him did not constitute international crimes and did not constitute acts committed outside the ambit of his functions as head of state.

For the reasons given by *Oppenheim’s International Law*, vol. I, p. 545, which I have cited in an earlier part of this judgment, I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages under the principle stated in *Jaffe v. Miller*, 13 O.R.(3d) 745. But I am of opinion that there is no inconsistency between Chile and Senator Pinochet’s entitlement to claim immunity if sued in civil proceedings for damages and Senator Pinochet’s lack of entitlement to claim immunity in criminal proceedings for torture brought against him personally. This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in article 4 and the commentary thereon in the 1996 Draft Report of the International Law Commission:

“*Responsibility of states.* The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of states under international law. *Commentary.* (1) Although, as made clear by article 2, the present Code addresses matters relating to the responsibility of individuals for the crimes set out in Part II, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an ‘agent of the state,’ ‘on behalf of the state,’ ‘in the name of the state’ or even in a de facto relationship with the state, without being vested with any legal power. (2) The ‘without prejudice’ clause contained in article 4 indicates that the present Code is without prejudice to any question of the responsibility of a state under international law for a crime committed by one of its agents. As the commission already emphasised in the commentary to article 19 of the draft articles on state responsibility, the punishment of individuals who are organs of the state ‘certainly does not exhaust the prosecution of the international responsibility incumbent upon the state for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs’. The state may thus remain responsible and be unable to exonerate

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A itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.”

 Therefore for the reasons which I have given I am of opinion that Senator Pinochet is not entitled to claim immunity in the extradition proceedings in respect of conspiracy to torture and acts of torture alleged to have been committed by him after 29 September 1988 and to that extent
B I would allow the appeal. However I am in agreement with the view of Lord Browne-Wilkinson that the Secretary of State should reconsider his decision under section 7 of the Extradition Act 1989 in the light of the changed circumstances arising from your Lordships’ decision.

 LORD SAVILLE OF NEWDIGATE. My Lords, in this case the Government of Spain seeks the extradition of Senator Pinochet (the former head of state of Chile) to stand trial in Spain for a number of alleged crimes. On
C this appeal two questions of law arise.

 Senator Pinochet can only be extradited for what in the Extradition Act 1989 is called an extradition crime. Thus the first question of law is whether any of the crimes of which he stands accused in Spain is an extradition crime within the meaning of that Act. As to this, I am in
D agreement with the reasoning and conclusions in the speech of my noble and learned friend, Lord Browne-Wilkinson. I am also in agreement with the reasons given by my noble and learned friend, Lord Hope of Craighead, in his speech for concluding that only those few allegations that he identifies amount to extradition crimes.

 These extradition crimes all relate to what Senator Pinochet is said to have done while he was head of state of Chile. The second question of law
E is whether, in respect of these extradition crimes, Senator Pinochet can resist the extradition proceedings brought against him on the grounds that he enjoys immunity from these proceedings.

 In general, under customary international law serving heads of state enjoy immunity from criminal proceedings in other countries by virtue of holding that office. This form of immunity is known as immunity *ratione personae*. It covers all conduct of the head of state while the person
F concerned holds that office and thus draws no distinction between what the head of state does in his official capacity (i.e. what he does as head of state for state purposes) and what he does in his private capacity.

 Former heads of state do not enjoy this form of immunity. However, in general under customary international law a former head of state does
G enjoy immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state. This form of immunity is known as immunity *ratione materiae*.

 These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question.

H In my judgment the effect of section 20(1)(a) of the State Immunity Act 1978 is to give statutory force to these international law immunities.

 The relevant allegations against Senator Pinochet concern not his private activities but what he is said to have done in his official capacity

when he was head of state of Chile. It is accepted that the extradition proceedings against him are criminal proceedings. It follows that unless there exists, by agreement or otherwise, any relevant qualification or exception to the general rule of immunity *ratione materiae*, Senator Pinochet is immune from this extradition process.

The only possible relevant qualification or exception in the circumstances of this case relates to torture.

I am not persuaded that before the Torture Convention there was any such qualification or exception. Although the systematic or widespread use of torture became universally condemned as an international crime, it does not follow that a former head of state, who as head of state used torture for state purposes, could under international law be prosecuted for torture in other countries where previously under that law he would have enjoyed immunity *ratione materiae*.

The Torture Convention set up a scheme under which each state becoming a party was in effect obliged either to extradite alleged torturers found within its jurisdiction or to refer the case to its appropriate authorities for the purpose of prosecution. Thus as between the states who are parties to the Convention, there is now an agreement that each state party will establish and have this jurisdiction over alleged torturers from other state parties.

This country has established this jurisdiction through a combination of section 134 of the Criminal Justice Act 1988 and the Extradition Act 1989. It ratified the Torture Convention on 8 December 1988. Chile's ratification of the Convention took effect on 30 October 1988 and that of Spain just over a year earlier.

It is important to bear in mind that the Convention applies (and *only* applies) to any act of torture "*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*" It thus covers what can be described as official torture and must therefore include torture carried out for state purposes. The words used are wide enough to cover not only the public officials or persons acting in an official capacity who themselves inflict torture but also (where torture results) those who order others to torture or who conspire with others to torture.

To my mind it must follow in turn that a head of state, who for state purposes resorts to torture, would be a person acting in an official capacity within the meaning of this Convention. He would indeed to my mind be a prime example of an official torturer.

It does not follow from this that the immunity enjoyed by a serving head of state, which is entirely unrelated to whether or not he was acting in an official capacity, is thereby removed in cases of torture. In my view it is not, since immunity *ratione personae* attaches to the office and not to any particular conduct of the office holder.

On the other hand, the immunity of a former head of state does attach to his conduct whilst in office and is wholly related to what he did in his official capacity.

So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has

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A agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture.

B Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity *ratione materiae* of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity *ratione materiae*.

C I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms. A former head of state who it is alleged resorted to torture for state purposes falls in my view fairly and squarely within those terms and on the face of it should be dealt with in accordance with them. Indeed it seems to me that it is those who would seek to remove such alleged official torturers from the machinery of the Convention who in truth have to assert that by some process of implication or otherwise the clear words of the Convention should be treated as inapplicable to a former head of state, notwithstanding he is properly described as a person who was "*acting in an official capacity.*"

D I can see no valid basis for such an assertion. It is said that if it had been intended to remove immunity for alleged official torture from former heads of state there would inevitably have been some discussion of the point in the negotiations leading to the treaty. I am not persuaded that the apparent absence of any such discussions takes the matter any further. If there were states that wished to preserve such immunity in the face of universal condemnation of official torture, it is perhaps not surprising that they kept quiet about it.

E It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty.

G For the same reasons it seems to me that the wider arguments based on act of state or non-justiciability must also fail, since they are equally inconsistent with the terms of the Convention agreed by these state parties.

H I would accordingly allow this appeal to the extent necessary to permit the extradition proceedings to continue in respect of the crimes of torture and (where it is alleged that torture resulted) of conspiracy to torture, allegedly committed by Senator Pinochet after 8 December 1988. I would add that I agree with what my noble and learned friend, Lord Hope of Craighead, has said at the end of his speech with regard to the need for the

Secretary of State to reconsider his decision and (if renewed authority to proceed is given) the very careful attention the magistrate must pay to the information laid before him.

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LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. Save in one respect, I agree with his reasoning and conclusions. Since the one respect in which I differ is of profound importance to the outcome of this appeal, I propose to set out my own process of reasoning at rather more length than I might otherwise have done.

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State immunity is not a personal right. It is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet. It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute.

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The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; *par in parem non habet imperium*. States were obliged to abstain from interfering in the internal affairs of one another. International law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form. The idea that individuals who commit crimes recognised as such by international law may be held internationally accountable for their actions is now an accepted doctrine of international law. The adoption by most major jurisdictions of the restrictive theory of state immunity, enacted into English law by Part I of the State Immunity Act 1978, has made major inroads into the doctrine as a bar to the jurisdiction of national courts to entertain civil proceedings against foreign states. The question before your Lordships is whether a parallel, though in some respects opposite, development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts.

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Two overlapping immunities are recognised by international law; immunity *ratione personae* and immunity *ratione materiae*. They are quite different and have different rationales.

Immunity *ratione personae* is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by section 20(1) of the State Immunity Act 1978, enacting customary

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1 A.C. Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.)) Lord Millett

A international law and the Vienna Convention on Diplomatic Relations (1961).

The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state in relation both to his public and private acts.

C This immunity is not in issue in the present case. Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.

D Immunity *ratione materiae* is very different. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1; *Hatch v. Baez*, 7 Hun 596; *Underhill v. Hernandez* (1897) 168 U.S. 250. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.

H Given its scope and rationale, it is closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine. As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.

Immunity *ratione materiae* is given statutory form in English law by the combined effect of section 20(1) of the State Immunity Act 1978 the Diplomatic Privileges Act 1964 and article 39(2) of the Vienna Convention. The Act of 1978 is not without its difficulties. The former head of state is given the same immunity “subject to all necessary modifications” as a former diplomat, who continues to enjoy immunity in respect of acts committed by him “in the exercise of his functions.” The functions of a diplomat are limited to diplomatic activities, i.e. acts performed in his representative role in the receiving state. He has no broader immunity in respect of official or governmental acts not performed in exercise of his diplomatic functions: see Dinstein, “Diplomatic Immunity from Jurisdiction *Ratione Materiae*” (1966) 15 I.C.L.Q. 76, 82. There is therefore a powerful argument for holding that, by a parity of reasoning, the statutory immunity conferred on a former head of state by the Act of 1978 is confined to acts performed in his capacity as head of state, i.e. in his representative role. If so, the statutory immunity would not protect him in respect of official or governmental acts which are not distinctive of a head of state, but which he performed in some other official capacity, whether as head of government, commander-in-chief or party leader. It is, however, not necessary to decide whether this is the case, for any narrow statutory immunity is subsumed in the wider immunity in respect of other official or governmental acts under customary international law.

The charges brought against Senator Pinochet are concerned with his public and official acts, first as Commander-in-Chief of the Chilean army and later as head of state. He is accused of having embarked on a widespread and systematic reign of terror in order to obtain power and then to maintain it. If the allegations against him are true, he deliberately employed torture as an instrument of state policy. As international law stood on the eve of the Second World War, his conduct as head of state after he seized power would probably have attracted immunity *ratione materiae*. If so, I am of opinion that it would have been equally true of his conduct during the period before the coup was successful. He was not then, of course, head of state. But he took advantage of his position as Commander-in-Chief of the army and made use of the existing military chain of command to deploy the armed forces of the state against its constitutional government. These were not private acts. They were official and governmental or sovereign acts by any standard.

The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law. Even before the end of the Second World War, however, it was questionable whether the doctrine of state immunity accorded protection in respect of conduct which was prohibited by international law. As early as 1841, according to Quincy Wright (see “The Law of the Nuremberg Trial” (1947) 41 A.J.I.L. 38, 71), many commentators held the view that: “the government’s authority could not confer immunity upon its agents for acts beyond its powers under international law.” Thus state immunity did not

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A provide a defence to a crime against the rules of war: see Sir Hersch Lauterpacht “The Subjects of the Law of Nations” (1947) 63 L.Q.R. 438, 442–443. Writing in “The Nuernberg Trial and Aggressive War” (1946) 59 Harv.L.Rev. 396 before the Nuremberg Tribunal delivered its judgment and commenting on the seminal judgment of Marshall C.J. in *Schooner Exchange v. M’Faddon* (1812) 11 U.S. (7 Cranch) 116, Sheldon Glueck observed, at p. 426:

B “as Marshall implied, even in an age when the doctrine of sovereignty had a strong hold, the non-liability of agents of a state for ‘acts of state’ must rationally be based on the assumption that no member of the family of nations will order its agents to commit flagrant violations of international and criminal law.”

C Glueck added, at pp. 427–428:

D “in modern times a state is—ex hypothesi—incapable of ordering or ratifying acts which are not only criminal according to generally accepted principles of domestic penal law but also contrary to that international law to which all states are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope; and must, in consequence, be held personally liable for their wrongful conduct.”

E It seems likely that Glueck was contemplating trial before municipal courts, for more than half a century was to pass before the establishment of a truly international criminal tribunal. This would also be consistent with the tenor of his argument that the concept of sovereignty was of relatively recent origin and had been mistakenly raised to what he described as the “status of some holy fetish.”

F Whether conduct contrary to the preemptory norms of international law attracted state immunity from the jurisdiction of national courts, however, was largely academic in 1946, since the criminal jurisdiction of such courts was generally restricted to offences committed within the territory of the forum state or elsewhere by the nationals of that state. In this connection it is important to appreciate that the International Military Tribunal (the Nuremberg Tribunal) which was established by the four allied powers at the conclusion of the Second World War to try the major war criminals was not, strictly speaking, an international court or tribunal. As Sir Hersch Lauterpacht explained in *Oppenheim’s International Law*, vol. II, 7th ed. (1952), pp. 580–581 (ed. Sir Hersch Lauterpacht), the tribunal was: “the joint exercise, by the four states which established the tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law.”

G In its judgment the tribunal described the making of the charter as an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered, and of the undoubted right of those countries to legislate for the occupied territories which had been recognised by the whole civilised world. Article 7 of the Charter of the International Military Tribunal provided:

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

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In its judgment the tribunal ruled:

“the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the rules 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 . . . The principle of international law, which under certain circumstances protects the representatives of a state, *cannot be applied to acts which are condemned as criminal by international law.*” (My emphasis.)

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The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

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

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The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned.

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In 1946 the General Assembly had entrusted the formulation of the principles of international law recognised in the Charter of the Nuremberg Tribunal and the judgment of the tribunal to the International Law Commission. It reported in 1954. It rejected the principle that international criminal responsibility for crimes against humanity should be limited to crimes committed in connection with war crimes or crimes against peace. It was, however, necessary to distinguish international crimes from

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A ordinary domestic offences. For this purpose, the commission proposed that acts would constitute international crimes only if they were committed at the instigation or the toleration of state authorities. This is the distinction which was later adopted in the Torture Convention. In my judgment it is of critical importance in relation to the concept of immunity *ratione materiae*. The very official or governmental character of the acts which is necessary to found a claim to immunity *ratione materiae*, and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime. It was, no doubt, for this reason that the Commission's draft code provided that: "The fact that a person acted as head of state or as a responsible government official does not relieve him of responsibility for committing any of the offences defined in the code."

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C The landmark decision of the Supreme Court of Israel in *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 5 is also of great significance. Eichmann had been a very senior official of the Third Reich. He was in charge of Department IV D-4 of the Reich Main Security Office, the department charged with the implementation of the Final Solution, and subordinate only to Heydrich and Himmler. He was abducted from Argentina and brought to Israel, where he was tried in the District Court for Tel Aviv. His appeal against conviction was dismissed by the Supreme Court. The means by which he was brought to Israel to face trial has been criticised by academic writers, but Israel's right to assert jurisdiction over the offences has never been questioned.

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E The court dealt separately with the questions of jurisdiction and act of state. Israel was not a belligerent in the Second World War, which ended three years before the state was founded. Nor were the offences committed within its territory. The District Court found support for its jurisdiction in the historic link between the state of Israel and the Jewish people. The Supreme Court preferred to concentrate on the international and universal character of the crimes of which the accused had been convicted, not least because some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and gipsies).

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G As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities, including the judgment of the Permanent Court of International Justice in *The Case of Lotus S.S.*, Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10 it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion. The limiting factor that prevents the exercise of extraterritorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.

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Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been

convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted universal jurisdiction. See, for example, *Greenspan's Modern Law of Land Warfare* (1959), p. 420, where he writes:

“Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party.”

This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute. The court explained that the limitation often imposed on the exercise of universal jurisdiction, that the state which apprehended the offender must first offer to extradite him to the state in which the offence was committed, was not intended to prevent the violation of the latter's territorial sovereignty. Its basis was purely practical. The great majority of the witnesses and the greater part of the evidence would normally be concentrated in that state, and it was therefore the most convenient forum for the trial.

Having disposed of the objections to its jurisdiction, the court rejected the defence of act of state. As formulated, this did not differ in any material respect from a plea of immunity *ratione materiae*. It was based on the fact that in committing the offences of which he had been convicted the accused had acted as an organ of the state, “whether as head of the state or a responsible official acting on the government's orders.” The court applied article 7 of the Nuremberg Charter (which it will be remembered expressly referred to the head of state) and which it regarded as having become part of the law of nations.

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

The case was followed in the United States in *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; affirmed 776 F.2d. 571. In the context of an extradition request by the State of Israel the court accepted Israel's right to try a person charged with murder in the concentration camps of Eastern Europe. It held that the crimes were crimes of universal jurisdiction, observing: “International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment.” The difficulty is to know precisely what is the ambit of the expression “certain offences.”

Article 5 of the Universal Declaration of Human Rights of 1948 and article 7 of the International Covenant on Civil and Political Rights of

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A 1966 both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A resolution of the General Assembly in 1973 proclaimed the need for international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A further resolution of the General Assembly in 1975 proclaimed the desire to make the struggle against torture more effective throughout the world. The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of the Charter of the United Nations was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms.

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C The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international order. Genocide was made an international crime by the Genocide Convention in 1948. By the time Senator Pinochet seized power, D the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that by 1973 the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists that this does not confer universal jurisdiction or affect the immunity of a former head of state *ratione materiae* from the E jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would F not satisfy these criteria. The first criterion is well attested in the authorities and textbooks: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in *Prosecutor v. Furundzija* (unreported), 10 December 1998, where the court stated, at para. 156:

G “at the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”

H The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in the *Eichmann* case, and the definitions used in the more recent conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.

Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

In their *Handbook* on the Torture Convention, Burgers and Danelius wrote at p. 1:

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

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extraterritorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by section 134 of the Criminal Justice Act 1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section.

The Torture Convention did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the Convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction. The charges against Senator Pinochet, however, are plainly of the requisite character. The Convention thus affirmed and extended an existing international crime and imposed obligations on the parties to the Convention to take measures to

1 A.C. Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.)) Lord Millett

A prevent it and to punish those guilty of it. As *Burgers and Danielus* explained, its main purpose was to introduce an institutional mechanism to enable this to be achieved. Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. Any state party in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or to initiate proceedings to prosecute him.

B The obligation imposed by the Convention resulted in the passing of section 134 of the Criminal Justice Act 1988.

I agree, therefore, that our courts have statutory extraterritorial jurisdiction in respect of the charges of torture and conspiracy to torture committed after the section had come into force and (for the reasons explained by my noble and learned friend, Lord Hope of Craighead) the charges of conspiracy to murder where the conspiracy took place in Spain.

C I turn finally to the plea of immunity *ratione materiae* in relation to the remaining allegations of torture, conspiracy to torture and conspiracy to murder. I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity *ratione materiae* is not available in respect of an offence committed in the forum state, whether this be England or

D Spain.

The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence.

E In my view a serving head of state or diplomat could still claim immunity *ratione personae* if charged with an offence under section 134. He does not have to rely on the character of the conduct of which he is accused. The nature of the charge is irrelevant; his immunity is personal and absolute. But the former head of state and the former diplomat are in

F no different position from anyone else claiming to have acted in the exercise of state authority. If the applicant's arguments were accepted, section 134 would be a dead letter. Either the accused was acting in a private capacity, in which case he cannot be charged with an offence under the section; or he was acting in an official capacity, in which case he would

G enjoy immunity from prosecution. Perceiving this weakness in her argument, counsel for Senator Pinochet submitted that the United Kingdom took jurisdiction so that it would be available if, but only if, the offending state waived its immunity. I reject this explanation out of hand. It is not merely far-fetched; it is entirely inconsistent with the aims and object of the Convention. The evidence shows that other states were to be placed under an obligation to take action precisely because the offending

H state could not be relied upon to do so.

My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal

jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *ius cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.

In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court while at the same time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action. This was the very object of the Torture Convention. It is important to emphasise that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture. Chile insists on the exclusive right to prosecute him. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.

My Lords, we have come a long way from what I earlier described as the classical theory of international law—a long way in a relatively short time. But as the Privy Council pointed out in *In re Piracy Jure Gentium* [1934] A.C. 586, 597, international law has not become a crystallised code at any time, but is a living and expanding branch of the law. Glueck observed, 59 Harv.L.Rev. 396, 398: “unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs.” In a footnote to this passage he added:

“Much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time.”

The law has developed still further since 1984, and continues to develop in the same direction. Further international crimes have been

A created. Ad hoc international criminal tribunals have been established. A permanent international criminal court is in the process of being set up. These developments could not have been foreseen by Glueck and the other jurists who proclaimed that individuals could be held individually liable for international crimes. They envisaged prosecution before national courts, and this will necessarily remain the norm even after a permanent international tribunal is established. In future those who commit atrocities against civilian populations must expect to be called to account .if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

B For my own part, I would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture wherever and whenever carried out. But the majority of your Lordships think otherwise, and consider that Senator Pinochet can be extradited only in respect of a very limited number of charges. This will transform the position from that which the Secretary of State considered last December. I agree with my noble and learned friend, Lord Browne-Wilkinson, that it will be incumbent on the Secretary of State to reconsider the matter in the light of the very different circumstances which now prevail.

D LORD PHILLIPS OF WORTH MATRAVERS. My Lords, the Spanish Government seeks extradition of Senator Pinochet to stand trial for crimes committed in a course of conduct spanning a lengthy period. My noble and learned friend, Lord Browne-Wilkinson, has described how, before your Lordships' House, the Spanish Government contended for the first time that the relevant conduct extended back to 1 January 1972, and now covered a significant period before Senator Pinochet became head of state and thus before acts done in that capacity could result in any immunity. This change in the Spanish Government's case rendered critical issues that have hitherto barely been touched on. What is the precise nature of the double criminality rule that governs whether conduct amounts to an extradition crime and what parts of Senator Pinochet's alleged conduct satisfy that rule? On the first issue I agree with the conclusion reached by Lord Browne-Wilkinson and on the second I agree with the analysis of my noble and learned friend, Lord Hope of Craighead.

E These conclusions greatly reduce the conduct that can properly form the subject of a request for extradition under our law. They leave untouched the question of whether the English court can assert any criminal jurisdiction over acts committed by Senator Pinochet in his capacity of head of state. It is on that issue, the issue of immunity, that I would wish to add some comments of my own.

State immunity

H There is an issue as to whether the applicable law of immunity is to be found in the State Immunity Act 1978 or in principles of public international law, which form part of our common law. If the statute governs it must be interpreted, so far as possible, in a manner which accords with public international law. Accordingly I propose to start by considering the position at public international law.

The nature of the claim to immunity

These proceedings have arisen because Senator Pinochet chose to visit the United Kingdom. By so doing he became subject to the authority that this state enjoys over all within its territory. He has been arrested and is threatened with being removed against his will to Spain to answer criminal charges which are there pending. That has occurred pursuant to our extradition procedures. Both the executive and the court has a role to play in the extradition process. It is for the court to decide whether the legal requirements which are a precondition to extradition are satisfied. If they are, it is for the Home Secretary to decide whether to exercise his power to order that Senator Pinochet be extradited to Spain.

If Senator Pinochet were still the head of state of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. A head of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile. While as a matter of courtesy a state may accord a visitor of Senator Pinochet's distinction certain privileges, it is under no legal obligation to do so. He accepts, and Chile accepts, that this country no longer owes him any duty under international law by reason of his status, *ratione personae*. Immunity is claimed, *ratione materiae*, on the ground that the subject matter of the extradition process is the conduct by Senator Pinochet of his official functions when he was head of state. The claim is put thus in his written case:

"There is no distinction to be made between a head of state, a former head of state, a state official or a former state official, in respect of official acts performed under colour of their office. Immunity will attach to all official acts that are imputable or attributable to the state. It is therefore the nature of the conduct and the capacity of the applicant at the time of the conduct alleged, not the capacity of the applicant at the time of any suit, that is relevant."

We are not, of course, here concerned with a civil suit but with proceedings that are criminal in nature. Principles of the law of immunity that apply in relation to civil litigation will not necessarily apply to a criminal prosecution. The nature of the process with which this appeal is concerned is not a prosecution but extradition. The critical issue that the court has to address in that process is, however, whether the conduct of Senator Pinochet which forms the subject of the extradition request constituted a crime or crimes under English law. The argument in relation to extradition has proceeded on the premise that the same principles apply that would apply if Senator Pinochet were being prosecuted in this country for the conduct in question. It seems to me that that is an appropriate premise on which to proceed.

Why is it said to be contrary to international law to prosecute someone who was once head of state, or a state official, in respect of acts committed in his official capacity? It is common ground that the basis of

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A the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's. Were these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile. The following general principles are
B advanced in Chile's written case as supporting the immunity claimed:

C “(a) the sovereign equality of states and the maintenance of international relations require that the courts of one state will not adjudicate on the governmental acts of another state; (b) intervention in the internal affairs of other states is prohibited by international law; (c) conflict in international relations will be caused by such adjudication or intervention.”

These principles are illustrated by the following passage from *Hatch v. Baez*, 7 Hun 596, a case in which the former President of the Dominican Republic was sued in New York for injuries allegedly sustained at his hands in Santo Domingo:

D “The counsel for the plaintiff relies on the general principle, that all persons, of whatever rank or condition, whether in or out of office, are liable to be sued for acts done by them in violation of law. Conceding the truth and universality of that principle, it does not establish the jurisdiction of our tribunals to take cognisance of the official acts of foreign governments. We think that, by the universal comity of nations and the established rules of international law, the
E courts of one country are bound to abstain from sitting in judgement on the acts of another government done within its own territory. Each state is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign
F jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country. The only remedy for such wrongs must be sought through the intervention of the government of the person injured . . . 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
G foreign and friendly government.”

This statement was made in the context of civil proceedings. I propose to turn to the sources of international law to see whether they establish that those principles have given rise to a rule of immunity in relation to criminal proceedings.

H *The sources of immunity*

Many rules of public international law are founded upon or reflected in conventions. This is true of those rules of state immunity which relate to

civil suit: see the European Convention on State Immunity 1972. It is not, however, true of state immunity in relation to criminal proceedings. The primary source of international law is custom, that is “a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right.” *Oppenheim’s International Law*, vol. I, p. 27. Other sources of international law are judicial decisions, the writing of authors and “the general principles of law recognised by all civilised nations:” see article 38 of the Statute of the International Court of Justice. To what extent can the immunity asserted in this appeal be traced to such sources?

Custom

In what circumstances might a head of state or other state official commit a criminal offence under the law of a foreign state in the course of the performance of his official duties?

Prior to the developments in international law which have taken place in the last 50 years, the answer is very few. Had the events with which this appeal is concerned occurred in the 19th century, there could have been no question of Senator Pinochet being subjected to criminal proceedings in this country in respect of acts, however heinous, committed in Chile. This would not have been because he would have been entitled to immunity from process, but for a more fundamental reason. He would have committed no crime under the law of England and the courts of England would not have purported to exercise a criminal jurisdiction in respect of the conduct in Chile of any national of that state. I have no doubt that the same would have been true of the courts of Spain. Under international practice criminal law was territorial. This accorded with the fundamental principle of international law that one state must not intervene in the internal affairs of another. For one state to have legislated to make criminal acts committed within the territory of another state by the nationals of the latter would have infringed this principle. So it would to have exercised jurisdiction in respect of such acts. An official of one state could only commit a crime under the law of another state by going to that state and committing a criminal act there. It is certainly possible to envisage a diplomat committing a crime within the territory to which he was accredited, and even to envisage his doing so in the performance of his official functions—though this is less easy. Well established international law makes provision for the diplomat. The Vienna Convention on Diplomatic Relations (1961) provides for immunity from civil and criminal process while the diplomat is in post and, thereafter, in respect of conduct which he committed in the performance of his official functions while in post. Customary international law provided a head of state with immunity from any form of process while visiting a foreign state. It is possible to envisage a visiting head of state committing a criminal offence in the course of performing his official functions while on a visit and when clothed with status immunity. What seems inherently unlikely is that a foreign head of state should commit a criminal offence in the performance of his official functions while on a visit and subsequently return after ceasing to be head of state. Certainly this cannot have happened with

A sufficient frequency for any custom to have developed in relation to it. Nor am I aware of any custom which would have protected from criminal process a visiting official of a foreign state who was not a member of a special mission had he had the temerity to commit a criminal offence in the pursuance of some official function. For these reasons I do not believe that custom can provide any foundation for a rule that a former head of state is entitled to immunity from criminal process in respect of crimes committed in the exercise of his official functions.

Judicial decisions

C In the light of the considerations to which I have just referred, it is not surprising that Senator Pinochet and the Republic of Chile have been unable to point to any body of judicial precedent which supports the proposition that a former head of state or other government official can establish immunity from criminal process on the ground that the crime was committed in the course of performing official functions. The best that counsel for Chile has been able to do is to draw attention to the following obiter opinion of the Swiss Federal Tribunal in *Marcos and Marcos v. Federal Department of Police*, 102 I.L.R. 198, 202–203.

D “The privilege of the immunity from criminal jurisdiction of heads of state . . . has not been fully codified in the Vienna Convention [on Diplomatic Relations] . . . But it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of states lead or universally represent . . . articles 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state.”

Writings of authors

F We have been referred to the writings of a number of learned authors in support of the immunity asserted on behalf of Senator Pinochet. *Oppenheim*, vol. I comments, at pp. 1043–1044, para. 456:

G “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.”

This comment plainly relates to civil proceedings.

H *Satow's Guide to Diplomatic Practice*, 5th ed. (1979) deals in chapter 2 with the position of a visiting head of state. The authors deal largely with immunity from civil proceedings but state, at p. 10, para. 2.2, that under customary international law “he is entitled to immunity—probably without exception—from criminal and civil jurisdiction.” After a further passage dealing with civil proceedings, the authors state, at p. 10, para. 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.”

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Sir Arthur Watts Q.C. in his Hague Lectures on “The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers,” (1994-III) 247 *Recueil des cours* deals with the loss of immunity of a head of state who is deposed on a foreign visit. He then adds, at p. 89:

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“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. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador’s appointment has come to an end.”

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My Lords, I do not find these writings, unsupported as they are by any reference to precedent or practice, a compelling foundation for the immunity in respect of criminal proceedings that is asserted.

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General principles of law recognised by all civilised nations

The claim for immunity raised in this case is asserted in relation to a novel type of extraterritorial criminal jurisdiction. The nature of that jurisdiction I shall consider shortly. If immunity from that jurisdiction is to be established it seems to me that this can only be on the basis of applying the established general principles of international law relied upon by Chile to which I have already referred, rather than any specific rule of law relating to immunity from criminal process.

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These principles underlie some of the rules of immunity that are clearly established in relation to civil proceedings. It is time to take a closer look at these rules, and at the status immunity that is enjoyed by a head of state *ratione personae*.

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Immunity from civil suit of the state itself

It was originally an absolute rule that the court of one state would not entertain a civil suit brought against another state. All states are equal and this was said to explain why one state could not sit in judgment on another. This rule was not viable once states began to involve themselves in commerce on a large scale and state practice developed an alternative restrictive rule of state immunity under which immunity subsisted in respect of the public acts of the state but not for its commercial acts. A distinction was drawn between acts done *jure imperii* and acts done *jure gestionis*. This refinement of public international law was described by Lord Denning M.R. in *Trendtex Trading Corporation v. Central Bank of*

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A *Nigeria* [1977] Q.B. 529. In that case the majority of the Court of Appeal held that the common law of England, of which international law forms part, had also changed to embrace the restrictive theory of state immunity from civil process. That change was about to be embodied in statute, the State Immunity Act 1978, which gave effect to the European Convention on State Immunity of 1972.

Part I of the Act starts by providing:

B “*General immunity from jurisdiction.* 1(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.”

Part I goes on to make provision for a number of exceptions from immunity, the most notable of which is, by section 3, that in relation to a commercial transaction entered into by the state. Part I does not apply to criminal proceedings: section 16(4).

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The immunity of a head of state racione personae

An acting head of state enjoyed by reason of his status absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, in so far as civil proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity.

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When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained: see sections 14(1)(a) and 20(5) of the Act of 1978.

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Immunity racione materiae

This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of the business of the state while in office. While a head of state is serving, his status ensures him immunity. Once he is out of office, he is in the same position as any other state official and any immunity will be based upon the nature of the subject matter of the litigation. We were referred to a number of examples of civil proceedings against a former head of state where the validity of a claim to immunity turned, in whole or in part, on whether the transaction in question was one in which the defendant had acted in a public or a private capacity: *Ex-King Farouk of Egypt v. Christian Dior*, 24 I.L.R. 228; *Société Jean Dessès v. Prince*

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Farouk (1963) 65 I.L.R. 37; *Jiminez v. Aristeguieta*, 311 F.2d 547; *United States v. Noriega*, 117 F.3d 1206.

There would seem to be two explanations for immunity *ratione materiae*. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine. Two citations well illustrate the principle. 1. *Underhill v. Hernandez*, 168 U.S. 250, 252, *per Fuller C.J.*:

"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 immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact."

2. *Buck v. Attorney-General* [1965] Ch. 745, 770, *per Diplock L.J.*:

"As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, *videlicet*, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent: see *Duff Development Co. v. Kelantan Government* [1924] A.C. 797, 820. As was made clear in *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379, the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the *res* of the *res*

A judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity.”

B It is contended on behalf of the applicant that the question of whether an official is acting in a public capacity does not depend upon whether he is acting within the law of the state on whose behalf he purports to act, or even within the limits of international law. His conduct in an official capacity will, whether lawful or unlawful, be conduct of the state and the state will be entitled to assert immunity in respect of it. In the field of civil litigation these propositions are supported by authority. There are a number of instances where plaintiffs have impleaded states claiming damages for injuries inflicted by criminal conduct on the part of state officials which allegedly violated international law. In those proceedings it was of the essence of the plaintiffs’ case that the allegedly criminal conduct was conduct of the state and this was not generally in issue. What was in issue was whether the criminality of the conduct deprived the state of immunity and on that issue the plaintiffs failed. Counsel for the applicant provided us with an impressive, and depressing, list of such cases: *Saltany v. Reagan* (1988) 702 F.Supp. 319 (claims of assassination and terrorism); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (claim of torture); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (claim in respect of the Holocaust); *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536 (claim of torture); *Sampson v. Federal Republic of Germany* (1997) 975 F.Supp. 1108 (claim in respect of the Holocaust); *Smith v. Socialist People’s Libyan Arab Jamahiriya* (1995) 886 F.Supp. 306; (1996) 101 F.3d 239 (claim in respect of Lockerbie bombing); *Persinger v. Islamic Republic of Iran* (1984) 729 F.2d 835 (claim in relation to hostage-taking at the U.S. Embassy).

E It is to be observed that all but one of those cases involved decisions of courts exercising the federal jurisdiction of the United States, *Al-Adsani v. Government of Kuwait* being a decision of the Court of Appeal of this country. In each case immunity from civil suit was afforded by statute—in America, the Foreign Sovereign Immunities Act and, in England, the State Immunity Act 1978. In each case the court felt itself precluded by the clear words of the statute from acceding to the submission that state immunity would not protect against liability for conduct which infringed international law.

The vital issue

G The submission advanced on behalf of the respondent in respect of the effect of public international law can, I believe, be summarised as follows. (1) One state will not entertain judicial proceedings against a former head of state or other state official of another state in relation to conduct performed in his official capacity. (2) This rule applies even if the conduct amounts to a crime against international law. (3) This rule applies in relation to both civil and criminal proceedings.

H For the reasons that I have given and if one proceeds on the premise that Part I of the State Immunity Act 1978 correctly reflects current international law, I believe that the first two propositions are made out in relation to civil proceedings. The vital issue is the extent to which they

apply to the exercise of criminal jurisdiction in relation to the conduct that forms the basis of the request for extradition. This issue requires consideration of the nature of that jurisdiction.

A

The development of international criminal law

In the latter part of this century there has been developing a recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur. In *Oppenheim's International Law*, vol. I, p. 998 the authors commented:

B

“While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.”

C

D

The appellants, and those who have on this appeal been given leave to support them, contend that this passage, which appears verbatim in earlier editions, is out of date. They contend that international law now recognises a category of criminal conduct with the following characteristics. (1) It is so serious as to be of concern to all nations and not just to the state in which it occurs. (2) Individuals guilty of it incur criminal responsibility under international law. (3) There is universal jurisdiction in respect of it. This means that international law recognises the right of any state to prosecute an offender for it, regardless of where the criminal conduct took place. (4) No state immunity attaches in respect of any such prosecution.

E

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in or reflected by a considerable number of international instruments. Since the Second World War states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.

F

G

I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes—that is the right, under international law, of the courts of any state to prosecute

H

A for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or to attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.

B The principle of state immunity provides no bar to the exercise of criminal jurisdiction by an international tribunal, but the instruments creating such tribunals have tended, none the less, to make it plain that no exception from responsibility or immunity from process is to be enjoyed by a head of state or other state official. Thus the Charter of the Nuremberg Tribunal 1945 provides by article 7: "The official position of defendants, whether as head of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment." The Tokyo Charter of 1946, the Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993, the Statute of the International Criminal Tribunal for Rwanda 1994 and the Statute of the International Criminal Court 1998 all have provisions to like effect.

C Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities *ratione personae* that exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Suppression of the Crime of Genocide 1948, which provides: "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." Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to state immunity *ratione materiae*. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly would not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can coexist with them. The exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.

There can be no doubt that the conduct of which Senator Pinochet stands accused by Spain is criminal under international law. The Republic of Chile has accepted that torture is prohibited by international law and that the prohibition of torture has the character of jus cogens and of obligation erga omnes. It is further accepted that officially sanctioned torture is forbidden by international law. The information provided by Spain accuses Senator Pinochet not merely of having abused his powers as head of state by committing torture, but of subduing political opposition by a campaign of abduction, torture and murder that extended beyond the boundaries of Chile. When considering what is alleged, I do not believe that it is correct to attempt to analyse individual elements of this campaign and to identify some as being criminal under international law and others as not constituting international crimes. If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign.

It is only recently that the criminal courts of this country acquired jurisdiction, pursuant to section 134 of the Criminal Justice Act 1984, to prosecute Senator Pinochet for torture committed outside the territorial jurisdiction, provided that it was committed in the performance, or purported performance, of his official duties. Section 134 was passed to give effect to the rights and obligations of this country under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, to which the United Kingdom, Spain and Chile are all signatories. That Convention outlaws the infliction of torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity:" (article 1). Each state party is required to make such conduct criminal under its law, wherever committed. More pertinently, each state party is required to prosecute any person found within its jurisdiction who has committed such an offence, unless it extradites that person for trial for the offence in another state. The only conduct covered by this Convention is conduct which would be subject to immunity *ratione materiae*, if such immunity were applicable. The Convention is thus incompatible with the applicability of immunity *ratione materiae*. There are only two possibilities. One is that the states parties to the Convention proceeded on the premise that no immunity could exist *ratione materiae* in respect of torture, a crime contrary to international law. The other is that the states parties to the Convention expressly agreed that immunity *ratione materiae* should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture.

The State Immunity Act 1978

I have referred earlier to Part I of the State Immunity Act 1978, which does not apply to criminal proceedings. Part III of the Act, which is of general application, is headed "Miscellaneous and Supplementary." Under this Part, section 20 provides:

A “(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.”

B The Diplomatic Privileges Act 1964 was passed to give effect to the Vienna Convention on Diplomatic Relations of 1961. The preamble to the Convention records that “peoples of all nations from ancient times have recognised the status of diplomatic agents.” The Convention codifies long standing rules of public international law as to the privileges and immunities to be enjoyed by a diplomatic mission. The Act of 1964 makes applicable those articles of the Convention that are scheduled to the Act.

C These include article 29, which makes the person of a diplomatic agent immune from any form of detention and arrest, article 31 which confers on a diplomatic agent immunity from the criminal and civil jurisdiction of the receiving state and article 39, which includes the following provisions:

D “(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 continue to subsist.”

E The question arises of how, after the “necessary modifications,” these provisions should be applied to a head of state. All who have so far in these proceedings given judicial consideration to this problem have concluded that the provisions apply so as to confer the immunities enjoyed by a diplomat upon a head of state in relation to his actions wherever in the world they take place. This leads to the further conclusion that a former head of state continues to enjoy immunity in respect of acts committed “in the exercise of his functions” as head of state, wherever those acts occurred.

G For myself, I would not accord section 20 of the Act of 1978 such broad effect. It seems to me that it does no more than to equate the position of a head of state and his entourage visiting this country with that of a diplomatic mission within this country. Thus interpreted, section 20 accords with established principles of international law, is readily applicable and can appropriately be described as supplementary to the other Parts of the Act. As Lord Browne-Wilkinson has demonstrated, reference to the parliamentary history of the section discloses that this was precisely the original intention of section 20, for the section expressly provided that it applied to a head of state who was “in the United Kingdom at the invitation or with the consent of the Government of the

United Kingdom.” Those words were deleted by amendment. The mover of the amendment explained that the object of the amendment was to ensure that heads of state would be treated like heads of diplomatic missions “irrespective of presence in the United Kingdom.”

A

Senator Pinochet and Chile have contended that the effect of section 20, as amended, is to entitle Senator Pinochet to immunity in respect of any acts committed in the performance of his functions as head of state anywhere in the world, and that the conduct which forms the subject matter of the extradition proceedings, in so far as it occurred when Senator Pinochet was head of state, consisted of acts committed by him in performance of his functions as head of state.

B

If these submissions are correct, the Act of 1978 requires the English court to produce a result which is in conflict with international law and with our obligations under the Torture Convention. I do not believe that the submissions are correct, for the following reasons.

C

As I have explained, I do not consider that section 20 of the Act of 1978 has any application to conduct of a head of state outside the United Kingdom. Such conduct remains governed by the rules of public international law. Reference to the parliamentary history of the section, which I do not consider appropriate, serves merely to confuse what appears to me to be relatively clear.

D

If I am mistaken in this view and we are bound by the Act of 1978 to accord to Senator Pinochet immunity in respect of all acts committed “in performance of his functions as head of state,” I would not hold that the course of conduct alleged by Spain falls within that description. Article 3 of the Vienna Convention, which strangely is not one of those scheduled to the Act of 1964, defines the functions of a diplomatic mission as including “protecting in the receiving state the interests of the sending state and of its nationals, *within the limits permitted by international law.*” (The emphasis is mine.)

E

In so far as Part III of the Act of 1978 entitles a former head of state to immunity in respect of the performance of his official functions I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way one can reconcile, as one must seek to do, the provisions of the Act of 1978 with the requirements of public international law.

F

For these reasons, I would allow the appeal in respect of so much of the conduct alleged against Senator Pinochet as constitutes extradition crimes. I agree with Lord Hope as to the consequences which will follow as a result of the change in the scope of the case.

G

Appeal allowed to extent that extradition to proceed for offences of torture and conspiracy to torture occurring after 8 December 1988.

Solicitors: Crown Prosecution Service, Headquarters; Bindman & Partners; Kingsley Napley; Herbert Smith; Treasury Solicitor.

H

Annex 57

Explanatory Notes to Terrorism Act 2000, prepared by the United Kingdom Home Office
and the Northern Ireland Office (20 July 2000)

*Pursuant to Rules of the Court Article 50(2), this annex is
comprised of such extracts of the whole document as are
necessary for the purpose of the pleading. A copy of the
whole document has been deposited with the Registry.*

*These notes refer to the Terrorism Act 2000 (c.11)
which received Royal Assent on 20th July 2000*

TERRORISM ACT 2000

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Terrorism Act 2000, which received Royal Assent on 20 July 2000. They have been prepared by the Home Office and the Northern Ireland Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment none is given.

SUMMARY

3. The Act reforms and extends previous counter-terrorist legislation, and puts it largely on a permanent basis. The previous legislation concerned is:
 - the [Prevention of Terrorism \(Temporary Provisions\) Act 1989 \(c. 4\)](#) (“the PTA”);
 - the [Northern Ireland \(Emergency Provisions\) Act 1996 \(c. 22\)](#) (“the EPA”); and
 - sections 1 to 4 of the [Criminal Justice \(Terrorism and Conspiracy\) Act 1998 \(c. 40\)](#).
4. The Act builds on the proposals in the Government’s consultation document *Legislation against terrorism* (Cm 4178), published in December 1998. The consultation document in turn responded to Lord Lloyd of Berwick’s *Inquiry into legislation against terrorism* (Cm 3420), published in October 1996.
5. Previous counter-terrorist legislation provided a range of measures designed to prevent terrorism and support the investigation of terrorist crime. These fall into three broad categories: a power for the Secretary of State to proscribe terrorist organisations, backed up by a series of offences connected with such organisations (membership, fundraising etc); other specific offences connected with terrorism (such as fund-raising for terrorist purposes, training in the use of firearms for terrorist purposes, etc); and a range of police powers (powers of investigation, arrest, stop and search, detention, etc).
6. The Act repeals the PTA and re-enacts those of its provisions which remain necessary, with a number of modifications. The previous counter-terrorist legislation was subject to annual renewal by Parliament. Under the Act this will in general no longer be the case. The main provisions in the Act are to be permanent. There will, however, continue to be an annual report to Parliament on the working of the Act; this is required under section 126.
7. The EPA would have repealed itself on 24 August 2000. The consultation document expressed the Government’s hope that the special provision it makes for Northern Ireland might not be needed after that date, an objective to be kept under review in the light of developments in the security situation. The Government takes the view that the time is not yet right to remove all of these provisions. Part VII of the Act therefore

*These notes refer to the Terrorism Act 2000 (c.11)
which received Royal Assent on 20th July 2000*

provides additional temporary measures for Northern Ireland only. These are subject to annual renewal and are time-limited to 5 years.

8. The previous counter-terrorist legislation was originally designed in response to terrorism connected with the affairs of Northern Ireland (“Irish terrorism”), and some of its provisions had subsequently been extended to certain categories of international terrorism. It did not apply to any other terrorism connected with UK affairs (“domestic terrorism”). Under the Act these restrictions have been lifted, so that counter-terrorist measures are to be applicable to all forms of terrorism: Irish, international, and domestic.

OVERVIEW

9. The Act’s Parts and Schedules are as follows.
 - Part I (Introductory) sets out the definition of terrorism for the purposes of the Act, repeals the PTA and, with Schedule 1, deals with the continuation of certain temporary provisions of the EPA until Part VII of the Act is brought into force.
 - Part II (Proscribed organisations) provides a power for the Secretary of State to proscribe organisations and sets out the associated offences. Schedule 2 lists the organisations which are currently proscribed and Schedule 3 details the functions of the Proscribed Organisations Appeal Commission (POAC) which the Act sets up.
 - Part III (Terrorist property) provides offences relating to fund-raising and other kinds of financial support for terrorism, together with power for a court to order forfeiture of any money or other property connected with the offences. Schedule 4 gives details of forfeiture procedures.
 - Part IV (Terrorist investigations) provides the police with a power to set up cordons. Schedule 5 sets out further powers to investigate terrorism by searching premises and seeking explanation of items found; and Schedule 6 provides a power to investigate terrorist finance based on an existing Northern Ireland power to investigate proceeds of crime.
 - Part V (Counter-terrorist powers) provides the police with powers to arrest and detain suspected terrorists, and broader powers to stop and search vehicles and pedestrians, and to impose parking restrictions. Schedule 7 provides examination powers at ports and borders; and Schedule 8 provides for the treatment of suspects who are detained and for judicial extension of the initial period of detention.
 - Part VI (Miscellaneous) provides ancillary offences of
 - weapons training for terrorist purposes, including recruitment for such training,
 - directing a terrorist organisation,
 - possessing articles for terrorist purposes,
 - possessing information for terrorist purposes, and
 - incitement of overseas terrorism.

Part VI also includes provisions on extraterritorial jurisdiction and extradition which will enable the UK to ratify the UN Conventions for the Suppression of Terrorist Bombings and for the Suppression of the Financing of Terrorism.

- Part VII (Northern Ireland) provides for the system of non-jury trials in Northern Ireland for the offences listed in Schedule 9. Together with Schedules 10–13, this Part also provides additional police and Army powers for Northern Ireland, and regulates the private security industry in Northern Ireland.

- Part VIII (General) contains further technical provisions and includes a list of terms defined in the Act. Schedule 14 provides general powers for police, customs and immigration officers including powers for them to exchange information. Schedules 15 and 16 list consequential amendments and repeals.

COMMENTARY

Part I: Introductory

Section 1: Terrorism: interpretation

10. Under the PTA, terrorism “means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear” (section 20). The definition in the PTA is limited in that the powers and offences in that Act only apply to terrorism connected with the affairs of Northern Ireland (“Irish terrorism”) or Irish and international terrorism. The Act, as suggested in the consultation document, adopts a wider definition, recognising that terrorism may have religious or ideological as well as political motivation, and covering actions which might not be violent in themselves but which can, in a modern society, have a devastating impact. These could include interfering with the supply of water or power where life, health or safety may be put at risk. *Subsection (2)(e)* covers the disrupting of key computer systems. *Subsection (3)* provides that where action involves firearms or explosives, it does not have to be designed to influence the government or to intimidate the public or a section of the public to be included in the definition. This is to ensure that, for instance, the assassination of key individuals is covered.
11. *Subsection (4)* provides for the definition to cover terrorism not only within the United Kingdom but throughout the world. This is implicit in the PTA definition but the Act makes it explicit.

Section 2: Temporary legislation

12. *Subsection (1)* repeals the PTA and EPA. *Subsection (2)*, together with Schedule 1, preserves certain provisions of the EPA, in some cases with amendment, until the date on which Part VII (Northern Ireland) of the Act is brought into force: see further notes on Schedule 1 below.

Part II: Proscribed Organisations

13. Part II is based on Part I of the PTA (which has effect in Great Britain only) and on sections 30–31 of the EPA (which have effect in Northern Ireland only). The proscription regime under the Act differs from those it replaces as follows:
 - The PTA and EPA provide separate proscription regimes for Great Britain and Northern Ireland. Under the Act proscription will no longer be specific to Northern Ireland or Great Britain, but will apply throughout the whole of the UK.
 - Under the PTA and EPA proscription is only applicable to organisations concerned in Irish terrorism. Under the Act it will also be possible to proscribe organisations concerned in international or domestic terrorism.
 - Under the PTA and EPA an organisation or an affected individual wishing to challenge a proscription can only do so in the UK via judicial review (no proscribed organisation has ever done this). Under the Act, organisations and individuals will be able to apply to the Secretary of State for deproscription and, if their application is refused, to appeal to the Proscribed Organisations Appeal Commission (“POAC”; see below).

Sections 62–64: Terrorist bombing and finance offences

57. These sections are included to enable the UK to ratify the UN Convention for the Suppression of Terrorist Bombings and the UN Convention for the Suppression of the Financing of Terrorism. They will enable the UK to meet its obligations under the “extradite or prosecute” provisions of these Conventions, which are common to earlier international counter-terrorism Conventions.

Part VII: Northern Ireland

Section 65: Scheduled offence: interpretation

58. This section and Schedule 9 define which offences qualify for special treatment because they are terrorist offences, or are offences related to the situation in Northern Ireland; it also provides for the concept “scheduled offence” and lists them; and gives the Attorney General discretion in certain cases to certify offences out of the list. The section also enables the Secretary of State to add, or remove, by affirmative resolution procedure any offences from Part I or II or amend Part I or II.

Section 66: Preliminary inquiry

59. This section is concerned with committal proceedings in the Magistrates’ Court. It allows the prosecutor to request a preliminary inquiry in relation to scheduled offences. The provision was introduced in 1975 following the Gardiner Report, as a means of dealing with the problem of non-recognition of the court system by many defendants. In ordinary law a preliminary inquiry may be held only if the prosecutor requests it and the accused does not object. The effect of this section is that the alternative less expeditious preliminary investigation can be avoided. However, if the court considers that a preliminary investigation is in the interest of justice, it will not accede to the prosecution request for a preliminary inquiry. While committal proceedings remain part of the system, this section is useful as a means of keeping delays to a minimum.

Section 67: Limitation of power to grant bail

60. This section provides that in the case of a scheduled offence bail applications must be dealt with by a High Court judge or a judge of the Court of Appeal. The provision owes its origin to the fact that prior to its introduction, when magistrates were dealing with bail applications in terrorist cases, the courts became crowded with persons who tried to intimidate the court and who created a threatening atmosphere. Under the ordinary law there is a presumption, as opposed to a discretion, that bail will be granted, subject to similar considerations.

Section 68: Bail: legal aid

61. This provision is peculiar to scheduled offences as a consequence of the special arrangements provided for them. The arrangements are such that the defendant may make application for legal aid directly to the High Court which is hearing the bail application rather than through the High Court to the Law Society, which is the procedure for legal aid in ordinary criminal cases.

Section 69: Maximum period of remand in custody

62. This section provides that in the case of a scheduled offence, the maximum period of remand in custody will be 28 days. The justification for this dates back to Sir George Baker’s report in 1984 (Cm 9222, paragraphs 84–88). He reported that to bring a person charged with a scheduled offence before a magistrate every seven days was meaningless, especially since the magistrates’ court was precluded from granting bail in the majority of scheduled cases.

Annex 58

Foreign Affairs Commission of the French National Assembly, Document Assemblée Nationale No. 3367, *Rapport No. 3367 de M. René Mangin, fait au nom de la commission des affaires étrangères sur la projet de loi, adopté par le Sénat, autorisant la ratification de la convention internationale pour la répression du financement du terrorisme* (7 November 2001)

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N° 3367

ASSEMBLÉE NATIONALE

CONSTITUTION DU 4 OCTOBRE 1958

ONZIÈME LÉGISLATURE

Enregistré à la Présidence de l'Assemblée nationale le 7 novembre 2001.

RAPPORT

FAIT

AU NOM DE LA COMMISSION DES AFFAIRES ÉTRANGÈRES ⁽¹⁾ SUR LE PROJET DE LOI, ADOPTÉ PAR LE SÉNAT, *autorisant la ratification de la convention internationale pour la répression du financement du terrorisme*,

PAR M. RENÉ MANGIN,

Député

--

(1) La composition de cette commission figure au verso de la présente page.

Voir les numéros :

Sénat : **259, 355** (2000-2001) et T.A. **3** (2001-2002)

Assemblée nationale : **3330**

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Mesdames, Messieurs,

Les fondements de la lutte contre la criminalité financière internationale ont en permanence évolué. A la fin des années 1980, la menace principale résidait dans l'argent

de la drogue, et les risques qu'il faisait courir, en termes de stabilité, à certaines régions du monde en développement - principalement le continent sud-américain - mais aussi aux économies occidentales, comme la Suisse, indirectement corrompues, aux sens propre et figuré, par l'afflux de cette manne financière. Vers le milieu des années 1990, la lutte contre le blanchiment de l'argent a eu plus largement comme visée de s'attaquer aux phénomènes criminels organisés (prostitution, trafic d'êtres humains, d'armes...) et à l'évasion fiscale. A la fin de ces mêmes années 1990, les scandales politico-financiers (affaire Elf, financement de la CDU, avatars du clan Eltsine...) y ont ajouté la lutte contre la corruption.

Les événements du 11 septembre 2001 ont donné une actualité nouvelle à la lutte contre cette forme de criminalité. Les Etats ont redécouvert, mais un peu tard, à l'occasion des enquêtes sur le financement de Al Qaida, l'organisation de Ben Laden, la possibilité, à travers les circuits financiers, de remonter au c_ur des organisations criminelles, voire de les empêcher de nuire.

L'utilité de la présente Convention, que les attentats récents nous conduisent à ratifier rapidement, a été confortée *a posteriori*. L'initiative de cette Convention revient à la France. Notre pays avait initié ce projet à l'été 1998, suite aux attentats contre les ambassades américaines de Nairobi (Kenya) et de Dar Es Salaam (Tanzanie). Les négociations ont été relativement rapides puisque le texte définitif fut adopté dès le 9 décembre 1999 par l'Assemblée générale des Nations unies. La Convention a été ouverte à la signature le 10 janvier 2000, date à laquelle la France l'a signée.

Ce n'est pas la première convention que les Nations unies consacrent au terrorisme. On recense déjà onze conventions « onusiennes » sur ce sujet, dont la première remonte à 1963. Mais ces conventions se préoccupaient avant tout d'organiser la lutte contre les diverses formes et manifestations du terrorisme (détournements d'avions, prises d'otages...). Aujourd'hui, l'angle d'attaque est modifié ; il s'agit de compléter ces modes traditionnels de lutte par un objectif de démantèlement des réseaux financiers.

Je tiens tout particulièrement à remercier M. Jean-François Thony, Conseiller à la Cour d'appel de Versailles et ancien directeur du programme mondial contre le blanchiment de l'argent, dont l'expertise m'a été très précieuse lors de la préparation de ce rapport.

I - UNE CONVENTION NÉCESSAIRE

A - La réalité financière du terrorisme

1) *Les masses en jeu*

Il est très difficile de chiffrer les masses financières servant au financement du terrorisme ; on ne peut procéder en ce domaine que par approximations.

Les experts ont créé un nouvel instrument statistique appelé Produit criminel brut (PCB) qui représente le chiffre d'affaires mondial annuel de l'ensemble des activités illicites. Le FMI estime le montant de ce PCB annuel entre 500 et 1 500 milliards de dollars. Le GAFI évoque plus volontiers quant à lui 1 000 milliards de dollars. A titre de comparaison, le PIB de la France était estimé en 2000 à 1 333 milliards de dollars.

D'autres experts estiment pour leur part que la définition ci-dessus est trop large car elle englobe à la fois les vols d'objets courants - comme les automobiles - les revenus cachés au fisc et les revenus du crime organisé. Ils préconisent des mesures plus restrictives limitées à l'argent du crime organisé et la finance terroriste. On atteint alors des chiffres plus « raisonnables », qui malgré tout font frémir, de l'ordre de 100 milliards par an.

Tous ces chiffres doivent bien sûr être pris avec beaucoup de prudence car il devient de plus en plus difficile de mesurer le flux de l'argent sale. Au cours de ces dernières années, les organisations criminelles ont adapté leurs méthodes en tenant compte des mesures prises par les autorités pour lutter contre le blanchiment. Les grosses transactions criminelles n'impliquent plus obligatoirement de paiements liquides, dont l'intégration dans les circuits financiers constitue une étape autorisant une détection ; elles donnent désormais de plus en plus souvent lieu à des virements de compte à compte sur des banques offshore ou s'effectuent par le biais d'échanges de marchandises : armes ou équipements électroniques contre drogues par exemple¹.

Il est assez difficile d'établir précisément une géographie de l'argent du terrorisme. Beaucoup souhaiteraient limiter cette zone à quelques pays complaisants des Caraïbes, d'Amérique centrale et d'Asie du Sud-Est. La réalité est plus complexe et c'est toute l'originalité et toute la force des rapports de notre collègue Arnaud Montebourg, au nom de la Mission parlementaire d'information présidée par M. Vincent Peillon, de démontrer, preuves à l'appui, que les pays européens sont utilisés par les trafiquants de toutes natures. Les enquêtes ont mis à jour la présence d'Al Qaida dans soixante pays du monde. La comparaison des listes noires publiées par les diverses institutions - l'ONU, le GAFI, le Département d'Etat américain...- illustre souvent de manière caricaturale que ces listes sont en fait le fruit d'un subtil équilibre entre réalisme politique, intérêts croisés des Etats et lutte contre le blanchiment.

2) Les sources du financement du terrorisme

Ce qui est sûr et certain aujourd'hui, c'est que le lien entre activités criminelles et terrorisme se resserre.

Dans les années 1970-1980, l'essentiel de l'argent du terrorisme international provenait des Etats, en l'occurrence et pour l'essentiel la Libye, la Syrie et l'Irak. Désormais, les sources sont beaucoup plus diversifiées. Celles représentées par le grand banditisme occupent une place de plus en plus importante.

Au sein de la criminalité de droit commun, trois types d'activités semblent particulièrement utilisées pour le financement du terrorisme : le trafic de drogue et de matières premières, les prises d'otages ainsi que le racket ou le hold-up.

Oussama Ben Laden est soupçonné d'avoir tiré d'importants profits du trafic d'opium, dont l'Afghanistan est le plus grand producteur mondial. La drogue représente également des ressources importantes pour le Sentier lumineux au Pérou. De manière générale, le trafic de matières premières, et notamment celui des diamants et des pierres précieuses, est très apprécié des terroristes car il s'agit de ressources faciles à exploiter, à stocker, à dissimuler et dont la provenance est difficile à établir. C'est un argument supplémentaire pour la proposition que j'avais formulée dans mon rapport consacré aux sanctions internationales d'instaurer une traçabilité sur les diamants et les pierres précieuses².

Les enlèvements et les prises d'otages sont de plus en plus facilités par le tourisme. Le groupe Abu Sayyaf, qui rassemble de petits groupes islamistes terroristes, s'est ainsi spécialisé dans l'enlèvement contre rançon et aurait ainsi réussi à amasser un trésor de guerre évalué à plus de 100 millions de francs.

Le racket ou le hold-up sont également très utilisés. La fatwa promulguée dans les années 1970 par le Cheikh Omar Abdel Rahman, emprisonné aux Etats-Unis après l'attentat contre le World Trade Center de 1993, rendait licite, en cas de besoin, le vol à main armée, assassinat compris, contre « *les Chrétiens mécréants et l'Etat impie* ». On se souvient également que la fraction « armée rouge » a pratiqué des hold-up politiques qualifiés « *d'expropriations prolétariennes* ».

D'autres sources de financement sont également utilisées comme la contrefaçon commerciale ou le trafic de médicaments, notamment des drogues de synthèse (ectasy, kétamine et autres amphétamines..)...

Mais les sources du financement du terrorisme peuvent être également légales. Il semblerait que Oussama Ben Laden ait été ainsi financé grâce à des dons de centaines de milliers de Musulmans, souvent de bonne foi, en faveur d'ONG islamiques « charitables ». Selon un informateur saoudien cité par l'Associated Press, « *Jusqu'aux attaques du 11 septembre, les dons des personnes privées collectés en Arabie saoudite pour Ben Laden s'élevaient à plus de un million de dollars par mois* ». Dans ce cas, le problème consiste à « noircir » l'argent légal : des sommes importantes disparaissent ainsi chaque année des comptabilités publiques nationales.

De fait, l'imbrication entre les différents modes et acteurs liés au financement du terrorisme est de plus en plus étroite. Des liens complexes s'établissent entre organisations terroristes, régimes politiques, organisations mafieuses, guérillas, organisations nationalistes ou organisations fondamentalistes religieuses, liens qu'il est souvent difficile de démêler.

L'expérience acquise dans la lutte contre le blanchiment du crime peut être utilisée pour combattre le financement du terrorisme. Certes, une organisation terroriste n'a pas pour finalité, comme une organisation criminelle classique, le profit mais dans les deux cas, ces organisations sont vulnérables sur le plan financier quand elles se mettent « à l'air libre » pour leur opérations financières³.

B - Un dispositif traditionnel avec quelques audaces

La présente Convention constitue un bon texte. Même s'il fait appel à des dispositifs somme toute traditionnels, il contient également quelques avancées intéressantes.

1) L'objectif de prévention et de répression du financement du terrorisme

La Convention oblige les Etats à mettre en place un régime de répression efficace contre le financement du terrorisme (*article 4*). Elle engage les Etats parties à rendre possible dans leur droit interne la mise en cause de la responsabilité des personnes morales compromises dans le financement du terrorisme (*article 5*). Elle oblige les Etats à adopter les mesures nécessaires à l'identification, au gel, à la saisie, ainsi qu'à la confiscation des fonds visés, qui pourront servir à indemniser les victimes des attentats et leurs familles (*article 8*).

Les avancées les plus notables de cette Convention, en dehors de l'harmonisation des infractions et la mise en œuvre d'une stratégie commune par tous les Etats parties, concernent à notre sens deux points particuliers : la définition particulièrement large de l'infraction et la remise en cause des sociétés offshore.

La définition retenue par la Convention de l'infraction de financement du terrorisme est particulièrement large puisqu'elle recouvre l'acte de fournir ou de collecter des fonds en vue d'un acte terroriste, et que les fonds en question peuvent être de toute nature et avoir une origine légale. Cela dépasse en conséquence le seul cadre du blanchiment. La Convention vise aussi bien les « donneurs d'ordre » que leurs complices et les autres contributeurs, y compris les personnes morales, comme les associations ou les entreprises. Pour que l'infraction soit constituée, il n'est pas nécessaire que les fonds aient été utilisés, il suffit que des fonds aient été réunis dans le but de commettre un acte terroriste.

La définition d'un acte terroriste prévue par la Convention renvoie aux traités anti-terroristes annexés à la Convention ou à « *tout autre acte destiné à tuer ou blesser grièvement un civil, ou toute autre personne qui ne participe pas directement aux hostilités dans une situation de conflit armé, lorsque, par sa nature et son contexte, cet acte vise à intimider une population et à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque* »(article 2).

Un autre aspect important de cette Convention tient à sa volonté de lutter contre la constitution de sociétés-écrans qui dérogent à l'ensemble des standards habituels en matière de constitution de sociétés commerciales : identification des organes de direction, constitution d'un capital effectivement libéré, publication des comptes annuels... Il est prévu dans la Convention que les Etats exigent « *que les institutions financières prennent, si nécessaire, des mesures pour vérifier l'existence et la structure juridique du client en obtenant d'un registre public ou du client, ou des deux, une preuve de la constitution en société comprenant notamment des renseignements concernant le nom du client, sa forme juridique, son adresse, ses dirigeants et les dispositions régissant le pouvoir d'engager la personne morale* » (article 18-b-ii).

2) L'approfondissement d'une coopération judiciaire

La coopération dans le cadre des demandes d'entraide judiciaire ou policière d'Etats étrangers est un élément important de lutte contre le financement du terrorisme. Selon un magistrat français auprès de l'Office européen de la lutte antifraude « *l'activité criminelle est dispersée dans de nombreux pays, alors que les justices sont enfermées dans les souverainetés et que les juges butent sur les frontières comme les mouches sur la vitre* ». Il est donc nécessaire d'empêcher les Etats de se retrancher derrière des artifices juridiques ou procéduriers pour refuser de donner suite à des demandes d'enquête au motif que la requête s'oppose aux règles du droit ou de la procédure interne au pays.

Selon la Convention, les Etats s'engagent à s'accorder « *l'entraide judiciaire la plus large possible* ». Elle prévoit que ni le secret bancaire (article 12), ni le caractère fiscal d'une infraction (article 13) ne pourront être invoqués par un Etat pour refuser une demande d'entraide ou d'extradition.

Aujourd'hui la plupart des pays pratiquent un secret bancaire relatif, qui peut s'assimiler à la notion de confidentialité, et qui autorise habituellement la fourniture d'informations par les banques dans certains cas, en particulier à la requête d'une autorité judiciaire dans le cadre d'une enquête criminelle, ou dans le cadre de la législation sur la déclaration de soupçons. Certains pays en revanche, comme par exemple les Philippines ou le Liban - qui ne sont pas signataires de cette Convention - pratiquent un secret bancaire absolu qui interdit la levée du secret même sur réquisition judiciaire.

La Convention prévoit également dans son article 18 tout un ensemble de dispositions directement inspirées des recommandations du groupe d'action financière internationale, le GAFI. Ces mesures reposent pour l'essentiel sur la coopération des institutions financières, incitées à surveiller plus étroitement et à signaler sans délai toute opération suspecte.

Au total, ces clauses déjà contenues dans d'autres conventions internationales ont peu de probabilités de révolutionner le monde de la coopération judiciaire. Elles n'en demeurent pas moins utiles. Elles devraient par exemple conduire la Suisse et le Luxembourg, qui ont signé cette Convention, à abandonner leur refus de demandes d'entraide, lorsque celles-ci interviennent dans le cadre d'une enquête sur des infractions fiscales.

II - UNE CONVENTION A APPROFONDIR

Il est sans doute assez audacieux de prétendre porter dès aujourd'hui un jugement sur l'efficacité d'une telle convention, alors même que cette dernière n'est pas encore entrée en vigueur, celle-ci étant subordonnée à l'adhésion de vingt-deux Etats (*article 26*). Si l'Assemblée nationale accepte d'autoriser cette ratification, la France sera le onzième Etat à y adhérer. A la date du 12 novembre 2001, cette Convention a été signée par 97 Etats mais ratifiée uniquement par dix d'entre eux (voir liste en annexe). Alors que l'adoption s'était effectuée dans un relatif anonymat (seulement 7 pays avaient signé la Convention le premier jour), les signatures se sont accélérées depuis le 11 septembre. Soit de nombreux pays ont été convaincus de la pertinence des dispositions de cette convention par les attentats du 11 septembre, soit plus prosaïquement, ils veulent éviter un effet d'image désastreux résultant d'un refus de signature.

La stratégie qui consiste à connaître et démêler les écheveaux financiers des organisations terroristes afin de mieux les combattre est une stratégie potentiellement porteuse, surtout à l'encontre des organisations puissantes et ramifiées contre lesquelles les modes de répression traditionnels ont montré leurs limites. Toutefois elle se heurte aux difficultés relatives à l'opacité financière qui existe encore en dépit des mesures mises en place depuis douze ans par le Groupe d'action financière contre le blanchiment des capitaux (GAFI).

A - Des failles persistantes

Il ne saurait y avoir de transparence financière sans la volonté résolue de lutter contre les deux obstacles persistants que constituent les centres offshore et les insuffisances de la coopération judiciaire.

1) Les centres offshore

Le problème des centres financiers offshore⁴ est ancien et constitue une assurance d'opacité pour l'argent qui emprunte ces chemins. Force est de constater que ces centres font l'objet, en dépit de déclarations indignées, d'une tolérance certaine de la part des mêmes gouvernements qui font de la lutte contre les circuits financiers clandestins une priorité. La raison est peut-être à chercher dans les usages parapublics de ces centres.

Le montage offshore est par exemple utilisé dans le cadre de transactions commerciales internationales pour faire échapper des marchés à l'impôt sur les bénéfices et assurer ainsi une meilleure compétitivité, ou bien pour contourner les embargos, financer des mouvements de guérillas sans que cela apparaisse dans les comptabilités publiques, ou encore pour financer des partis politiques, assurer certaines ristournes à des chefs d'Etat en remerciement de l'obtention de marchés publics ou de licences d'exploitation pétrolière... Il est moins étonnant de constater que les pays de la zone GAFI laissent ainsi leurs institutions financières et bancaires multiplier les filiales et agences dans les centres offshore. Ainsi que l'écrit Jean-François Thony : *« ces agences sous le soleil permettent aux sièges sociaux des banques d'afficher une politique de transparence financière et de lutte contre le blanchiment la plus stricte dans son pays d'origine et de laisser effectuer ses opérations à risque, son « dirty business » pour parler autrement, par une filiale dans un pays dans lequel tous les coups sont permis. Il y a là une énorme zone de non-droit dans la législation des pays occidentaux sur laquelle le GAFI ne s'est curieusement jamais penché sérieusement »*.

2) La coopération judiciaire

Nous avons déjà souligné l'importance de la coopération judiciaire dans le cadre de la lutte contre l'argent sale. Les experts ont parfois coutume de parler du « triangle des Bermudes » pour parler des pays dits « non-coopératifs » qui ne donnent, sans le faire savoir officiellement, aucune suite aux demandes d'entraide judiciaire : celles-ci

disparaissent mystérieusement sans laisser de trace. Cette technique permet à ces Etats d'afficher en façade un minimum de bonne volonté tout en continuant à exercer des pratiques les assimilant à des paradis financiers.

La coopération judiciaire est souvent difficile entre pays de bonne volonté, comme *a priori* ceux de l'Union européenne. L'appel dit de Genève lancé en 1996 par 7 magistrats européens voulait attirer l'attention sur l'insuffisance des instruments internationaux existants qui ne permettaient pas selon les signataires des résultats satisfaisants en matière de lutte contre les formes de criminalité internationale. Elle demeure aujourd'hui inexistante avec nombre de pays plus lointains, et de culture différente.

Je suis convaincu que les futurs progrès dans la lutte contre les systèmes criminels internationaux passent aujourd'hui par la levée de cette hypocrisie d'Etat. J'ai déjà souligné ci-dessus l'écart entre les pays ayant signé cette Convention et ceux l'ayant ratifiée. Parmi ces derniers, combien introduiront dans leur législation l'ensemble des recommandations contenues dans le texte ?

B -Pour une meilleure transparence financière

1) Des résultats médiocres

Force est de constater que les résultats aujourd'hui obtenus dans la lutte contre le blanchiment sont plutôt médiocres : peu de poursuites sont lancées sur cette base, peu d'organisations ont été démantelées grâce à ces actions, peu d'avoirs ont été confisqués. Il risque d'en être de même dans quelques années quant au bilan de la présente Convention.

Il existe bien évidemment des problèmes de volonté. On ne peut à la fois placer la barre très haut, être économe en hommes et moyens techniques, et regretter que cela ne marche pas. A l'évidence, le renseignement financier n'est pas suffisamment développé dans nos pays. Mais il existe aussi des problèmes de méthode.

2) La nécessité d'un dialogue constructif

Le choix a été fait par les pays occidentaux de privilégier l'action du GAFI. Rappelons que ce dernier a été créé au sommet du G7 à Paris en 1989 ; c'est un organisme intergouvernemental dont l'objectif est de concevoir et de promouvoir des stratégies de lutte contre le blanchiment des capitaux. Au lendemain des attentats du 11 septembre, le G7 a élargi sa compétence à la lutte contre le financement du terrorisme. Le GAFI est composé aujourd'hui de 29 pays, pour la plupart membres de l'OCDE.

Si les quelque quarante recommandations du GAFI, élaborées pour constituer un cadre mondial de lutte contre le blanchiment, sont difficilement acceptées, et par conséquent appliquées, par un certain nombre d'Etats à l'évidence concernés, c'est que celles-ci apparaissent trop souvent comme des politiques dictées par un groupe de pays riches, ayant taillé des règles à sa mesure et voulant les imposer aux autres. La Suisse, le Luxembourg, le Royaume-Uni, dont les activités ont été à juste raison dénoncées par la mission parlementaire sur le blanchiment, font partie du GAFI. A l'évidence, il existe encore beaucoup de travail à l'intérieur des pays du GAFI et se pose la crédibilité de préceptes que ces pays veulent imposer aux autres sans toujours les respecter eux-mêmes.

Utiliser le GAFI de manière hégémonique m'apparaît être comme une erreur à la fois diplomatique et stratégique. C'est donner aux Etats les plus pauvres non-membres du GAFI, et ayant fondé une part, sinon la totalité, de leur développement, sur des systèmes d'ingénierie financière et bancaire, l'impression de vouloir une fois encore faire prévaloir les intérêts des pays riches sous prétexte de lutte contre le terrorisme. Une nouvelle architecture internationale reste à construire qui distinguerait les différents niveaux

d'élaboration, de mise en _uvre et de contrôle des politiques de lutte contre la criminalité financière. On pourrait par exemple imaginer de créer pour le terrorisme ce qui existe pour les drogues avec l'Organe international de contrôle des stupéfiants (OICS), dont les membres sont élus par le Conseil économique et social de l'ONU. L'OICS demeure cependant indépendant des gouvernements et de l'ONU.

L'ONU a d'ores et déjà décidé de s'impliquer davantage dans la lutte contre le terrorisme. La résolution 1373 du Conseil de sécurité, adoptée à l'unanimité le 28 septembre 2001, demande notamment aux Etats de geler sans attendre les fonds des personnes et entités liées aux actes de terrorisme et d'interdire à leurs nationaux de mettre des ressources financières à la disposition des personnes qui commettent, tentent de commettre, facilitent ou participent à des actes de terrorisme. Les Etats ont été invités à faire sous 90 jours rapport des mesures prises pour l'application de cette résolution. Un comité anti-terroriste a été créé au sein du Conseil de sécurité, dont il comprend tous les membres, afin de veiller à l'application de la résolution 1373 et recevoir les rapports. Cette initiative est la bienvenue ; il est à espérer que cette mobilisation se maintiendra et s'approfondira au fil des mois.

Quelle que soit la solution retenue, je reste convaincu que toute avancée ne pourra se faire dans l'avenir que par l'établissement d'un dialogue constructif avec les Etats concernés et en leur offrant des alternatives crédibles à l'abandon de la filière offshore plutôt que par l'établissement de règles imposées par les pays les plus riches de la planète, rarement au-dessus de tout soupçon.

CONCLUSION

La présente Convention, qui est soumise aujourd'hui à notre approbation, est porteuse d'avancées, d'autant qu'elle n'a pas été prise dans l'urgence mais de manière réfléchie et prémonitoire. J'ai pu dans ce rapport exprimer certains doutes quant à son efficacité et essayer d'indiquer quelques pistes pour surmonter les obstacles à son application. Je reste persuadé néanmoins que dans l'attente de l'expression d'une véritable solidarité politique dans la lutte contre le terrorisme, la voie des « petits pas » techniques demeurent la seule praticable. C'est la raison pour laquelle je vous convie à adopter ce projet de loi.

EXAMEN EN COMMISSION

La Commission a examiné le présent projet de loi au cours de sa réunion du mardi 6 novembre 2001, sur le rapport de M. René Mangin.

Après l'exposé du Rapporteur, **M. Pierre Brana, Président**, a souhaité connaître le nombre des pays qui avaient signé et ratifié cette Convention.

M. René Mangin a répondu que 97 pays avaient signé cette Convention et que jusqu'à maintenant dix d'entre eux l'avaient ratifiée.

Suivant les conclusions du Rapporteur, *la Commission a adopté le projet de loi (n° 3330).*

*

* *

La Commission vous demande donc d'*adopter*, dans les conditions prévues à l'article 128 du Règlement, le présent projet de loi.

NB : Le texte de la convention internationale figure en annexe au projet de loi (n° 3330).

ANNEXE - ÉTAT DES SIGNATURES ET DES RATIFICATIONS

**3367. - Rapport de M. René Mangin (COMMISSION DES AFFAIRES ÉTRANGÈRES)
SUR LE PROJET DE LOI, ADOPTÉ PAR LE SÉNAT : ratification de la convention
internationale pour la répression du financement du terrorisme (commission des affaires
étrangères)**

1 Voir notamment la présentation, devant l'IFRI, de M. Jean-François Thony sur les pratiques financières illégales ; cette présentation est disponible sur le site Internet de l'IFRI.

2 Voir René Mangin, *ONU : les sanctions en question*, Rapport d'information n°3203, 2001.

3 Voir Jean-Charles Brisard et Guillaume Dasquié in *Ben Laden : la vérité interdite*, Denoël, 2001 et notamment son chapitre 8 sur les réseaux saoudiens du financement de Ben Laden.

4 Voir notamment, Jean-François Thony, « le monde offshore, la mondialisation et le blanchiment de l'argent du crime » dans le prochain rapport moral sur l'argent dans le monde.

Annex 59

*United States Senate Executive Report No. 107-2, 107th Congress, First Session, U.S.
Government Publishing Office (27 November 2001)*

*Pursuant to Rules of the Court Article 50(2), this annex is
comprised of such extracts of the whole document as are
necessary for the purpose of the pleading. A copy of the
whole document has been deposited with the Registry.*

ANTI-TERRORISM CONVENTIONS

NOVEMBER 27, 2001.—Ordered to be printed.

Mr. BIDEN from the Committee on Foreign Relations
submitted the following

REPORT

[To accompany Treaty Docs. 106-6 and 106-49]

The Committee on Foreign Relations, to which was referred the International Convention for the Suppression of Terrorist Bombings (Treaty Doc. 106-6) and the International Convention for the Suppression of the Financing of Terrorism (Treaty Doc. 106-49), having considered the same, reports favorably thereon with reservations, understandings, and conditions as indicated in the resolutions of advice and consent, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolutions of advice and consent to ratification.

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I. PURPOSE

These two anti-terrorism conventions address two specific aspects of terrorist conduct: terrorist bombings and the financing of terrorism. Their objective is to require the United States and other States Parties to criminalize such activities and to cooperate with each other in extraditing or prosecuting those suspected of such activities.

on the idea that States must enforce, under national law, international legal prohibitions. The indirect enforcement system depends on national criminal justice systems to investigate, apprehend, prosecute, and adjudicate accused persons within their jurisdictions and to punish those found guilty. It also depends on the cooperation of States to extradite and to provide legal assistance to other States investigating cases or seeking to apprehend persons accused or found guilty of international crimes.

The problem with the indirect law enforcement system is that many of the nations of greatest concern lack capabilities to undertake their responsibilities. Therefore, prohibitions against development of terrorist capabilities should be supported, not only by legal assistance and cooperation obligations, but by enhancing the direct law enforcement capabilities of relevant international institutions, notably policing institutions and those which oversee the international traffic in goods.

As already mentioned, Interpol (and Europol) should be strengthened both in terms of legal authority as well as technical and financial capabilities. The World Customs Organization, the World Health Organization, and various UN agencies should, along with the OPCW and IAEA, be integrated into an anti-terrorism network capable of obtaining and analyzing information and of investigating suspicious activities. Regional organizations, especially in regions where terrorism has concentrated, should also be included in this network.

Upcoming Opportunities

The most important near-term opportunity for the international community to develop mechanisms that can make a positive contribution to defeating terrorism is the Review Conference for the Biological Weapons Convention. Unfortunately, biological weapons have become a weapon of choice for terrorists. Yet, the BWC is entirely inadequate to counter this horrifying threat. Efforts to produce a verification Protocol ended by producing a system that would have put significant burdens on legitimate enterprise without markedly improving capabilities to prevent, detect, or interdict bioterrorism.

The Administration's rejection of that Protocol earlier this year, although justified on the merits, has been viewed as yet another example of American unilateralism. It is incumbent, therefore, that U.S. representatives to the upcoming Review Conference offer meaningful anti-terrorism and international law enforcement proposals. This forum and whatever final document it produces could have a far more decisive impact on the campaign to defeat terrorism than either of the two conventions currently under consideration.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD

RESPONSES FROM THE DEPARTMENT OF STATE TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

I. QUESTIONS WITH REGARD TO BOTH TREATIES

A. Authoritative Nature of Executive Branch Testimony

Question. When Executive Branch witnesses testify on the treaties before the Senate, can the Committee assume that the testimony is contributing to the "shared understanding" between the Executive and the Senate as to the meaning of the treaties and the way the United States will interpret it?

Answer. Yes. Testimony by Executive Branch witnesses on treaties before the Senate is intended to contribute to the "shared understanding" between the Executive and the Senate on the meaning of the treaties and the way such treaties will be interpreted by the United States.

Question. Does the Executive Branch believe that it is necessary for the Committee to question Executive Branch witnesses with respect to each clause of the treaties in order to firmly establish the "shared understanding" of the meaning of the treaties?

Answer. No. It is not necessary for the Senate Foreign Relations Committee to question Executive Branch witnesses with respect to each clause of treaties pending before the Committee in order to establish the "shared understanding" of the meaning of the treaties. For purposes of U.S. law, the formal transmittal documents submitted by the President, the accompanying report of the Department of State, the testimony of Executive Branch witnesses and responses to the Committee's questions contribute to the "shared understanding" of the meaning of such treaties with respect to the issues covered therein.

Question. In order for the Senate to establish its expectation—and to establish law—that the Executive Branch will interpret the treaties as they have been presented to the Senate (including in the formal submittal and in testimony), do you regard it as necessary for the Senate to take each provision of the treaties which it regards as significant, to commit the interpretation to writing, and to convert that interpretation into a formal condition of Senate consent? Or can the Senate act on the assumption that it can rely on the Executive Branch and act in accord with its presentation of the treaties to the Senate without going through such a ritual?

Answer. In order for the Senate to establish its expectation with respect to Executive Branch interpretation of treaties, it would be unnecessary and impractical for the Senate to take each significant provision of the treaties, commit the interpretation to writing, and attach that interpretation as a formal condition of Senate consent. For purposes of U.S. law, the formal transmittal documents submitted by the President, the accompanying report of the Department of State, the testimony of Executive Branch witnesses and responses to the Committee's questions provide the context for interpreting such treaties with respect to the issues covered therein.

Question. Does the Executive Branch regard it as necessary for the Senate to examine the entire negotiating record of the treaties in order to establish that there is nothing in that record inconsistent with the terms in the text of the treaties and the Executive Branch interpretation of those terms?

Answer. No. The Senate does not need to examine the entire negotiating record of such treaties in order to establish that the record is consistent with the treaty text and the Executive Branch's interpretation of the treaty terms. The Executive Branch takes into account relevant points in the negotiating record when it presents a treaty to the Senate.

Question. To summarize, if the text of the treaties and the Executive Branch's presentations of the treaties' meaning are clear and mutually consistent, then can we expect the Executive Branch to act in accordance with that interpretation, even if the Senate does not explicitly state in the resolution of advice and consent to ratification that it is relying upon the Executive Branch to do so?

Answer. Yes. If the treaty text and the Executive Branch's presentation of its meaning are clear and mutually consistent, the Committee can expect the Executive Branch to act in accordance with that interpretation with respect to the issues covered therein.

B. General Questions

Question. The Convention on the Suppression of Terrorist Bombings has entered into force, but the Convention on the Suppression of Financing Terrorism has not yet entered into force.

Does the Administration intend to engage in active diplomacy to encourage states to sign and ratify these treaties? Have any diplomatic measures been undertaken in this regard?

Answer. The Administration is engaging in active international diplomacy to encourage states to become parties to the treaties before the Committee, as well as the ten previous counterterrorism treaties that have been agreed upon at the United Nations and its specialized agencies. We have made such efforts both in bilateral diplomatic contacts with other parties and as a part of the Group of Eight Industrialized countries, which for many years has made adherence to the counterterrorism conventions a very high diplomatic priority. As of October 31, 2001, 58 countries had signed the Terrorist Bombings Convention and 29 had ratified. As of the same date, 69 countries had signed the Terrorism Financing Convention and 5 had ratified. We believe that U.S. ratification of these two conventions will bolster our efforts to encourage other countries to become party to these Conventions if they have not already done so.

Question. Article 23 of Convention on the Suppression of Financing Terrorism provides a means for amending the annex of the Convention. Neither Convention provides a means for amending the text of the treaties.

Does the Executive Branch intend to submit any amendments, including amendments to the annex of the Convention of the Suppression of Financing Terrorism, to the Senate for advice and consent to ratification?

Answer. Consistent with the October 3, 2000, Letter of Submittal accompanying the Terrorism Financing Convention, if a new counterterrorism treaty enters into force for the United States, after the Senate has given its advice and consent, and that treaty has been added to the Annex through the amendment process set out in Article 23, then the United States expects to deposit an instrument of acceptance of the amendment adding that treaty to the Annex. Such an instrument of Accept-

ance would not require future advice and consent because the Senate would already have approved the treaty in question. Any other amendment to the Terrorism Financing Convention or its Annex, or to the Terrorist Bombings Convention, would be submitted to the Senate for its advice and consent.

Question. Article 9 of the Convention on the Suppression of Terrorist Bombings and Article 11 of the Convention on the Suppression of Terrorist Financing provide that State Parties may, in cases where it receives a request for extradition from another State Party with which it has no extradition treaty, consider the conventions as a legal basis for extradition in respect of the offenses in the respective conventions.

Is it the intention of the Executive Branch to consider the conventions as a legal basis or bases for extradition in cases where the United States has no extradition treaty with the other State Party?

Answer. The United States would not use these Conventions as an independent legal basis for extradition from the United States in cases where the United States has no extradition treaty with another State Party seeking extradition. We will continue our practice of extraditing persons under the authority of bilateral extradition treaties, in conjunction with multilateral counterterrorism conventions, as applicable.

Question. Both Conventions, in the key articles defining offenses under the Conventions, include in the definition the concept of a person acting “unlawfully”. That is, Article 2 of the Convention on the Suppression of the Financing of Terrorism provides that any person commits an offense under the Convention if that person “by any means, directly or indirectly, unlawfully and willfully, provides or collects funds. . . .” Similarly, Article 2 of the Convention on the Suppression of Terrorist Bombings provides that any person commits an offense if that person “unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device. . . .”

The letter of submittal provided by the Secretary of State to the President in connection with the Conventions does not provide any analysis of the meaning of the term “unlawfully.” One possible reading of this term is that the Conventions do not cover activity authorized by governments. That is, under this construction of the term, if a foreign government authorized an activity described, then it would be “lawful” and not covered by the Conventions. I presume that is not the intention.

Am I correct in my understanding that the term “unlawfully” is not meant to exempt state-sponsored terrorism? What then, is the meaning of the term?

Answer. The word “unlawfully” in Article 2 of each of these Conventions is not meant to exempt state-sponsored terrorism. It is a term used in many international conventions, including the prior counterterrorism conventions, to make clear that States are not required to criminalize conduct which under common principles of criminal law is not considered unlawful (e.g., properly authorized use of force by its own police forces or conduct permitted as self-defense), even if those actions are otherwise described in the offense.

Question. Both Conventions contain exclusions for military activity. Article 19 of the Convention on the Suppression of Terrorist Bombings states that “activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.” The Convention on the Suppression of the Financing of Terrorism addresses the issue in a different manner. Article 2(1)(b) defines a category of acts which are illegal under the Convention, and excludes from the definition persons “taking an active part in the hostilities in a situation of armed conflict.” With regard to both Conventions, the Executive Branch has recommended that the Senate approve an understanding which would state that the term “armed conflict” does not include “internal disturbances and tensions, such as riots, isolated or sporadic acts of violence and other acts of a similar nature.”

Does the definition of “armed conflict” include subnational groups?

In the current military action in Afghanistan, we are presumably providing financial support to the Northern Alliance and to other anti-Taliban groups. Am I right in understanding that the Financing Convention would not bar that kind of financial support by the United States—because the situation is an “armed conflict”?

Answer. Article 2 of the Terrorism Financing Convention states in relevant part that “[a]ny person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that that they are to be used, in full or in part, in order to carry out: [a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed

in the annex; or [an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation or armed conflict," when such act is accompanied by a "terrorist purpose," as set forth in the Convention. ("Armed conflict" can include conflicts where sub-national groups are combatants.) U.S. Government assistance mentioned in the question would not be covered by the Convention, since the groups identified in the question are not engaged in these activities.

Question. Does the Executive Branch regard it as necessary for the Senate to include a condition in the resolutions of advice and consent regarding the International Criminal Court?

Answer. It is not necessary for the Senate to include a condition in the resolutions of advice and consent regarding the International Criminal Court. The ICC will not be a party to these Conventions, and our assistance to other parties to the Conventions would be for their proceedings, not those of the ICC. Should we deem it necessary, the United States could limit or condition its assistance to other parties to ensure that U.S. assistance is not subsequently transferred to the International Criminal Court.

Question. The treaties state that the texts of Arabic, Chinese, English, French, Russian and Spanish are equally authentic. Are there any material ambiguities in the translations? If so, what are they?

Answer. To our knowledge there are no material ambiguities among the various authentic language texts.

II. QUESTIONS WITH REGARD TO INTERNATIONAL CONVENTION FOR SUPPRESSION OF FINANCING TERRORISM

Question. On September 28, 2001, the UN Security Council approved Resolution 1373. Among other things, the resolution requires all States to "prevent and suppress the financing of terrorist acts," (para. 1(a)) and to "[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts." (para. 1(b)). The language in paragraph 1(b) is similar to Article 2(1) of the Convention.

What is the relationship between the Convention and the provisions of Resolution 1373 as they relate to the suppression of financing of terrorism? Are the legal obligations on states to suppress the financing of terrorism under Resolution 1373 and under the Convention (for states that ratify the Convention) identical? If they differ, how do they differ? If they differ, will the implementing legislation need to also address obligations under Resolution 1373?

The United States sponsored Resolution 1373. Was it drafted by the United States? Was Resolution 1373 drafted in coordination with the U.S. government departments which were involved in the negotiation of the Convention?

Answer. The Convention and UNSCR 1373 complement one another and improve our overall ability to combat the financing of terrorism. Resolution 1373 imposes on all U.N. Member States broad obligations to take steps immediately to combat the financing of terrorism. The resolution requires Member States, inter alia, to prevent and suppress the financing of terrorist acts, to criminalize the willful provision or collection of funds with the intent or knowledge that the funds will be used to carry out terrorist acts, to freeze the funds and other financial assets or economic resources of persons who commit, or attempt to commit, such acts or are affiliated with such persons, and to prohibit their nationals or others within their territories from making any funds, financial assets or economic resources or financial or other related services available for the benefit of those who commit or attempt to commit terrorist acts. The resolution also requires Member States to refrain from providing support to terrorists and terrorist groups, and to deny safe haven to those who finance, plan, support or commit terrorist acts.

The Financing Convention will provide the specificity and international legal mechanisms that are needed to combat terrorist financing. The Convention defines with more specificity than UNSCR 1373 what conduct must be criminalized under domestic law and, provided there is an international nexus, requires States Parties to establish jurisdiction when the offense is committed in its territory, on board its ships or aircraft, or by its nationals. (The Convention allows States Parties to exercise discretionary jurisdiction in certain other prescribed circumstances.) Although UNSCR 1373 requires Member States to ensure that persons who finance terrorism are brought to justice, the Convention requires parties to extradite alleged offenders or submit them for prosecution and amends existing extradition treaties by incorporating the Convention's offenses as extraditable offenses under such treaties.

Once the Financing Convention is in force, we anticipate that these instruments will complement and support each other. UNSCR 1373 will provide a basis for challenging any States that have not become party to the Convention to refrain from providing support to terrorists and to take steps to prevent terrorist financing in their territories. In addition, the committee established by the resolution will monitor implementation and promote and facilitate international cooperation in combating terrorist financing. Finally, the Convention, once it enters into force, will establish specific mechanisms for detecting, investigating and prosecuting individuals who finance terrorist acts.

UNSCR 1373 can be fully implemented under existing law and the implementing legislation for the two conventions need not address the United States' obligations under Resolution 1373.

The initial draft of the Security Council resolution was prepared by the United States. The final text was the product of negotiations among the members of the Security Council. Yes, Resolution 1373 was drafted in coordination with the U.S. government departments that were involved in the negotiation of the Convention, including State, Justice and Treasury.

Question. Article 2(1)(b) requires states to criminalize acts "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population. . . ."

Does the negotiating history reflect an understanding of the term "population" as used in this Article?

Answer. The negotiating history does not provide any guidance concerning the meaning of the term "population." The Administration interprets "population" as used in Article 2(1)(b) to mean "civilian population." This interpretation is consistent with U.S. law, for example 18 U.S.C. § 2331(1)(B)(i) ("to intimidate or coerce a civilian population"), as well as the law of armed conflict.

Question. In Article 1(1), does the term "funds" include non-financial assets such as personal or real property?

Answer. Yes. As defined in Article 1(1) of the treaty, the term "funds" includes "assets of every kind, whether tangible or intangible, movable or immovable" As noted in the State Department's report in the transmittal package (p. VI), all delegations understood the definition to include "property." The Administration's proposed implementing legislation defines "funds" as "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to, coin, currency, bank credits, travelers checks, bank checks, money orders, shares, securities, bonds, drafts, and letters of credit." (Section 202, adding new section 2339C(e)(1) to title 18)

Question. Does the term "State" (as used in Article 1(2)) include political subdivisions of a State?

Answer. Yes, the term "State" (as used in Article 1(2)) includes political subdivisions of a State.

Question. What is the meaning of the term "fiscal offense" as used in Article 13?

Answer. Some countries refuse international cooperation in cases involving crimes that they consider "fiscal offenses." There is no generally accepted definition of what constitutes a "fiscal offense," and indeed, several countries, including the United States, do not use this concept to limit international assistance in criminal matters. In our experience, when the concept is used, it will generally encompass tax offenses, but a given country might extend it to other crimes such as banking or currency controls, money laundering crimes, customs offenses, or financial regulatory offenses. Thus, because the term is not clearly defined, and could potentially include a broad range of offenses involving financial flows and financial instruments, a particular country might apply it to the very offenses which are the subject of the Convention. Accordingly, Article 13 prohibits a State from using a "fiscal offense" exception to international cooperation which might exist in its law, irrespective of how expansively the term might be defined in its law, to circumvent its obligations under the Convention. A similar provision was included in the 1988 UN Drug Convention, to assure that a "fiscal offense" exception did not defeat its provisions regarding money laundering.

Question. On page VIII of the Senate print of the Convention (T.Doc. 106-49) there is discussion of Paragraph 5 of Article 2. There appears to be an erroneous internal reference in this section. The erroneous sentence reads "These ancillary of-

fenses in *paragraph 3* are more comprehensive than those included in the earlier counterterrorism conventions to which the United States is a party—"

Is not the reference in italics to "paragraph 3" an error? Should it not be a reference to "paragraph 5?"

Answer. The reference to paragraph 3 is incorrect. The proper reference should be to paragraph 5.

III. QUESTIONS WITH REGARD TO INTERNATIONAL CONVENTION FOR SUPPRESSION OF TERRORIST BOMBINGS

Question. The Executive Branch proposes an understanding regarding Article 19 which reads:

The United States of America understand that, pursuant to Article 19, the Convention does not apply in any respect to the activities undertaken by military forces of States in the exercise of their official duties.

Article 19 of the Convention reads in pertinent part that "the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention." The proposed understanding and the language of Article 19 are virtually identical in their operative words.

- a. Why is this understanding necessary?
- b. What is meant by the phrase "inasmuch as they are governed by other rules of international law." To which rules of international law does this phrase refer?
- c. Was there negotiating history on this point which was agreed to by the other participants in the negotiations?

Answer. The exclusion of the official activities of military forces of states from the scope of this Convention was an important negotiating objective that was achieved by the United States during the development of this Convention and is a key to the Convention's success internationally. We recommend that an Understanding be included in the U.S. instrument of ratification in order to underscore the importance of this provision in the interpretation of the Convention. In addition, we recommend the Understanding because of the way Article 19(2) combines in its text two different exceptions to the Convention's coverage for "armed forces" (which are only excepted during "armed conflict," as those terms are understood under international humanitarian law, which are governed by that law) and for "military forces of a state" (which are excepted under all circumstances in the exercise of their official duties). Because these different concepts are combined in a lengthy single sentence with numerous clauses, and because of our strong interest in noting our understanding of the wording, we believe it is helpful to note in an Understanding that the exception for military forces of a state is absolute.

The reference in Article 19(2) to "other rules of international law" includes the international instruments relating to the law of war (including the 1949 Geneva Conventions) and the international law of state responsibility. There is no formal negotiating history on this subject, but these bodies of law were referred to by the negotiators as the justification and explanation of the "military forces of a state" exception in that article.

RESPONSES FROM THE DEPARTMENT OF STATE TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR HELMS

CHARITABLE ORGANIZATIONS

Question. Will the financing convention provide new authority to U.S. law enforcement agencies to stop the financing of terrorism by charitable organizations in the United States?

Answer. The administration has developed and transmitted to the Congress draft implementing legislation for the Terrorism Financing Convention that would create a new legal basis for U.S. law enforcement authorities to investigate and prosecute the financing of terrorism. In addition, the Convention itself will provide a legal basis for the United States to seek assistance from other countries in our investigations and prosecutions of those believed to have engaged in the financing of terrorism.

OTHER PRIORITIES

Question. Have events since September 11th indicated other international law enforcement priorities that could be addressed by treaties already pending on the For-

Annex 60

Objet du Conseil Fédéral 02.052, *Conventions des Nations Unies pour la répression du financement du terrorisme et des attentats terroristes à l'explosif, Ratification: Message relatif aux Conventions internationales pour la répression du financement du terrorisme et pour la répression des attentats terroristes à l'explosif ainsi qu'à la modification du code pénal et à l'adaptation d'autres lois fédérales, Feuille fédérale n° 32 du 13 août 2002 (26 Juin 2002)*

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

02.052

Message

**relatif aux Conventions internationales pour la répression
du financement du terrorisme et pour la répression des attentats
terroristes à l'explosif ainsi qu'à la modification du code pénal
et à l'adaptation d'autres lois fédérales**

du 26 juin 2002

Madame la Présidente,
Monsieur le Président,
Mesdames et Messieurs,

Par le présent message, nous vous soumettons, en vous proposant de les adopter, un projet d'arrêté fédéral portant approbation des Conventions internationales pour la répression du financement du terrorisme et pour la répression des attentats terroristes à l'explosif ainsi qu'un projet de loi fédérale portant modification du code pénal (terrorisme et financement du terrorisme) et adaptation du code pénal militaire, de la loi fédérale sur la surveillance de la correspondance par poste et télécommunication, de la loi fédérale sur les Offices centraux de police criminelle de la Confédération et de la loi fédérale concernant la lutte contre le blanchiment d'argent dans le secteur financier.

Nous vous prions d'agréer, Madame la Présidente, Monsieur le Président, Mesdames et Messieurs, l'assurance de notre haute considération.

26 juin 2002

Au nom du Conseil fédéral suisse:

Le président de la Confédération, Kaspar Villiger
La chancelière de la Confédération, Annemarie Huber-Hotz

Condensé

Après les attentats terroristes perpétrés aux Etats-Unis, le 11 septembre 2001, la coopération internationale en matière de prévention et de lutte contre le terrorisme a nettement gagné en importance. Le dispositif normatif adopté dans ce domaine au niveau international est constitué notamment de douze conventions et protocoles additionnels conclus sous l'égide de l'ONU. La Suisse a déjà ratifié et mis en application dix de ces instruments. L'adhésion aux deux derniers – la Convention pour la répression du financement du terrorisme et la Convention pour la répression des actes terroristes à l'explosif – et le renforcement du dispositif de droit pénal qu'elle induit, visent à garantir que la Suisse ne devienne pas un pays attrayant pour le terrorisme et pour ceux qui le soutiennent. Par ailleurs, en ratifiant la Convention pour la répression du financement du terrorisme, la Suisse manifestera sa ferme volonté de continuer à s'opposer à ce que l'on abuse de sa place financière pour financer des activités terroristes.

La Convention pour la répression des attentats terroristes à l'explosif oblige les Etats parties à réprimer les attentats commis au moyen d'engins explosifs ou autres engins meurtriers et instaure une coopération internationale aux fins de cette répression. Cette convention qui est compatible avec le droit suisse en vigueur, n'impose pas d'obligations nouvelles à notre pays. Il en va de même, dans une large mesure, de la Convention pour la répression du financement du terrorisme qui complète les onze autres instruments de l'ONU, puisqu'elle vise à priver le terrorisme de toute base financière. La mise en œuvre intégrale de cette convention exige l'introduction dans le code pénal d'une disposition sanctionnant spécifiquement le financement du terrorisme. En outre, la convention exige que le droit interne statue la punissabilité de l'entreprise au sein de laquelle l'infraction a été commise.

Le projet de révision du code pénal proposé repose sur une nouvelle norme pénale d'ordre général visant à réprimer le terrorisme ainsi que sur une norme pénale autonome ayant pour objet le financement du terrorisme. La nouvelle norme pénale consacrée au terrorisme permettra de sanctionner plus lourdement que ce n'est le cas aujourd'hui l'infraction spécifique que constituent les attentats terroristes. Cette norme s'appliquera à la personne qui commet un acte de violence criminelle visant à intimider une population ou à contraindre un Etat ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque. La définition des éléments constitutifs de l'infraction de financement du terrorisme renvoie à celle du terrorisme. Cette norme pénale sanctionne donc les personnes qui, dans le dessein de financer un tel crime qualifié, réunit ou met à disposition des fonds. Par ailleurs, la disposition concernant la responsabilité de l'entreprise, sur laquelle les Chambres fédérales se sont déjà mises d'accord quant au fond dans le cadre de la révision de la Partie générale du code pénal est transposée dans la présente révision. Enfin, le projet de modification du code pénal prévoit de soumettre à la juridiction fédérale les crimes de terrorisme et de financement du terrorisme.

Les nouvelles normes pénales proposées permettent à la Suisse de combler des lacunes dans la codification de la répression du terrorisme et du soutien apporté aux terroristes ainsi que de satisfaire à l'ensemble des exigences posées par la Convention pour la répression du financement du terrorisme. Par ailleurs, en exigeant qu'il y ait eu intention et en se limitant à sanctionner les actes de violence criminels, les nouvelles normes ne risquent pas de se traduire par des incriminations qui débordent leur cadre et qui ne seraient pas voulues par le législateur.

directrices et directeurs des départements cantonaux de justice et police (CCDJP). En outre, l'administration fédérale a auditionné des experts du droit pénal sur les nouvelles normes législatives proposées. Si ceux-ci n'ont pas non plus contesté la nécessité d'adhérer aux deux conventions, en revanche ils ont apprécié diversement la législation d'application préconisée. Certains ont considéré que les normes en vigueur étaient suffisantes pour garantir la mise en œuvre des deux conventions, y compris celle qui concerne la répression du financement du terrorisme; d'autres ont estimé que les nouvelles normes pénales proposées allaient trop loin ou, au contraire, avaient un caractère plutôt symbolique. Etant donné l'importance éminente que revêt, pour la place financière suisse, la Convention pour la répression du financement du terrorisme, l'administration a également consulté l'Association suisse des banquiers. Celle-ci partage le point de vue selon lequel il importe de tout mettre en œuvre pour pouvoir lutter efficacement contre le terrorisme et son financement. Elle a, toutefois, émis des doutes quant à l'adéquation des nouvelles normes pénales proposées avec cet objectif. En tout état de cause, elle escompte que ces dispositions n'aient que des incidences mineures sur les activités du secteur financier.

2 Convention internationale du 9 décembre 1999 pour la répression du financement du terrorisme

2.1 Partie générale

2.1.1 Genèse de la convention

Les onze conventions adoptées au sein de l'ONU jusqu'en décembre 1997 avaient été élaborées dans le but de mieux lutter contre certaines sortes d'actes terroristes. Toutefois, suite aux attentats contre les Ambassades américaines de Dar es Salaam et Nairobi en juillet 1998, le besoin d'adopter une approche plus large contre la menace terroriste s'est fait sentir. Il devenait indispensable de lutter contre tous les actes de terrorisme, en s'attaquant directement à leur financement.

En 1998, l'Assemblée générale de l'ONU a décidé dans sa résolution 53/108 de suivre une suggestion de la France de traquer internationalement les financiers et les commanditaires des actes terroristes. Elle a chargé le Comité spécial d'élaborer une convention pour la répression du financement du terrorisme. Grâce au soutien notamment du G-8, la proposition française a été discutée prioritairement au cours de l'année 1999 au sein du Comité spécial, du 15 au 26 mars 1999, puis dans le groupe de travail de la sixième Commission, du 27 septembre au 8 octobre 1999. A l'issue de cette dernière session, le groupe de travail a transmis à la sixième Commission de l'Assemblée générale de l'ONU le texte final du projet de convention pour examen et discussion. Le 9 décembre 1999, l'Assemblée générale a adopté par consensus le texte de la Convention¹⁷. La rapidité par laquelle cette convention a été négociée peut être expliquée par les réflexions concordantes engagées de manière parallèle au sein de l'ONU, du G-8, et de l'UE. La Convention a été ouverte à la signature des Etats, du 10 janvier 2000 au 31 décembre 2001, au siège de l'ONU, à New York. La Suisse a signé la Convention le 13 juin 2001. La Convention est en-

¹⁷ A/RES/54/109.

trée en vigueur le 10 avril 2002. Aujourd'hui¹⁸, 132 Etats ont signé la Convention, 36 l'ont ratifiée.

2.1.2 Le rôle de la Suisse dans l'élaboration de la convention

Le but poursuivi par la Convention étant conforme aux intérêts de la Suisse, la délégation suisse a pris part de manière active à l'élaboration de la Convention pour la suppression du financement du terrorisme. Elle souhaitait l'élaboration de normes d'incrimination précises et a notamment soumis diverses propositions relatives au délit même de financement du terrorisme. La Suisse et certains pays européens ont milité pour que le financement du terrorisme soit réprimé comme une infraction accessoire à l'acte de terrorisme, c'est-à-dire dépendent de la réalisation de celui-ci, contrairement à une majorité d'Etats qui soutenaient l'approche opposée: réprimer le financement du terrorisme comme délit principal indépendant. Un compromis sur ce point n'a pu être trouvé et l'approche majoritaire a prévalu. Pour ce qui est de l'élément subjectif de l'infraction, la Suisse a pu contribuer à l'obtention d'un compromis, qui permet d'éviter que le financement du terrorisme par dol éventuel ou par négligence ne soit également couvert par la Convention. Dans le domaine de la coopération judiciaire internationale en matière pénale, la Convention suit la logique déjà instituée dans différents instruments en matière de terrorisme ratifiés par la Suisse, approche toutefois quelque peu affinée. En ce qui concerne la question de la prévention par le biais de la coopération des intermédiaires financiers (art. 18), la Suisse a pu faire figurer dans le chapeau introductif du par. 1, let. b, des formulations pratiquement identiques à celles utilisées dans les recommandations du GAFI concernant la lutte contre le blanchiment d'argent (n° 14 et 15), qui sont déjà mises en œuvre en droit suisse et ne nécessitent dès lors aucune modification de notre droit.

Le texte final de la Convention pour la répression du financement du terrorisme constitue un compromis entre les différentes approches présentées durant la négociation qui est compatible avec les intérêts de la Suisse.

2.1.3 Importance et contenu de la convention

Compte tenu de la complexité des actes terroristes, leur réalisation implique dans la majeure partie des cas d'importants travaux préparatoires. Ces travaux doivent par ailleurs être financés. Les sources de ce financement sont diverses. Elles peuvent provenir d'activités tant licites qu'illicites. Peuvent notamment être cités dans le premier cas des activités commerciales, industrielles ou caritatives et dans le second le trafic de drogue, les prises d'otages ou encore le racket. En raison de cette multiplicité des sources et de la diversité des acteurs liés au financement du terrorisme, il s'avérait nécessaire de créer un instrument international de coopération dans cette matière. La Convention pour la répression du financement du terrorisme vise dès lors l'interdiction des transactions financières qui participent dans nombres de cas

¹⁸ État au 19 juin 2002.

de manière décisive à la réussite de l'opération terroriste. Elle entend également punir les personnes qui, sans avoir directement pris part à l'acte terroriste, permettent sa réalisation.

L'importance de cette Convention tient dès lors à son objet et à son champ d'application. Si les conventions antérieures réprimaient l'acte terroriste à proprement parler, la convention qui nous occupe ici va plus loin, puisqu'elle vise à réprimer le financement du terrorisme. En outre, le champ d'application de la Convention est plus large. En effet, l'acte terroriste lui-même est défini au-delà de toutes les conventions antérieures conclues au sein de l'ONU. La Convention réprime le financement non seulement des actes terroristes déjà condamnés par les onze conventions précédentes mais également de tout acte terroriste contre la vie et l'intégrité corporelle tel que défini à l'art. 2, par. 1, let. b. Une telle approche permet de poursuivre les personnes tant physiques que morales qui participent au financement du terrorisme, à condition qu'elles aient l'intention ou la connaissance de l'utilisation des fonds.

La Convention comporte tant des mesures préventives que répressives. Au titre de la prévention, les Etats ont l'obligation de prendre les mesures nécessaires à l'identification, à la détection, au gel et à la saisie des fonds utilisés (art. 8). Fortement inspirée des 40 recommandations du GAFI concernant la lutte contre le blanchiment d'argent, la prévention repose également sur une coopération des institutions financières (art. 18). Au titre de la répression, les Etats doivent ériger en infraction pénale, dans leur droit national, les infractions couvertes par cette convention (art. 4). En outre, la Convention institue un système cohérent et complet de coopération internationale régissant les domaines de l'extradition, de l'entraide judiciaire et du transfèrement de personnes condamnées (art. 9 à 16).

Les principes de base issus des conventions précédentes, tels le principe «extrader ou juger» (art. 11), la dépolitisation de l'infraction (art. 6 et 14), la protection des droits et libertés fondamentales de la personne (art. 9, 15 et 17), ou encore l'arbitrage de la Cour internationale de justice (art. 24) ont été repris. La Convention ne s'applique pas lorsque l'acte incriminé n'a de rattachement qu'avec un seul Etat (art. 3).

2.2 Partie spéciale: Les principales dispositions de la Convention

2.2.1 Art. 1 et 2 (Définition du financement du terrorisme)

L'art. 2, qui contient la définition du financement du terrorisme, est l'élément central de la Convention. L'objectif visé à travers cette disposition est de sanctionner de manière aussi complète que possible les personnes qui, volontairement, participent au financement d'attentats terroristes. En rendant ainsi pénalement répréhensibles des activités qui se situent en amont des actes terroristes à proprement parler, on espère saper les bases financières du terrorisme.

La Convention ne contient pas de définition générale du terrorisme, car il n'a pas été possible, jusqu'à présent, de trouver une définition du terrorisme qui soit généralement acceptée à l'échelle internationale. On y dénonce en revanche certaines opérations de financement qui, en raison de l'intention dont elles procèdent, méritent

d'être abominées par la communauté internationale et doivent par conséquent être sanctionnées par les Etats Parties.

Eléments constitutifs de l'infraction: notion objective

Selon l'art. 2, par. 1, de la Convention, l'un des éléments constitutifs de l'acte est la mise à disposition ou la collecte de fonds par l'auteur. Conformément à la définition que l'on trouve à l'art. 1, le terme «fonds» doit être pris au sens large – comme dans le droit suisse – car il peut se rapporter aux biens de toute nature (corporels ou incorporels, mobiliers ou immobiliers) ou encore à des documents ou instruments juridiques sous quelque forme que ce soit (même de nature électronique ou numérique) attestant d'un droit de propriété ou un intérêt sur ces biens¹⁹. Peu importe que ces fonds soient d'origine licite ou illicite. Illicites, ils le deviendront en effet de toute manière en raison de leur utilisation à des fins terroristes. La mise à disposition de fonds est un élément constitutif de l'infraction dont se rendent coupables non seulement les bailleurs de fonds à proprement parler, mais aussi les personnes qui se chargent du transfert des moyens financiers destinés à permettre des attentats terroristes. Est aussi pénalement répréhensible la récolte de fonds destinés au terrorisme avant même leur mise à disposition.

Pour que ces opérations financières deviennent punissables, il n'est pas nécessaire que les fonds en cause soient effectivement utilisés dans le contexte d'un acte terroriste à proprement parler²⁰. Le fait de réaliser une transaction financière en ayant l'intention de mettre des fonds à la disposition de terroristes ou en sachant qu'ils seront utilisés à des fins terroristes constitue déjà un acte pénalement répréhensible en tant que tel. Le caractère punissable du financement n'est donc pas accessoire, ce qui signifie qu'il ne dépend pas de l'exécution ou même de la tentative d'exécution d'un acte terroriste. Dans l'optique du droit suisse, cette conception des choses a pour conséquence que le financement du terrorisme doit désormais être considéré comme une infraction à part entière, qui doit être punissable indépendamment de tout autre acte tombant sous le coup du code pénal. C'est là le seul moyen de pénaliser suffisamment le financement dans les cas où l'acte terroriste lui-même n'est finalement pas perpétré²¹.

Eléments constitutifs de l'infraction: notion subjective

Les conditions subjectives que l'auteur doit remplir pour se rendre punissable aux termes de la Convention sont très restrictives: il faut d'abord qu'il ait eu l'intention de commettre l'acte, soit la transaction financière à proprement parler ou la recherche de fonds; en plus, l'auteur doit avoir eu l'intention de mettre les fonds à la disposition de groupements terroristes ou au moins savoir qu'ils sont destinés à des opérations terroristes. Le financement d'activités terroristes par négligence n'est en

¹⁹ Cette formulation s'inspire de l'art. 1, let. q, de la Convention internationale de 1988 contre le trafic illicite de stupéfiants et de substances psychotropes. La Suisse se fonde elle aussi sur une définition très large des moyens financiers. Sont ainsi considérés comme des éléments de fortune tous les avantages économiques, qu'il s'agisse d'une augmentation des actifs ou d'une diminution des passifs. Pour plus de détails, cf. message du 30 juin 1993 concernant la modification du code pénal suisse et du code pénal militaire (Révision du droit de la confiscation, punissabilité de l'organisation criminelle, droit de communication du financier); FF **1993** III 269, 298 s.

²⁰ Précision expressément donnée à l'art. 2, par.3.

²¹ Pour plus de détails à ce sujet, cf. ch. 4.2.2.

effet pas punissable. La Convention ne s'applique donc pas aux personnes qui, en toute bonne foi, donnent de l'argent dans le cadre d'une campagne de récolte de fonds à des fins humanitaires et ignorent que cet argent est en fait destiné à des réseaux terroristes²².

L'intention terroriste est définie à l'art. 2, par. 1, de la Convention. Selon la disposition figurant à la let. a, commet une infraction au sens de la Convention toute personne qui fournit ou réunit des fonds dans l'intention de les voir utilisés ou en sachant qu'ils seront utilisés pour commettre un acte constituant une infraction à l'un des neuf traités anti-terroristes énumérés dans l'annexe de la Convention²³. Du point de vue de la Suisse, ce procédé par renvoi²⁴ ne fait pas obstacle à la ratification de la Convention. Elle a en effet déjà ratifié toutes les traités énumérés, à l'exception de la Convention pour la répression des attentats terroristes à l'explosif, à laquelle le Conseil fédéral propose d'adhérer dans le présent message. Les infractions visées par les traités cités sont toutes punissables en vertu du droit suisse.

Selon la disposition du par.1, let. b, l'intention terroriste est également reconnue aux personnes qui financent des opérations destinées à tuer ou à blesser grièvement un civil²⁵ lorsque ces dernières ont pour but d'intimider une population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque. L'intimidation de la population et la pression exercée sur un gouvernement ou sur une organisation internationale sont les éléments qui font d'un homicide ordinaire ou d'une atteinte à l'intégrité corporelle d'une personne un acte terroriste. Le décès d'une personne ou l'atteinte à son intégrité corporelle n'est cependant pas nécessaire pour que l'auteur du financement se rende punissable, pas plus que n'est nécessaire la réalisation de son intention d'intimidation ou de contrainte: il suffit que l'auteur ait eu la volonté d'obtenir un tel résultat en finançant un groupement terroriste.

²² Cf. commentaire relatif à l'art. 260^{sexies} P-CP, ch. 4.5.6.

²³ Convention pour la répression de la capture illicite d'aéronefs (La Haye, 16.12.1970); RS **0.748.710.2**; Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile (Montréal, 23.9.1971); RS **0.748.710.3**; Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques (adoptée par l'Assemblée générale des Nations Unies le 14.12.1973); RS **0.351.5**; Convention contre la prise d'otages (adoptée par l'Assemblée générale des Nations Unies le 17.12.1979); RS **0.351.4**; Convention sur la protection physique des matières nucléaires (Vienne, 3.3.1980); RS **0.732.031**; Protocole pour la répression d'actes de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile (Montréal, 24.2.1988); RS **0.748.710.31**; Convention pour la répression d'actes illicites dirigés contre la sécurité de la navigation maritime (Rome, 10.3.1988); RS **0.747.71**; Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental (Rome, 10.3.1988); RS **0.747.711**; Convention pour la répression des actes terroristes à l'explosif (adoptée par l'Assemblée générale des Nations Unies le 15.12.1997).

²⁴ Cette technique du renvoi a aussi été appliquée dans la Convention européenne du 27 janvier 1977 pour la répression du terrorisme, que la Suisse a ratifiée (RS **0.353.3**).

²⁵ La Convention n'est pas applicable lorsque les actes financés visent des personnes qui prennent une part active aux hostilités dans le cadre d'un conflit armé. Le caractère licite ou illicite de tels actes doit être déterminé en fonction des règles du droit international humanitaire et non selon les dispositions de la présente convention.

Tentative et participation

Sont aussi punissables la tentative de financement d'actes terroristes, la complicité et le concours, de même que l'instigation (art. 2, par. 4 et 5, let. a et b). Ces formes d'infraction tomberont sous le coup de la Partie générale du code pénal suisse dès que le financement d'actes terroristes sera – comme nous le proposons – reconnu comme un délit à part entière, indépendamment de tout autre acte. La disposition de l'art. 2, par. 5, let. c, qui interdit aussi le soutien d'un groupement terroriste, est en revanche sujette à interprétation, car le libellé ne permet pas de déterminer clairement si, pour commettre cette infraction, son auteur doit contribuer à l'acte à proprement parler ou si les éléments constitutifs de l'infraction peuvent être réunis d'une autre manière (p. ex. par une personne qui gèrerait des fonds en ayant conscience de servir les intérêts d'un groupement terroriste). Toutefois, comme le droit pénal suisse, à travers l'art. 260^{ter}, ch. 1, al. 1, CP (soutien d'une organisation criminelle) s'applique, d'ores et déjà, tant dans l'une que dans l'autre des deux éventualités, il n'est pas nécessaire de trancher la question pour l'instant.²⁶

Illicéité

Selon l'art. 2, par.1, de la Convention, le caractère punissable du financement est conditionné par son illicéité. Cette condition, que l'on peut considérer comme allant de soi, a été mentionnée expressément dans la Convention parce que certaines Parties avaient, en cours de négociation, exprimé leur crainte de voir des organisations humanitaires tomber sous le coup de cette disposition lorsqu'il leur arrive, en cas de catastrophe, de devoir, pour atténuer les souffrances de la population civile, soutenir financièrement des groupements locaux qui, outre leurs activités humanitaires, poursuivent aussi des objectifs terroristes. Le fait de payer une rançon pour obtenir la libération d'otages est lui aussi un motif excluant l'illicéité du paiement²⁷. Lorsque, dans les cas de ce type, l'absence de toute volonté de soutenir des mouvements terroristes ne suffit pas à empêcher l'application de la convention, il est toujours possible d'examiner le cas d'espèce pour voir si l'action ne se justifie pas en raison de motifs particuliers comme une situation de détresse ou la défense d'intérêts légitimes.

2.2.2 Art. 3 (Champ d'application de la Convention)

L'art. 3 limite le champ d'application de la Convention quant au fond lorsque aucun pays étranger n'est impliqué dans les opérations en cause: la Convention ne s'applique pas lorsque l'infraction est commise à l'intérieur d'un seul Etat, lorsque l'auteur présumé est un national de cet Etat et se trouve sur son territoire, et lorsque aucun autre Etat n'a de raison d'établir sa compétence, étant entendu que les dispositions pertinentes des art. 12 à 18, selon qu'il convient, s'appliquent en pareil cas.

²⁶ Cf. Message du 30 juin 1993 concernant la modification du code pénal suisse et du code pénal militaire (Révision du droit de la confiscation, punissabilité de l'organisation criminelle, droit de communication du financier); FF **1993** III 269, 293.

²⁷ Cf. § 67 du résumé informel des discussions du groupe de travail rédigé par le président (annexe III du rapport du groupe de travail du 26.10.1999, UN Doc. A/C.6/54/L.2).

2.2.3

Art. 5 (Responsabilité des personnes morales)

En vertu de l'art. 5 de la Convention, tous les Etats Parties sont tenus de prendre les mesures nécessaires pour obliger les personnes morales qui financent des opérations terroristes à répondre de leurs actes. Pour que la responsabilité d'une personne morale se trouve engagée, il faut que la personne physique ayant commis l'infraction au nom de la personne morale ait des responsabilités dans la direction ou le contrôle de la personne morale. La responsabilité pénale des personnes physiques ayant commis l'infraction n'est pas exclusive de la responsabilité de la personne morale qui les emploie. Selon l'art. 5, par. 2, de la Convention, les Etats Parties doivent même veiller à ce que ce soit la personne morale qui soit tenue d'assumer la responsabilité de l'acte indépendamment de la responsabilité d'un individu. En principe, la Convention n'exige pas forcément que la responsabilité de la personne morale ait un caractère pénal. Les Etats qui ne connaissent pas le principe de la responsabilité pénale peuvent donc aussi agir sur le plan civil ou administratif, à condition que les sanctions prévues soient «efficaces, proportionnées et dissuasives» (art. 5, par. 3).

La tendance internationale à l'engagement de la responsabilité des personnes morales, notamment des entreprises, ayant commis des actes pénalement répréhensibles a été lancée en tout premier lieu dans les conventions du Conseil de l'Europe²⁸, mais aussi dans celles de l'ONU²⁹ et, plus particulièrement, dans les conventions de l'OCDE³⁰. Dans certains domaines, l'UE a elle aussi réalisé cette idée au moins partiellement³¹. Le 13 juin 2002, le Conseil des ministres de la justice et de l'intérieur de l'UE a en outre adopté une décision-cadre exigeant expressément des Etats membres qu'ils assurent la prise de sanctions pénales à l'encontre des personnes morales ayant pris part à des actes terroristes, y compris au financement de groupements terroristes³². Différents pays de tradition juridique continentale (Belgique, Danemark, Finlande, France, Islande, Norvège et Pays-Bas), de tradition juridique asiatique (Japon, Corée), de même que la plupart des pays de tradition juridique anglo-saxonne (Angleterre et Pays de Galles, Australie, Canada, Nouvelle-Zélande, Etats-Unis d'Amérique), ont déjà dans leur législation des dispositions régissant la responsabilité pénale des entreprises³³.

En droit suisse, la responsabilité pénale des entreprises n'en est encore qu'à ses premiers balbutiements, même si cela fait déjà un certain temps que la notion de res-

²⁸ Cf. Convention du 4.11.1998 sur la protection de l'environnement par le droit pénal (STE 172); Convention pénale sur la corruption du 27.1.2001 (STE 173), signée par la Suisse le 26.2.2001; Convention du 23 novembre 2001 sur la cybercriminalité (STE 185), signée par la Suisse le 23.11.2001.

²⁹ Cf. art. 10 de la Convention contre la criminalité transnationale organisée du 28 juillet 2000, qui a été signée par la Suisse le 12.12.2000.

³⁰ Cf. Convention de l'OCDE du 9.12.1999 sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, que la Suisse a ratifiée le 31 mai 2000.

³¹ Cf. p.ex. CEE Conseil: règlement n° 17 de 1965; règlement CE 2988/95 du 18.11.1995 relatif à la protection des intérêts financiers des CE, ou encore Deuxième protocole à la Convention relative à la protection des intérêts financiers des Communautés européennes.

³² Cf. Journal officiel des Communautés européennes L 164 du 22.6.2002, p. 3 ss.

³³ Cf. OECD Working Group on Bribery in International Business Transactions (CIME): Corporate Liability Rules in the Common Law Jurisdictions of Australia, Canada, England and Wales, New Zealand and the United States, Doc. DAFFE/IME/BR (2000)22 du 14.09.2000, ainsi que Corporate Liability Rules in Civil Law Jurisdictions, Doc. DAFFE/IME/BR (2000)23 du 25.09.2000.

ponsabilité pénale des personnes morales est connue et généralement acceptée en droit fiscal³⁴ et, s'agissant des cas de peu d'importance, en droit administratif³⁵. Il y a en effet bien longtemps que le Conseil fédéral a pris conscience du fait que seul des sanctions de droit pénal pouvaient être suffisamment efficaces et dissuasives pour les entreprises³⁶. Dans le contexte de la révision de la Partie générale du code pénal, il avait dès lors proposé au parlement de prévoir une responsabilité subsidiaire des entreprises en cas de manque d'organisation. Le parlement a modifié le projet du Conseil fédéral en prévoyant la responsabilité primaire de l'entreprise pour certains types d'infractions. En prévision de la ratification de la Convention pour la répression du financement du terrorisme, il suffira donc d'ajouter la nouvelle norme de lutte contre le terrorisme à la liste des infractions dressée par le parlement³⁷.

2.2.4 Art. 7 (Compétence des Etats Parties)

La Convention distingue entre compétence obligatoire et compétence facultative des Etats Parties en matière de poursuite du financement du terrorisme.

En vertu de l'art. 7, par. 1, chaque Etat Partie est *tenu* d'établir sa compétence lorsque l'infraction a été commise sur son territoire (principe de la territorialité), si l'infraction a été commise à bord d'un navire battant son pavillon ou d'un aéronef immatriculé conformément à sa législation au moment des faits (principe du pavillon), ou si l'infraction a été commise par l'un de ses nationaux (principe de la personnalité active). Dans ces cas, la compétence des tribunaux suisses peut être établie sans aucune difficulté. La compétence à raison des délits commis sur territoire suisse résulte de l'art. 3 CP. Dans l'éventualité peu probable où le financement d'une opération terroriste aurait lieu à bord d'un navire battant pavillon suisse, c'est de toute manière le droit pénal suisse qui serait applicable en vertu de l'art. 4, al. 2, de la loi sur la navigation maritime³⁸. Une disposition analogue s'appliquant aux aéronefs figure à l'art. 97, al. 1, de la loi sur l'aviation³⁹. Le principe de la personnalité active, quant à lui, ressort de l'art. 6 CP. Il permet à la juridiction pénale suisse d'étendre sa compétence aux crimes et délits qu'un ressortissant suisse a commis à l'étranger.

Selon l'art. 7, par. 4, de la Convention, la Suisse doit aussi pouvoir établir sa compétence dans les cas où l'auteur présumé de l'infraction se trouve sur son territoire et où elle ne l'extrade par vers l'un des Etats Parties qui ont établi leur compétence conformément à l'art. 7, par. 1 ou 2, de la Convention. Cette obligation d'engager des poursuites pénales contre les auteurs d'infractions qui ne sont pas extradés («*aut*

³⁴ Cf. art. 181 de la loi fédérale sur l'impôt fédéral direct; RS **642.11**.

³⁵ Les entreprises sont passibles d'une peine maximale de 5000 francs d'amende en vertu de l'art. 7 de la loi fédérale sur le droit pénal administratif; RS **313.0**.

³⁶ Pour plus de détails à ce sujet, cf. considérations du Conseil fédéral dans son message du 19 avril 1999 concernant la modification du code pénal suisse et du code pénal militaire (révision des dispositions pénales applicables à la corruption) et l'adhésion de la Suisse à la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales; FF **1999** 5045, 5090 ss.

³⁷ Cf. ch. 4.5.2.

³⁸ Loi fédérale du 23 septembre 1953 sur la navigation maritime sous pavillon suisse; RS **747.30**.

³⁹ Loi fédérale du 21 décembre 1948 sur l'aviation; RS **748.0**.

dedere, aut iudicare») est soulignée encore une fois spécifiquement à l'art. 10. Dans ce cas de figure, le lieu où l'infraction a été commise n'importe pas plus que la nationalité de l'auteur ou de la victime. Si l'on veut rendre la lutte contre la criminalité plus efficace, il est en effet important de se donner les moyens de poursuivre les groupements terroristes agissant à l'échelle internationale même s'il n'y a pas eu spécifiquement violation des intérêts de l'Etat dans lequel le suspect est arrêté. En Suisse, l'art. 6^{bis} CP, qui existe déjà depuis quelque temps, permet aux autorités de notre pays d'établir leur compétence dans ce genre de cas.

Aux termes de l'art. 7, par. 2, il est en outre cinq situations dans lesquelles les Etats Parties peuvent établir leur compétence à titre *facultatif*. La compétence des tribunaux suisses est en principe là aussi assurée. Selon l'art. 7, par. 3, chaque Etat Partie doit notifier au Secrétaire général des Nations Unies tous les cas dans lesquels il entend établir sa compétence conformément aux dispositions de l'art. 7, par. 2.

La Convention (art. 7, par. 6) n'exclut pas l'exercice de la compétence pénale à un autre titre, pour autant que le droit interne des Etats Parties le permette et à condition que les normes du droit international soient respectées.

2.2.5 Art. 8

Art. 8, par. 1 et 2 (Saisie et confiscation)

Conformément à l'art. 8, par. 1 et 2, les Etats Parties sont tenus d'adopter les mesures nécessaires à l'identification, à la détection, au gel ou à la saisie des fonds utilisés ou destinés à être utilisés pour commettre les infractions visées à l'art. 2, ainsi que du produit de ces infractions. Ces mesures doivent être conformes au droit interne des Etats Parties.

Le gel de fonds appelle en premier lieu des mesures de police, qui peuvent, en Suisse, être prises par voie d'ordonnance. Pour que des mesures de ce type puissent être ordonnées, il faut toutefois que les personnes et organisations en cause soient connues (listes) et que leurs noms aient été publiés. En vertu de l'ordonnance du 2 octobre 2000⁴⁰ instituant des mesures à l'encontre de personnes et entités liées à Oussama ben Laden, au groupe «Al-Qaïda» ou aux Taliban, par exemple, les avoirs appartenant à ces personnes ou entités ou contrôlés par elles sont gelés. Les personnes physiques et les personnes morales tombant sous le coup de cette mesure sont nommées dans une annexe de l'ordonnance.

La saisie aux fins de confiscation peut aussi, selon le cas d'espèce, être ordonnée par les autorités de poursuite pénale. Aux art. 58 ss CP, le droit pénal suisse est doté de dispositions efficaces qui satisfont aux exigences de la Convention. Pour qu'elles soient applicables, il faut simplement que des poursuites pénales aient été engagées. Peuvent être saisies en vue d'une confiscation ultérieure toutes les valeurs patrimoniales qui sont le résultat d'une infraction ou qui étaient destinées à décider ou à récompenser l'auteur d'une infraction (art. 59, ch. 1, CP). Dans l'optique de l'infraction nouvelle que représentera le financement du terrorisme⁴¹, cette disposition

⁴⁰ RS 946.203, teneur du 1^{er} mai 2002. Les modifications sont entrées en vigueur le 2 mai 2002.

⁴¹ Cf. ch. 4.5.6.

permettra la confiscation des fonds suspects soit avant, soit après leur remise au destinataire.

Les moyens de saisie et de confiscation de fonds sont particulièrement étendus lorsque ces derniers appartiennent à des organisations terroristes. Le juge peut, en se fondant sur les art. 59, ch. 3, et 260^{ter} CP, ordonner la confiscation de toutes les valeurs sur lesquelles une organisation criminelle ou terroriste exerce un pouvoir de disposition. Les valeurs appartenant à une personne qui a participé ou apporté son soutien à une organisation de ce type sont présumées soumises au pouvoir de disposition de l'organisation jusqu'à preuve du contraire. Cette confiscation facilitée a été prévue d'une part pour améliorer les moyens d'action contre les organisations de ce genre et d'autre part pour permettre à la justice d'avoir accès à leurs fonds de roulement. L'effet recherché dans ce type de cas est aussi préventif dans la mesure où l'on tente de saper les bases financières de l'organisation criminelle en cause. Les possibilités de saisie sont donc d'autant plus étendues qu'une organisation est soupçonnée d'avoir des activités criminelles ou que la personne en cause est soupçonnée de soutien ou de participation à une organisation criminelle ou terroriste. La totalité de leur fortune peut ainsi être saisie lorsque l'on pense que la confiscation facilitera l'administration de la preuve.

Art. 8, par. 3 (Partage des fonds confisqués)

Si les Etats Parties peuvent envisager de partager les fonds confisqués avec d'autres Etats (art. 8, par. 3), la Convention ne les y oblige pas. Le projet de loi sur le partage des valeurs patrimoniales confisquées que le Conseil fédéral a adopté le 24 octobre 2001⁴² autorise expressément les autorités (art. 11 ss) à conclure des accords de partage avec d'autres Etats.

Art. 8, par. 4 (Indemnisation des victimes)

Selon l'art. 8, par. 4, les sommes confisquées peuvent être affectées à l'indemnisation des victimes des attentats terroristes. En Suisse, l'indemnisation au moyen de valeurs patrimoniales confisquées est possible aux termes des dispositions de l'art. 60, ch. 1, let. b, CP, qui ont été introduites dans le code pénal à l'entrée en vigueur de la loi sur l'aide aux victimes d'infractions⁴³.

2.2.6 Art. 9 à 16 (Coopération judiciaire internationale en matière pénale)

2.2.6.1 Art. 9, par. 1 et 2 (Obligation d'enquêter)

Le par. 1 de l'art. 9 prévoit une obligation d'enquêter dans le cas où un Etat Partie reçoit la communication d'une information au sens de cet article – en règle générale par Interpol – relative à une personne qui a participé au financement du terrorisme ou qui est suspectée d'avoir y participé.

L'art. 9, par. 2, se prononce sur les mesures en vue d'assurer la présence de l'auteur ou de l'auteur présumé de l'infraction au sens de la Convention aux fins de poursuite ou d'extradition. La condition de circonstances justifiant de telles mesures ac-

⁴² FF 2002 423 ss.

⁴³ RS 312.5

corde une certaine liberté d'appréciation à l'Etat où se trouve cette personne. Lorsque cet Etat arrête des mesures, il s'agit en particulier d'éviter la fuite de la personne visée. Dans la procédure d'extradition, la règle dont on ne doit s'écarter qu'exceptionnellement consiste à placer la personne en détention⁴⁴.

2.2.6.2 Art. 9, par. 3 à 6 (Protection consulaire)

La Convention offre des garanties à l'auteur présumé d'une infraction contre lequel des mesures visant à assurer sa présence aux fins de poursuite ou d'extradition ont été prises. Elle prévoit que l'auteur présumé peut communiquer avec le représentant qualifié de son Etat, en recevoir la visite et être informé des droits susmentionnés. Ces droits minimaux classiques entendent faciliter les relations entre l'auteur présumé de l'infraction et les représentants de son Etat. Ils figurent aussi à l'art. 36 de la Convention de Vienne sur les relations consulaires⁴⁵. En outre, un Etat Partie ayant établi sa compétence conformément à certains alinéas de l'art. 7 de la Convention pour la répression du financement du terrorisme peut inviter le Comité international de la Croix-Rouge à communiquer avec l'auteur présumé de l'infraction et à lui rendre visite.

2.2.6.3 Art. 10 («Aut dedere, aut iudicare»)

Le par. 1 de cet article consacre la maxime bien établie au niveau international «*aut dedere, aut iudicare*». Elle impose à l'Etat requis d'ouvrir une procédure, soit d'extradition, soit de poursuites pénales, lorsque il n'extrade pas l'auteur présumé⁴⁶. Si la Suisse est saisie d'une demande d'extradition, elle aura en tous les cas besoin d'informations de l'Etat requérant:

- a. lorsque elle entamera une procédure d'extradition⁴⁷;
- b. lorsqu'elle refusera l'extradition et ouvrira des poursuites pénales⁴⁸.

Une extradition n'est pas possible lorsque la personne recherchée est de nationalité suisse et ne consent pas à son extradition (art. 7, al. 1, EIMP) ou que les standards minimaux de protection des droits individuels résultant de la Convention de sauve-

⁴⁴ Art. 47 ss EIMP et notamment ATF 111 IV 108.

⁴⁵ RS 0.191.02

⁴⁶ Les infractions de l'art. 2 de la Convention sont graves. Toutefois, l'Etat qui n'extrade pas est tenu, au sens de l'art. 10, par. 1, de saisir la justice, mais pas de juger ni de punir. Il satisfait donc à ses obligations conventionnelles en transmettant la cause à ses autorités de poursuite pénale, quelle qu'en soit l'issue. L'Etat requis dispose en conséquence d'une marge d'appréciation concernant la réalisation de l'objectif d'éviter que la personne réclamée n'échappe à une sanction adéquate.

⁴⁷ Elle procédera en application des accords internationaux (p. ex. art. 12 ss de la Convention européenne d'extradition) et des art. 32 ss EIMP, en particulier l'art. 28, al. 3, et 41.

⁴⁸ Dans ce cas, elle demandera le dossier de l'enquête diligentée par l'Etat requérant, et la poursuite suivra les règles de droit matériel et de procédure en vigueur, applicables dans notre pays à de telles infractions.

garde des droits de l'homme et des libertés fondamentales (CEDH)⁴⁹ ou du Pacte international relatif aux droits civils et politiques⁵⁰ ne sont pas garantis⁵¹.

Une pareille obligation ne représente pas une nouveauté pour la Suisse⁵² et peut être exécutée en application de l'art. 6^{bis} CP qui resserre la collaboration internationale dans la lutte contre les manifestations criminelles les plus dangereuses pour la société. En tous les cas, même sans la Convention, la Suisse dispose de la possibilité, si l'extradition est exclue, de réprimer à sa place une infraction à la demande de l'Etat dans lequel l'infraction a eu lieu⁵³.

Le par. 2 de l'art. 10 ne s'applique pas à notre pays car l'extradition de citoyens suisses est régie à l'art. 7 EIMP qui prévoit, à son al. 1, la possibilité de remettre ou d'extrader un national moyennant consentement écrit de ce dernier qui est révocable tant que la remise n'a pas été ordonnée. En cas d'absence d'un tel consentement, il est par conséquent procédé à la poursuite de la personne réclamée par les autorités suisses tel que le prévoit le par. 1 de l'art. 10.

2.2.6.4 Art. 11 (Extradition)

L'art. 11, par. 1, régit les effets de la Convention sur les instruments d'extradition en vigueur ou qui seront conclus entre les Parties contractantes à la Convention. Il considère que les infractions répertoriées à l'art. 2 de la Convention constituent des infractions extraditionnelles auxquelles ces instruments d'extradition sont applicables. Cet article ne représente pas une nouveauté pour la Suisse; en effet, de nombreux instruments en matière de lutte contre le terrorisme en vigueur pour notre pays contiennent une disposition de teneur similaire.

L'art. 11, par. 2, potestatif, n'est pas pertinent pour la Suisse. En effet, elle n'est pas tributaire de l'existence d'un instrument international pour pouvoir extrader, puisqu'elle dispose de la loi sur l'entraide internationale en matière pénale (EIMP) qui lui en donne la faculté.

L'art. 11, par. 3, applicable aux Etats Parties ne subordonnant pas l'extradition à l'existence d'un traité, prévoit qu'ils reconnaissent les infractions prévues à l'art. 2 comme cas d'extradition entre eux, sans préjudice des conditions prévues par la législation de l'Etat requis. L'EIMP règle les procédures d'extradition⁵⁴. Parmi les conditions auxquelles la Suisse assujettit l'extradition, il convient de mentionner la

⁴⁹ RS 0.101

⁵⁰ RS 0.103.2

⁵¹ Cf. notamment ATF 124 II 140, consid. 3a.

⁵² On la retrouve en particulier à l'art. 7 de la Convention européenne pour la répression du terrorisme (RS 0.353) et dans de nombreux autres instruments en matière de lutte contre le terrorisme déjà ratifiés par la Suisse. Par ailleurs, elle figure également à l'art. 7 de la Convention internationale contre la torture et autres peines et traitements cruels, inhumains ou dégradants; RS 0.105.

⁵³ Délégation de la poursuite pénale selon les art. 85 ss EIMP.

⁵⁴ Art. 32 ss EIMP, ceci dans le cadre de ce que prévoient les dispositions générales des articles premier et suivants, à moins que des traités internationaux n'en disposent autrement. Les mesures relatives à l'extradition sont prises par l'Office fédéral de la justice (art. 16, al. 2, EIMP).

double incrimination⁵⁵ et les garanties offertes notamment par la CEDH et le Pacte international relatif aux droits civils et politiques⁵⁶.

L'objectif poursuivi par l'art. 11, par. 4, consiste à éviter que l'auteur d'une infraction mentionnée à l'art. 2 de la Convention puisse échapper aux poursuites pénales. Une telle réglementation apparaît déjà dans d'autres instruments internationaux⁵⁷.

Le par. 5 reprend une pratique consacrée par plusieurs instruments internationaux qui améliore l'efficacité de la Convention.

2.2.6.5 Art. 12 (Entraide judiciaire)

L'art. 12, par. 1, statue une obligation contenue dans la quasi totalité des instruments internationaux multilatéraux et bilatéraux d'entraide judiciaire en matière pénale, selon laquelle les Etats s'accordent l'entraide judiciaire la plus large possible.

Le par. 2 précise que le secret bancaire⁵⁸ ne peut être invoqué à titre de refus de l'entraide judiciaire. En matière de répression du financement du terrorisme, le secret bancaire, déjà actuellement, ne constitue pas un obstacle pour l'entraide. Car, en Suisse, il peut être très rapidement levé, à savoir dès l'annonce d'une demande d'entraide⁵⁹, voire dès qu'une procédure pénale est ouverte. Le système suisse est à la pointe à cet égard, dans la mesure où, à titre de mesures provisoires, l'autorité compétente peut notamment ordonner le blocage de comptes bancaires⁶⁰ ainsi que la saisie de documents⁶¹, une perquisition⁶² ou des séquestres conservatoires⁶³. D'autres instruments internationaux prévoient également une clause semblable⁶⁴.

Le par. 3 met en œuvre un principe important de coopération judiciaire internationale en matière pénale, à savoir la règle de la spécialité. Cette règle protège la personne concernée par la demande de coopération judiciaire ainsi que la souveraineté de l'Etat requis.

⁵⁵ La quotité minimale de la sanction privative de liberté dont est passible l'infraction doit être d'au moins un an, selon l'art. 35, let. a, EIMP, ce qui ne pose aucun problème relativement aux infractions mentionnées à l'art. 2 de la Convention, toutes soumises à des peines réalisant cette exigence, car elles sont au moins passibles de l'emprisonnement, voire de la réclusion (art. 9 CP) selon le droit pénal matériel suisse et les nouvelles dispositions pénales proposées.

⁵⁶ Cf. art. 2, let. a, EIMP.

⁵⁷ Notamment art. 8, par. 4, de la Convention contre la torture et autres peines et traitements cruels, inhumains ou dégradants; RS **0.105**.

⁵⁸ Art. 47 de la loi fédérale sur les banques et les caisses d'épargne; RS **952.0**. Cette disposition réserve expressément, à son al. 4, les dispositions de la législation fédérale et cantonale statuant l'obligation de renseigner l'autorité et de témoigner en justice; pour de plus amples développements: Robert Zimmermann, *La coopération judiciaire internationale en matière pénale*, Berne 1999, ch. 223, p. 169 et la jurisprudence citée.

⁵⁹ Mesures provisoires instituées à l'art. 18 EIMP.

⁶⁰ Notamment ATF **127** II 198; **126** II 462; **123** II 161; **113** Ib 175; **111** Ib 129; **107** Ib 274.

⁶¹ Entre autres ATF **127** II 154, consid. 3b; **126** II 324; **123** II 268; **121** II 153; **118** Ib 457.

⁶² En particulier ATF **120** Ib 179.

⁶³ Notamment ATF **110** IV 118.

⁶⁴ Art. 7, par. 5, de la Convention des Nations Unies contre le trafic illicite de stupéfiants et de substances psychotropes, signée par la Suisse le 16.11.1989; FF **1996** I 557; art. 18, par. 8, de la Convention des Nations Unies contre la criminalité transnationale organisée, signée par la Suisse le 12.12.2000.

L'art. 12, par. 5, stipule un autre principe essentiel du droit international: «pacta sunt servanda». En l'absence d'un accord d'entraide judiciaire ou d'échange d'informations entre les Etats Parties, ceux-ci sont tenus de faire application de leur législation interne afin de remplir leurs obligations selon les par. 1 et 2 de l'art. 12.

2.2.6.6 Art. 13 (Clause de «défiscalisation»)

L'art. 13 consacre la «défiscalisation» des infractions visées à l'art. 2 de la Convention en rapport avec une demande de coopération judiciaire pénale, ce qui veut dire que la coopération judiciaire pénale requise pour une infraction visée par la Convention ne peut être refusée au seul motif qu'elle concerne une infraction fiscale. Une telle clause ne représente pas une nouveauté, au niveau international⁶⁵. Cette disposition est uniquement applicable concernant les infractions entrant dans le champ d'application de l'art. 2 de la Convention, lesquelles ne représentent pas, selon le droit suisse en vigueur, des infractions fiscales. Cela signifie que le droit applicable permet déjà d'accorder l'entraide judiciaire et l'extradition en ce qui les concerne. La Convention n'apporte donc pas de changement en rapport avec les infractions fiscales.

Il convient de souligner que l'extradition est soumise aux conditions du droit de l'Etat requis au sens de l'art. 11, par. 3 de la Convention. Ainsi, le principe de la spécialité peut en tous les cas être cité à l'appui de la communication par laquelle l'Office fédéral de la justice accorde l'entraide judiciaire et l'extradition (voir art. 12, par. 3).

2.2.6.7 Art. 14 et 15 (Clauses de «dépolitisation» et de non-discrimination)

L'art. 14 régit la «dépolitisation» des infractions mentionnées à l'art. 2 en ce qui concerne les besoins de l'extradition ou de l'entraide judiciaire entre Etats Parties. Cela signifie que la coopération judiciaire pénale requise pour une infraction visée par la Convention ne saurait être refusée pour la seule raison qu'elle concerne une infraction politique⁶⁶. La «ratio legis» de l'art. 14 est liée à la gravité des infractions de l'art. 2 qui ne peuvent plus être considérées comme revêtant un aspect politique. Cette disposition modifie des instruments d'entraide judiciaire et d'extradition en

⁶⁵ Cf. notamment la Convention des Nations Unies contre la criminalité transnationale organisée, art. 16, par. 15 et art.18, par. 22 de contenu identique, formulés à peine différemment.

⁶⁶ De nombreux autres instruments internationaux ratifiés ou en voie de ratification par la Suisse excluent déjà, dans le domaine de la coopération judiciaire internationale en matière pénale, le caractère politique des infractions auxquelles ils se rapportent: Art. 3, par. 3 de la Convention européenne d'extradition (RS 0.353.1), mais la Suisse a toutefois émis une réserve à ce sujet (RS 0.353.11); art. 1, 2 et 8 de la Convention européenne pour la répression du terrorisme, mais voir également art. 13 de cette Convention et la réserve émise par la Suisse (RS 0.353.3); art. 3, par.2 du Traité d'extradition entre la Confédération Suisse et les Etats-Unis d'Amérique (RS 0.353.933.6); art. 1 du Protocole additionnel à la Convention européenne d'extradition (RS 0.353.11); art. VII – en relation avec l'art. III – de la Convention pour la répression et la répression du crime de génocide; future RS 0.311.11.

vigueur en ce qui concerne l'appréciation de la nature des infractions visées à l'art. 2. En droit interne, l'art. 3, al. 2, EIMP consacre déjà la «dépolitisation» de certains actes sévères. Certes, l'art. 14 de la Convention dépasse la portée de l'art. 3, al. 2, EIMP, dans la mesure où il limite notamment, en matière d'extradition, le pouvoir d'appréciation du Tribunal fédéral, autorité compétente pour accorder ou refuser l'extradition lorsque la personne réclamée prétend être poursuivie à raison d'une infraction politique, ou si l'instruction permet sérieusement de croire que l'acte revêt un caractère politique. La Convention n'en demeure pas moins conforme au droit interne suisse, compte tenu de l'art. 1 EIMP réservant les accords internationaux, tel qu'en l'occurrence. Les dispositions d'un traité priment en conséquence et par principe⁶⁷ celles du droit interne, sauf si ce dernier est plus favorable à la coopération que le traité⁶⁸.

L'art. 14 doit être examiné en relation avec l'art. 15 de la Convention. L'art. 15 se rapporte au but déguisé de la poursuite pour des motifs de race, de religion, de nationalité, d'origine ethnique ou d'opinions politiques de la personne concernée⁶⁹. Il s'agit d'une clause obligatoire de non-discrimination visant à ce que l'entraide au sens large (extradition comprise) soit refusée en cas de réalisation des motifs mentionnés ci-dessus. Une telle disposition veut éviter que l'Etat requis ne prête son concours, par le biais de la coopération judiciaire internationale en matière pénale, à des procédures ne garantissant pas à la personne poursuivie un standard de protection minimal correspondant à celui offert par le droit des Etats démocratiques, tel qu'il est défini en particulier par le Pacte international relatif aux droits civils et politiques ou la CEDH, ou qui se heurteraient à des normes reconnues appartenir à l'ordre public international⁷⁰. En ce sens, l'art. 15 se place sur un plan différent de l'art. 14, puisqu'il permet l'analyse de la requête non plus en fonction de la nature de l'acte, mais en fonction du mobile de la demande. Cette disposition permet de se prémunir contre des demandes abusives. Une telle clause constitue un acquis de la Convention européenne pour la répression du terrorisme (art. 5). La personne concernée par la demande dispose en conséquence d'un droit opposable à l'Etat requis de ne pas coopérer lorsque l'Etat requérant dissimule la nature effective de sa demande. Sauf lorsque le régime en vigueur dans l'Etat requérant relève de la dictature, la démonstration d'un risque sérieux et objectif, rendu vraisemblable, d'une grave violation des droits de l'homme ou d'un traitement discriminatoire prohibé dans l'Etat requérant susceptible de toucher de manière concrète la personne concernée⁷¹ est difficile à établir, ce qui diminue l'attrait de la clause de non-discrimination. Dans tous les cas la personne poursuivie dans la procédure étrangère peut invoquer les normes impératives et obligatoires du droit international, qui

⁶⁷ Le Tribunal fédéral a d'ailleurs relevé que le principe de la primauté du droit international sur le droit interne découle de la nature même de la règle internationale, toute règle interne contraire se révélant en conséquence inapplicable: notamment ATF 122 II 485.

⁶⁸ Robert Zimmermann, op. cit., ch. 492, p. 383.

⁶⁹ D'autres instruments internationaux contiennent une telle clause, notamment art. 3, par. 2, de la Convention européenne d'extradition; art. 5 de la Convention européenne pour la répression du terrorisme; art. 16, par 14, de la Convention des Nations Unies contre la criminalité transnationale organisée.

⁷⁰ ATF 123 II 517, consid. 5a et les références évoquées.

⁷¹ Notamment ATF 123 II 167, consid. 6b; cf. Robert Zimmermann, op. cit., ch. 396, p. 307.

s'imposent à la Suisse indépendamment de l'existence de traités bi- ou multilatéraux la liant à l'Etat requérant, et qui peuvent justifier un refus de la Suisse de coopérer⁷².

2.2.6.8 Art. 16 (Remise temporaire de personnes détenues)

Cette disposition régit la remise temporaire de personnes détenues à des fins d'identification ou de témoignage ou pour qu'elles apportent leurs concours à l'établissement des faits dans le cadre d'une enquête ou de poursuites relatives aux infractions visées à l'art. 2 de la Convention. La remise est subordonnée au consentement de la personne concernée, à celui des Etats requérant et requis (art. 16, ch. 1, let. a et b), et est soumise aux conditions fixées entre ces Etats (art. 16, par. 1, let. b). Par principe, sauf demande ou accord de l'Etat requis, la personne remise reste en détention dans l'Etat requérant, ce qui permet d'éviter qu'elle ne prenne la fuite; elle est ensuite remise sans délai à l'Etat requis, sans que ce dernier ne doive pour cela présenter une demande d'extradition, et bien évidemment sous déduction de la période passée en détention par l'intéressé (art. 16, par. 2, let. a à d). L'art. 16, par. 3, accorde à la personne remise la garantie qu'elle ne peut pas être poursuivie ou détenue ou soumise à d'autres restrictions à sa liberté de mouvement sur le territoire de l'Etat vers lequel elle est transférée, à raison d'actes ou de condamnations antérieurs à son départ du territoire de l'Etat à partir duquel elle a été transférée.

2.2.7 Art. 17 (Garanties en matière de respect des droits de l'homme)

En vertu de l'art. 17, les Etats Parties s'engagent à garantir un traitement équitable à toutes les personnes contre lesquelles des mesures de contrainte ont été prises ou une procédure a été engagée pour cause de financement d'activités terroristes. Les Etats Parties sont en outre tenus de respecter les droits prévus par leur législation, mais aussi de ne pas enfreindre les dispositions applicables du droit international ayant trait aux droits de l'homme⁷³.

⁷² ATF **117** Ib 340, consid. 2a et les références citées.

⁷³ Notamment les art. 9 et 10 du Pacte international du 16.12.1966 relatif aux droits civils et politiques (RS **0.103.2**), la Convention du 10.12.1984 contre la torture et autres peines ou traitements cruels, inhumains, ou dégradants (RS **0.105**), art. 5 et 6 de la Convention européenne des droits de l'homme (RS **0.101.1**) ainsi que la Convention européenne du 26.11.1987 pour la prévention de la torture ou des peines ou traitements inhumains ou dégradants (RS **0.106**). La Suisse s'en tient en outre aux règles minima pour le traitement des détenus que le Comité des Ministres du Conseil de l'Europe a adoptées le 19.1.1973 sous la forme de la Résolution (73) 5 et qui ont été confirmées le 12.2.1987 dans une version révisée contenue dans la Recommandation 87 (3); cf. ATF **122** I 226.

2.2.8

Art. 18

2.2.8.1

Art. 18, par. 1 (Mesures visant à prévenir le financement du terrorisme)

Selon l'art. 18, par 1, de la Convention, les Etats Parties doivent prendre toutes les mesures possibles afin d'empêcher et de contrecarrer le financement d'attentats terroristes. La Suisse, pour sa part, intervient tant sur le plan préventif que sur le plan répressif. Aux termes de l'art. 2 de la loi fédérale instituant des mesures visant au maintien de la sûreté intérieure⁷⁴, les autorités compétentes de l'administration publique sont tenues de prendre des mesures préventives pour lutter contre le terrorisme. Un Service d'analyse et de prévention a ainsi été créé à l'Office fédéral de la police afin d'assurer une évaluation permanente de la menace représentée par le terrorisme. Lorsqu'ils entrent en possession d'indices ou d'informations en rapport avec des actes criminels, les organes de protection de l'Etat en font part aux autorités de poursuite pénale⁷⁵. La coopération internationale dans le domaine du renseignement repose souvent sur des accords administratifs informels, bilatéraux ou multilatéraux, et n'est donc pas régie par des conventions.⁷⁶

En vertu de l'art. 18, par. 1, let. a, les Etats Parties à la Convention doivent en outre prendre des mesures interdisant sur leur territoire les activités illégales de personnes et d'organisations mêlées au financement du terrorisme. Bien que le droit pénal en vigueur ne contienne pas encore de norme spécifiquement dirigée contre le financement du terrorisme, il existe de nombreuses autres dispositions pénales pouvant s'y appliquer. Comme le droit pénal en vigueur ne satisfait cependant pas à toutes les exigences de la Convention, le code pénal sera complété par une norme spéciale interdisant le financement du terrorisme⁷⁷. Réagissant aux attentats du 11 septembre 2001 aux Etats-Unis, le Conseil fédéral a, le 7 novembre 2001 déjà, adopté une ordonnance visant spécifiquement à permettre des poursuites pénales contre l'organisation «Al-Qaïda»⁷⁸. Sont ainsi interdites non seulement toutes les activités de l'organisation elle-même, mais aussi toutes les opérations – de financement ou de propagande, p. ex. – ayant pour but de la soutenir. Dans ce contexte, mentionnons aussi l'arrêté du Conseil fédéral du 30 novembre 2001, qui avait pour objet l'interdiction des récoltes de fonds et de toute propagande idéalisant la violence à l'occasion d'une manifestation organisée par le mouvement tamoul LTTE (Liberation Tigers of Tamil Eelam) le «jour des héros» («Heroes' Day») le 2 décembre 2001. Le Conseil

⁷⁴ LMSI, RS 120. Les ordonnances relatives à la LMSI peuvent elles aussi servir de base juridique aux activités relevant de la sûreté et du renseignement dans le domaine civil. Dans le domaine militaire, nous citerons l'art. 99 de la loi fédérale du 3 février 1995 sur l'armée et l'administration militaire (LAAM; RS 510.10) ainsi que l'ordonnance du 4 décembre 2000 sur le renseignement du Département fédéral de la défense, de la protection de la population et des sports (ordonnance sur le renseignement; RS 512.291).

⁷⁵ Cf. art. 13, al. 1, let. a, LMSI ainsi que l'ordonnance du 27 juin 2001 sur les mesures visant au maintien de la sûreté intérieure (OMSI; RS 120.2), art. 18 et annexe 2, ch. 5.

⁷⁶ Cf. art. 26, al. 2, LMSI.

⁷⁷ Pour plus de détails, cf. ch. 4.2.2.

⁷⁸ RS 122. La base constitutionnelle de l'interdiction d'Al-Qaïda ainsi que de toutes les organisations qui auraient pour but de l'aider ou de reprendre la lutte à sa place est fournie par les art. 184 et 185 de la Constitution, qui autorisent le Conseil fédéral à prendre les mesures et à adopter les ordonnances nécessaires pour préserver la sécurité intérieure et les relations extérieures de la Suisse.

fédéral tient en effet à éviter que des conflits armés à l'étranger soient soutenus depuis la Suisse sur le plan matériel ou idéologique.

2.2.8.2 Art. 18, par. 1, let. b (Mesures à prendre par les institutions financières)

Selon l'art. 18, ch. 1, let. b, les Etats Parties à la Convention sont tenues de prendre des mesures obligeant les institutions financières au sens large à identifier leurs clients, à prendre des précautions particulières ainsi qu'à signaler les cas suspects. La mise en œuvre de ces dispositions formulées en termes généraux est précisée aux points i à iv. Comme il ne s'agit toutefois là que de recommandations, ces dispositions ne sont *pas contraignantes*.

2.2.8.2.1 Art. 18, par. 1, let. b, point i (Identification des clients)

En vertu de l'art. 18, ch. 1, let. b, point i, les Etats Parties doivent envisager «d'adopter des réglementations interdisant l'ouverture de comptes dont le titulaire ou le bénéficiaire n'est pas identifié ni identifiable et des mesures garantissant que ces institutions vérifient l'identité des véritables détenteurs de ces opérations». En Suisse, le droit en vigueur oblige déjà l'intermédiaire financier à vérifier l'identité du cocontractant (art. 3 de la loi sur le blanchiment d'argent⁷⁹) et à identifier l'ayant droit économique (art. 4 LBA). L'ouverture de comptes dont l'ayant droit économique n'est pas identifié ou identifiable est donc interdite. Si le cocontractant n'est pas l'ayant droit économique ou s'il y a un doute à ce sujet, si le cocontractant est une société de domicile ou si la transaction est une opération de caisse portant sur une somme importante (art. 3, al. 2, LBA), la loi exige des intermédiaires financiers qu'ils requièrent du cocontractant une déclaration écrite indiquant qui est l'ayant droit économique (art. 4, al. 1, let. a à c, LBA). Lorsqu'il s'agit de comptes globaux ou de dépôts globaux, l'intermédiaire financier doit, en vertu de l'art. 4, al. 2, LBA, exiger du cocontractant qu'il lui fournisse une liste complète des ayants droit économiques.

Du point de vue qualitatif, la législation suisse en vigueur satisfait déjà pleinement aux exigences de la Convention contenues dans ces dispositions.

⁷⁹ LBA, RS 955.0

2.2.8.2.2

Art. 18, par. 1, let. b, point ii (Identification de personnes morales)

L'art. 18, par. 1, let. b, point ii, a pour objet les mesures jugées nécessaires à l'identification des personnes morales. L'art. 3 LBA et les dispositions d'exécution de cette loi⁸⁰ satisfont là aussi aux exigences de la Convention (extrait du registre du commerce, statuts, acte de fondation, contrat de fondation, attestation de l'organe de contrôle ou autorisation officielle d'exercer l'activité). L'extrait du registre du commerce, notamment, contient toutes les indications exigées par la Convention (fondation, nom, forme juridique, adresse, dirigeants et dispositions régissant le pouvoir d'engager la personne morale).

2.2.8.2.3

Art. 18, par. 1, let. b, point iii (Obligation de signaler)

Selon l'art. 6 LBA, l'intermédiaire financier doit clarifier l'arrière-plan économique et le but d'une transaction ou d'une relation d'affaires lorsque celle-ci lui paraît inhabituelle ou si des indices laissent supposer que certaines valeurs patrimoniales proviennent d'un crime ou qu'une organisation criminelle ou terroriste exerce un pouvoir de disposition sur ces valeurs⁸¹. Si un soupçon fondé au sens de l'art. 9 LBA résulte de la prise de renseignements, ce soupçon doit être communiqué: aux termes de l'art. 9 LBA, l'intermédiaire financier qui sait ou qui présume, sur la base de soupçons fondés, que les valeurs patrimoniales impliquées dans la relation d'affaires ont un rapport avec une infraction au sens de l'art. 305^{bis} CP, qu'elles proviennent d'un crime ou qu'une organisation criminelle ou terroriste exerce un pouvoir de disposition sur ces valeurs, doit en informer sans délai le Bureau de communication en matière de blanchiment d'argent. Il doit en outre bloquer immédiatement toutes les valeurs patrimoniales qui ont un lien avec les informations communiquées. Ce blocage doit être maintenu jusqu'à la réception d'une décision de l'autorité de poursuite pénale compétente, mais au maximum durant cinq jours ouvrables (art. 10 LBA). Tant que dure le blocage des avoirs décidé par lui-même, l'intermédiaire financier ne doit informer ni les personnes concernées ni des tiers de la communication qu'il a faite (art. 10 LBA). Les nouvelles infractions «terrorisme» (art. 260^{quinquies} P-CP) et «financement du terrorisme» (art. 260^{sexies} P-CP) entreront dans la catégorie des crimes et représenteront donc des actes déclenchant les obligations décrites plus haut qui résultent de la LBA. Le dispositif suisse satisfera donc pleinement aux exigences de la Convention.

Le fait que l'art. 18, par. 1, let. b, point iii, oblige les Etats Parties à envisager de contraindre les institutions financières à signaler toutes les opérations complexes, inhabituellement importantes, ainsi que tous les types inhabituels d'opérations lorsqu'elles n'ont pas de cause économique ou licite apparente, n'y change rien. Selon le dispositif mis en place dans la législation suisse, ce type de transactions déclenche en premier lieu chez l'intermédiaire financier une obligation particulière de clarifi-

⁸⁰ Notamment art. 13 de l'ordonnance de l'autorité de contrôle sur les obligations de diligence des intermédiaires financiers, du 25 novembre 1998 (RS **955.033.2**), art. 2 (n.m. 12 ss) de la Convention de 1998 relative à l'obligation de diligence des banques (CDB 98) ainsi que les règlements des organismes d'autorégulation (OAR) reconnus par l'Autorité de contrôle.

⁸¹ Selon projet de compléter la note marginale de l'art. 260^{ter} CP, cf. ch. 4.5.4 et 4.8.

cation au sens de l'art. 6 LBA. Elles ne seront donc signalées que si les soupçons ne peuvent pas être éliminés au moyen d'une enquête approfondie. Le législateur a opté pour cette solution afin d'éviter que le Bureau de communication ne croule sous des quantités de communications sans fondement. Au regard de l'objectif visé à travers l'art. 18 de la Convention, force est de constater que le dispositif de détection mis en place par la Suisse équivaut en tous points aux mesures suggérées par la Convention. La disposition du point iii n'appelle donc aucune modification de notre législation.

2.2.8.2.4 Art. 18, par. 1, let. b, point iv (Conservation des pièces)

En vertu de l'art. 7, al. 3, LBA, les intermédiaires financiers sont tenus de conserver les documents pendant dix ans au moins, ce qui est donc nettement plus que la durée de cinq ans exigée par la Convention.

2.2.8.3 Art. 18, par. 2, let. a (Supervision des organismes de transfert monétaire)

Selon l'art. 18, par. 2, let. a, les Etats Parties envisagent de prendre des mesures assurant la supervision des organismes de transfert monétaire. Les instruments dont la Suisse dispose déjà dans ce domaine sont régis par la loi sur le blanchiment d'argent, en vertu de laquelle l'autorité de contrôle exerce sa surveillance sur le secteur para-bancaire. Sont ainsi assujetties à son contrôle toutes les personnes morales ou physiques qui exercent une activité au sens de l'art. 2, al. 3, LBA (intermédiaires financiers). Cette disposition s'applique de manière très large à tous les établissements du secteur para-bancaire qui procèdent à des transferts de fonds. Les personnes qui fournissent des services dans le domaine du trafic des paiements, notamment en procédant à des virements électroniques pour le compte de tiers, ou qui émettent ou gèrent des moyens de paiement comme les cartes de crédit ou les chèques de voyage, tombent ainsi expressément sous le coup de l'art. 2, al. 3, let. b, LBA.

Selon l'art. 14 LBA, toute personne désireuse d'exercer une activité d'intermédiaire financier au sens de l'art. 2, al. 3, LBA doit soit être affiliée à un organisme d'autorégulation reconnu (OAR), soit demander à l'autorité de contrôle l'autorisation d'exercer son activité. Aux termes de l'art. 25 LBA, les OAR sont tenus de définir dans leur règlement les conditions relatives à l'affiliation et à l'exclusion. Les conditions auxquelles l'autorité de contrôle accorde l'autorisation sont régies à l'art. 14, al. 2, LBA (inscription au registre du commerce ou autorisation officielle d'exercer, prescriptions internes et organisation propres à garantir le respect des obligations résultant de la LBA, bonne réputation de l'intermédiaire financier et des personnes chargées de l'administration ou de la direction de ses affaires et garantie que toutes ces personnes respectent les obligations découlant de la LBA). Les personnes agissant en qualité d'intermédiaire financier sans y être autorisé par l'autorité de contrôle et sans être affiliées à un OAR sont passibles d'une amende de 200 000 francs au plus (art. 36 LBA).

2.2.8.4

Art. 18, par. 2, let. b (Surveillance du transport transfrontière d'espèces)

Pour ce qui est du transfert d'espèces d'un pays à l'autre, la Convention suggère la prise de mesures réalistes tout en précisant que celles-ci doivent être assujetties à des garanties strictes visant à assurer que l'information sera utilisée à bon escient et qu'elles n'entraveront en aucune façon la libre circulation des capitaux.

En Suisse, l'importation, l'exportation et le transit de toutes les marchandises sont assujettis au contrôle douanier⁸². Comme l'argent liquide est franc de droits de douane et de TVA et que l'importation, l'exportation ainsi que le transit d'espèces ne sont soumis à aucune restriction (pas d'obligation de déclaration des devises)⁸³, l'administration des douanes n'a pas de raisons de les soumettre à un contrôle spécial. Pour être efficaces, les mesures de surveillance devraient, le cas échéant, porter non seulement sur le trafic des marchandises commerciales, mais aussi sur le trafic des voyageurs. Dans ce domaine, il serait toutefois illusoire de croire à la possibilité de faire appliquer de manière rigoureuse l'obligation de déclarer les espèces⁸⁴. Contrôler ainsi toutes les personnes franchissant la frontière est tout bonnement impossible: les ressources existantes seraient loin d'y suffire, sans compter que l'on ne parviendrait pas à assurer l'imperméabilité de la frontière verte. A chaque fois, cependant, qu'un contrôle douanier permet de découvrir des indices laissant soupçonner que des actes pénalement répréhensibles ont été commis (p. ex. dans le contexte d'un crime ou d'une opération de blanchiment d'argent), les agents responsables font aujourd'hui déjà appel soit à l'Autorité de contrôle en matière de lutte contre le blanchiment d'argent, soit directement à la police.

2.2.8.5

Art. 18, par. 3 et 4 (Coopération et échanges d'informations entre les autorités)

L'art. 18, par. 3, a pour objet la coopération ainsi que l'échange d'informations en rapport avec la prévention et la répression du financement du terrorisme à l'échelle internationale. La coopération porte d'une part sur l'entraide judiciaire en tant que telle⁸⁵, soit sur tous les actes de procédure ainsi que sur toutes les mesures de contrainte admises dans le cadre de la procédure pénale qui peuvent être prises par commission rogatoire à la demande d'un autre pays. Peuvent ainsi être ordonnées notamment des mesures provisoires comme le blocage de comptes bancaires (art. 18 EIMP) ou, lorsqu'une procédure est entamée en Suisse, la transmission spontanée de moyens de preuve et d'informations à des autorités étrangères (art. 67a EIMP). Outre les traités multilatéraux destinés à lutter contre le terrorisme, la Suisse s'est constitué tout un réseau d'instruments bilatéraux – notamment avec les Etats-Unis – s'appliquant spécifiquement aux domaines de l'entraide judiciaire en matière pénale et de l'extradition. Tous ces instruments représentent des moyens de lutte contre la criminalité, y compris le terrorisme. L'EIMP et l'ordonnance d'exécution y relative

⁸² Art. 6, al. 1, de la loi sur les douanes (RS 631.0).

⁸³ Art. 14, ch. 3, de la loi sur les douanes et art. 74, ch. 2, de la loi sur la TVA (RS 641.20).

⁸⁴ En moyenne, 650 000 voyageurs et 270 000 véhicules franchissent quotidiennement la frontière suisse.

⁸⁵ Art. 63 ss EIMP.

permettent à la Suisse de collaborer aussi avec les Etats avec lesquels elle n'a pas conclu de traité d'entraide judiciaire. A l'Office fédéral de la justice, le traitement des demandes d'entraide judiciaire ou d'extradition relève de la Section de l'entraide judiciaire.

La coopération internationale recouvre cependant aussi l'échange de renseignements obtenus par la police ou les contacts policiers en matière d'entraide judiciaire, soit la collaboration entre les autorités de police de différents pays, à l'exclusion de toute mesure de contrainte. En Suisse, c'est la Police judiciaire fédérale qui se charge d'assurer la collaboration avec les autres Etats⁸⁶ en ce qui concerne les mesures de police judiciaire destinées à lutter contre les organisations criminelles ou terroristes et contre la criminalité économique internationale⁸⁷. A ce niveau, l'échange d'informations a généralement lieu par l'intermédiaire d'Interpol, qui a institué un service permanent à cet effet après les attentats terroristes du 11 septembre 2001. Depuis plusieurs années, la Suisse a collaboré étroitement avec Interpol. En fonction de ses priorités et des moyens à disposition, elle continuera à prendre une part active aux groupes de travail mis en place suite aux événements du 11 septembre 2001 ou à fournir une contribution active à l'échelon stratégique.

Les attentats aux Etats-Unis ont fait ressortir toute l'importance de l'échange d'informations, notamment en ce qui concerne le financement des activités terroristes. A la suite de ces événements, le Ministère public de la Confédération et l'Office fédéral de la police ont créé une cellule spéciale baptisée «Task Force Terror USA» afin d'accroître l'efficacité non seulement de la collaboration avec les autorités étrangères, mais aussi de la procédure d'enquête de police judiciaire ouverte après les attentats du 11 septembre 2001. Cette cellule centralise les résultats des enquêtes menées en Suisse, se charge de répartir les tâches entre les autorités d'investigation, évalue les informations reçues, fixe les priorités et se charge des contacts ainsi que de la collaboration avec les autorités de police et avec les autorités de poursuite pénale cantonales et étrangères.

Fonctionnant comme Financial Intelligence Unit (FIU) de la Suisse, le Bureau de communication en matière de blanchiment d'argent, rattaché à l'Office fédéral de la police, prend lui aussi part à l'échange international d'informations en matière de financement du terrorisme⁸⁸. Les FIU de la Suisse et de 68 autres pays se trouvent ainsi réunis dans le «Groupe Egmont»⁸⁹, dont les canaux sont très fréquemment utilisés depuis le 11 septembre 2001.

⁸⁶ Les bases légales se trouvent aux art. 351^{quater} et 351^{quinquies} CP, à l'art. 75a EIMP, à l'art. 35, al. 2, de l'ordonnance du 24 février 1982 sur l'entraide pénale internationale (OEIMP; RS 351.11) ainsi qu'à l'art. 13 de la loi fédérale du 7 octobre 1994 sur les Offices centraux de police criminelle de la Confédération (LOC); RS 360.

⁸⁷ Art. 7 de la loi fédérale du 7 octobre 1994 sur les Offices centraux de police criminelle de la Confédération (LOC). RS 360; art. 1, let. b, de l'ordonnance du 30 novembre 2001 concernant l'exécution des tâches de police judiciaire au sein de l'Office fédéral de la police (RS 360.1).

⁸⁸ Base légale: art. 32, al. 2, LBA

⁸⁹ Sont membres du «Groupe Egmont» les FIU qui, en leur qualité d'autorité centrale d'un pays, reçoivent des communications de soupçons, les examinent et les transfèrent aux autorités de poursuite pénale compétentes. L'objectif visé par le «Groupe Egmont» est de garantir un échange sûr, rapide et légal d'informations servant à lutter contre le blanchiment d'argent. Dans le sillage des attentats terroristes du 11 septembre 2001, cet échange d'informations a été étendu à la lutte contre le terrorisme et a ainsi acquis une importance accrue.

2.2.9

Art. 19 (Communication du résultat au Secrétaire général des Nations Unies)

L'art. 19 institue un devoir de communication pour les Etats Parties à la Convention. Ces derniers doivent informer le Secrétaire général du résultat définitif des actions pénales engagées contre des auteurs présumés de financement du terrorisme.

2.2.10

Art. 20 à 22 (Respect du droit international public)

Les art. 20 à 22 se fondent, en tout ou en partie, sur d'autres conventions internationales. Ces articles rappellent les principes de l'égalité souveraine des Etats, de l'intégrité territoriale et de la non-ingérence dans les affaires intérieures. Il convient de souligner également qu'aucune disposition de la Convention n'a d'incidence sur les autres droits, obligations et responsabilités des Etats et des individus en vertu du droit international, en particulier sur ceux découlant des buts de la Charte des Nations Unies, du droit international humanitaire et des autres conventions pertinentes, par exemple dans le domaine des droits de l'homme.

2.2.11

Art. 23 (modifications de l'annexe)

La définition du terrorisme, telle qu'établie à l'art. 2, par. 1, de la Convention, utilise une double référence: d'une part les actes constitutifs des infractions au sens de l'un des traités contre le terrorisme mentionnés en annexe de cette convention (let. a), d'autre part la définition établie par cette convention (let. b). Le but poursuivi par l'art. 23 est de ne pas limiter le champ d'application de la Convention pour la répression du financement du terrorisme aux instruments internationaux existant lors de son élaboration et auxquels se réfère l'art. 2, par. 1, let. a. Dès lors, cet article établit un mécanisme précis qui permet de compléter l'énumération des traités figurant en annexe, de manière à adapter la liste initiale à l'évolution législative internationale. Il convient de souligner que des modifications éventuelles de l'annexe ne sont contraignantes pour les Etats Parties que si ceux-ci les approuvent.

2.2.12

Art. 24 (Règlement des différends)

L'art. 24, par. 1, établit le mécanisme de règlement des différends concernant l'interprétation ou l'application de la Convention. Dans un premier temps, les dissensions sont réglées par voie de négociation. Dans un deuxième temps, les parties ont recours à l'arbitrage ad hoc. Faute de résultats, la Convention institue en dernier recours l'arbitrage de la Cour internationale de justice. L'art. 24, par. 2, prévoit que tout Etat peut formuler une réserve au principe de l'arbitrage obligatoire énoncé au par. 1. Cette réserve peut toutefois être révoquée en tout temps (art. 24, par. 3).

La formulation de l'art. 24 correspond à celle utilisée dans les autres conventions relatives au terrorisme négociées au sein de l'ONU et auxquelles la Suisse est partie.

En outre, la Suisse a adhéré au Statut de la Cour internationale de justice⁹⁰ et a reconnu, conformément à l'art. 36 du Statut, la juridiction obligatoire de cette cour.

2.2.13 Art. 25 à 28 (Dispositions finales)

Les art. 25 à 28 comportent les dispositions finales usuelles concernant la signature, l'entrée en vigueur et la dénonciation de la Convention.

La Convention était ouverte à la signature de tous les Etats du 10 janvier 2000 au 31 décembre 2001, au siège de l'ONU à New York (art. 25, par. 1). Passé ce délai, tout Etat peut encore adhérer à la Convention (art. 25, par. 3). Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion doivent être déposés auprès du Secrétaire général de l'ONU (art. 25, par. 2 et 3). La Suisse a signé la Convention le 13 juin 2001.

L'art. 26 établit que la Convention entrera en vigueur trente jours après la 22^e ratification. En conséquence, la Convention est entrée en vigueur le 10 avril 2002. Pour les Etats qui ratifieraient ou adhèreraient à la Convention après cette date, la Convention entrera en vigueur le 30^e jour après le dépôt par l'Etat de son instrument de ratification, d'approbation, d'acceptation ou d'adhésion.

Finalement, chaque Etat peut dénoncer en tout temps la Convention, en adressant une notification écrite au Secrétaire général de l'ONU (art. 27).

3 Convention internationale du 15 décembre 1997 pour la répression des attentats terroristes à l'explosif

3.1 Partie générale

3.1.1 Genèse de la Convention

Au nom du G-8, la France a présenté à l'ONU un texte de convention pour la répression des attentats terroristes à l'explosif, en décembre 1996. Dans la résolution 51/210 du 17 décembre 1996, l'Assemblée générale de l'ONU a repris cette idée et a créé puis chargé un Comité spécial d'élaborer un tel projet de Convention. Les discussions ont débuté dans le Comité spécial, du 24 février au 7 mars 1997, puis se sont poursuivies au sein du groupe de travail de la sixième Commission, du 22 septembre au 3 octobre 1997. A l'issue de la session d'automne, les délégations avaient réussi à se mettre d'accord sur l'ensemble de la Convention, à l'exception de la question de l'exclusion des forces armées du champ d'application de la Convention⁹¹. Le groupe de travail a dès lors transmis un projet de texte à la sixième Commission, qui, grâce aux intenses négociations en novembre, a pu accepter un compromis sur la question des forces armées. Le 15 décembre 1997, l'Assemblée générale a adopté⁹² par consensus la Convention internationale pour la répression des attentats terroristes à l'explosif et a ouvert cet instrument à la signature des

⁹⁰ RS 0.193.501. Le Statut est entré en vigueur pour la Suisse le 28 juillet 1948.

⁹¹ Voir ch. 3.2.8.

⁹² A/RES/52/164.

Etats, du 12 janvier 1998 au 31 décembre 1999, au siège de l'ONU à New York. La Convention est entrée en vigueur le 23 mai 2001. Aujourd'hui⁹³, 58 Etats ont signé la Convention, 63 l'ont ratifiée.

3.1.2 Le rôle de la Suisse dans l'élaboration de la Convention

La Suisse a pris part de manière active aux négociations relatives à une Convention pour la répression des attentats terroristes à l'explosif. Elle a ainsi soumis des propositions en ce qui concerne l'objet de l'infraction (art. 2) et les forces armées (préambule et art. 19)⁹⁴. Elle a également clairement pris position en ce qui concerne les articles relatifs à l'extradition (art. 8), au respect des droits de l'homme en faveur des personnes, contre lesquelles une procédure a été engagée pour cause d'activités terroristes (art. 14) et à la coopération en vue de la prévention des infractions (art. 15).

3.1.3 Importance et contenu de la Convention

Par son objet, la Convention pour la répression des attentats terroristes à l'explosif recouvre un grand nombre des actes terroristes perpétrés dans le monde. Elle définit de manière large les «explosifs ou autres engins meurtriers» (art. 1, par. 3). Grâce à cette définition, la Convention est applicable aux actes terroristes utilisant des produits chimiques toxiques, d'agents biologiques, toxines ou substances analogues ou de rayonnements ou de matières radioactives. Le champ d'application personnel de la Convention s'applique à l'ensemble des personnes à l'origine de ces actes, que celles-ci aient commis l'acte terroriste ou qu'elles aient tenté de le commettre. La Convention sanctionne les exécutants de l'acte mais également les complices, les organisateurs ou les personnes qui contribuent de toute autre manière à la commission de l'acte (art. 2). Sont toutefois exclues du champ d'application de la Convention les forces armées en période de conflit armé (art. 19, par. 2).

La Convention crée un système tant de prévention que de répression des attentats terroristes à l'explosif. Les Etats collaborent sur la base de l'art. 15 à la prévention des actes terroristes. En même temps, cette Convention d'incrimination demande aux Etats d'ériger en infraction pénale, dans le droit interne, les actes décrits par la Convention et de les réprimer par des peines appropriées qui prennent en compte la gravité de l'infraction (art. 4). La répression efficace des actes terroristes à l'explosif est complétée par des règles de coopération internationale entre les Etats Parties (art. 7 à 13).

⁹³ État au 19 juin 2002.

⁹⁴ Art. 3 du projet de Convention. Voir ch. 3.2.8.

3.2

Partie spéciale: Les principales dispositions de la Convention

3.2.1

Art. 1 et 2 (Définition des infractions)

Comme toutes les autres conventions de l'ONU relatives au terrorisme, la présente Convention ne contient pas de définition du terrorisme, car on n'en a encore trouvé aucune qui soit généralement acceptée à l'échelle internationale. Ce qui est en revanche défini dans la présente Convention, ce sont certains actes qui sont condamnés par la communauté internationale quelle que puisse être la motivation de leurs auteurs et qui doivent donc être sanctionnés par les Etats Parties.

Eléments constitutifs de l'infraction: notion objective

Aux termes de l'art. 2, est punissable toute personne qui livre, pose ou fait exploser ou détonner un engin explosif ou un autre engin meurtrier dans ou contre un des quatre lieux d'infraction définis à l'art. 1 (lieu public, installation gouvernementale ou publique, système de transport public ou infrastructure). En vertu de la définition des lieux d'infraction selon l'art. 1, ne tombent sous le coup de la Convention que les attentats dirigés contre la collectivité ou contre l'Etat en tant que représentant de la collectivité. Si les explosions qui n'ont pas lieu dans un endroit considéré comme un lieu public ou qui visaient des infrastructures ne fournissant pas des services d'utilité publique sont normalement pénalement répréhensibles en vertu des législations nationales, elles ne sont pas, pour les Etats Parties à la Convention, génératrices d'obligations prévues dans cette dernière. La présente Convention s'applique non seulement aux actes consistant à faire exploser ou détonner un engin explosif, mais aussi au transport de ce dernier et à sa pose sur le lieu prévu de l'explosion. Selon l'art. 1, par. 3, sont considérés comme moyens utilisés pour perpétrer l'infraction non seulement les engins explosifs ou incendiaires, mais aussi toutes les armes et tous les dispositifs qui sont conçus pour provoquer la mort, des dommages corporels graves ou des dégâts matériels importants ou qui en ont la capacité, par l'émission, la dissémination ou l'impact de produits chimiques, toxiques, d'agents biologiques, de toxines ou de substances analogues ou de rayonnements ou de matières radioactives. Dans toutes ces éventualités, les auteurs mettent en danger la collectivité dans une mesure non prévisible ou dirigent leur action contre des institutions qui sont importantes pour la collectivité. Etant donné le caractère très général de la définition de l'infraction, les explosions provoquées par des avions dans le World Trade Center en automne 2001 tombent sous le coup de la présente Convention, tout comme, d'ailleurs, la diffusion de spores d'anthrax au moyen de lettres envoyées à des institutions de l'Etat et distribuées par le système postal public.

Le code pénal suisse contient différentes dispositions s'appliquant à des infractions représentant un danger pour la collectivité et satisfait ainsi aux exigences de la Convention sans qu'il soit nécessaire de compléter la loi: selon l'art. 221 CP, les auteurs d'incendies intentionnels sont passibles d'une peine de réclusion; en vertu de l'art. 224 CP, est également puni de la réclusion celui qui, intentionnellement et dans un dessein délictueux, aura, au moyen d'explosifs ou de gaz toxiques, exposé à un danger la vie de personnes ou la propriété d'autrui; l'art. 226 CP interdit quant à lui la fabrication, la dissimulation et le transport d'explosifs ou de gaz toxiques. L'art. 231 CP vise la propagation intentionnelle d'une maladie de l'homme et l'art. 232 contient une disposition analogue concernant la propagation d'épizooties.

L'art. 233 CP, finalement, sanctionne la propagation de parasites dangereux pour la culture agricole ou forestière. Selon les dispositions pénales de la loi sur l'énergie atomique⁹⁵, les personnes ayant libéré de l'énergie atomique intentionnellement ou qui, par malveillance, aura causé une perturbation de l'exploitation d'une installation atomique, dans le dessein de mettre en danger la vie ou la santé de personnes, ou de choses d'autrui de grande valeur, sont passibles de la réclusion (art. 29). Quant à ceux qui auraient intentionnellement exposé des personnes ou des choses à des radiations ionisantes dans le dessein de mettre en danger leur santé ou de porter préjudice à leur utilité, ils sont passibles de l'emprisonnement ou de la réclusion (art. 31). Les actes préparatoires commis en vue de telles infractions sont eux aussi pénalement répréhensibles (art. 32). Dans la loi fédérale sur le matériel de guerre⁹⁶, la possession illicite d'armes nucléaires, biologiques ou chimiques est punie de l'emprisonnement ou de la réclusion.

Eléments constitutifs de l'infraction: notion subjective

Aux termes de la Convention, celui qui livre, pose ou fait exploser ou détonner un engin explosif doit avoir agi intentionnellement. L'auteur doit en outre avoir agi en ayant eu l'intention de provoquer la mort, des dommages corporels graves ou des dégâts matériels de grande envergure. Pour que les dégâts matériels tombent sous le coup de la Convention, il faut que l'auteur ait eu l'intention de causer des destructions massives et que ces destructions aient entraîné ou aient risqué d'entraîner des pertes économiques considérables. Les actes commis par négligence ou avec l'intention de provoquer des dégâts matériels peu importants – p. ex. à l'occasion de manifestations violentes – sont donc, par principe, exclus du champ d'application de la Convention.

Tentative et participation

Sont aussi punissables la tentative d'attentat à l'explosif, la complicité et le concours, de même que l'instigation (art. 2, par. 2 et 3, let. a et b). Ces formes d'infraction tombent sous le coup des dispositions de la Partie générale du code pénal suisse. Quant au soutien d'un groupement terroriste, également interdit aux termes de l'art. 2, par. 3, let. c, il tombe sous le coup des dispositions interdisant le concours à un acte terroriste ou le soutien d'une organisation criminelle selon l'art. 260^{ter} CP.

Illicéité

Il est précisé expressément à l'art. 2 que l'utilisation de l'explosif doit être illicite. Cette précision permet d'éviter que les personnes qui se servent d'explosifs dans le cadre de la légalité – dans l'exercice de leur profession, par exemple (génie civil, activités militaires, industrie, agriculture, etc.) – ne tombent pas sous le coup de la Convention⁹⁷.

⁹⁵ RS 732.0

⁹⁶ RS 514.51

⁹⁷ Le code pénal suisse s'applique en revanche aussi aux actes impliquant l'utilisation d'explosifs ou de gaz toxiques qui mettent en danger des personnes ou des biens sans procéder d'une intention délictueuse ou même commis par négligence (cf. art. 225 CP). La loi sur les explosifs (RS 941.41 CP) contient elle aussi des prescriptions relatives à l'utilisation illicite d'explosifs.

3.2.2 Art. 3 (Champ d'application de la Convention)

L'art. 3 limite le champ d'application de la Convention quant au fond lorsque aucun pays étranger n'est impliqué dans les opérations en cause: la Convention ne s'applique pas lorsque l'infraction est commise à l'intérieur d'un seul Etat, lorsque l'auteur présumé et les victimes sont des nationaux de cet Etat, lorsque l'auteur présumé se trouve sur son territoire, et lorsque aucun autre Etat n'a de raisons d'établir sa compétence, étant entendu que les dispositions pertinentes des art. 10 à 15 s'appliquent néanmoins en pareil cas.

3.2.3 Art. 6 (Compétence des Etats Parties)

A son art. 6, par. 1 et 2, la Convention distingue entre compétence obligatoire et compétence facultative des Etats Parties. Les dispositions relatives à la compétence obligatoire sont identiques à celles que l'on trouve à l'art. 7, par. 1, de la Convention pour la répression du financement du terrorisme. La formulation des dispositions relatives à la compétence facultative diffère en revanche légèrement de celle que l'on trouve dans la Convention pour la répression du financement du terrorisme (art. 7, par. 2). On ne dénote par contre aucune différence quant au fond. Il en va de même des par. 3 à 5 de l'art. 6, qui correspondent aux par. 3, 4 et 6 de l'art. 7 de la Convention pour la répression du financement du terrorisme⁹⁸.

3.2.4 Art. 7 à 13 (Coopération judiciaire internationale en matière pénale)

3.2.4.1 Art. 7, par. 1 à 2 (Obligation d'enquêter)

L'art. 7, par. 1 et 2, a une teneur textuellement identique à celle de l'art. 9, par. 1 et 2, de la Convention internationale pour la répression du financement du terrorisme, raison pour laquelle il est renvoyé aux développements présentés à l'appui de cet instrument⁹⁹.

3.2.4.2 Art. 7, par. 3 à 6 (Protection consulaire)

L'art. 7, par. 3 à 6, a une teneur textuellement semblable à celle de l'art. 9, par. 3 à 6, de la Convention internationale pour la répression du financement du terrorisme, raison pour laquelle il est renvoyé aux développements présentés à l'appui de cet instrument¹⁰⁰.

⁹⁸ Cf. ch. 2.2.4.

⁹⁹ Cf. ch. 2.2.6.1.

¹⁰⁰ Cf. ch. 2.2.6.2.

3.2.4.3 Art. 8 («Aut dedere, aut iudicare»)

L'art. 8 de la Convention revêt une teneur matériellement pareille à celle de l'art. 10 de la Convention internationale pour la répression du financement du terrorisme. Pour ce motif, il convient de se référer aux explications liées à cette dernière disposition¹⁰¹.

3.2.4.4 Art. 9 (Extradition)

L'art. 9 est matériellement identique à l'art. 11 de la Convention internationale pour la répression du financement du terrorisme. Par conséquent, il est renvoyé à ce qui est exposé concernant cette disposition¹⁰².

3.2.4.5 Art. 10 (Entraide judiciaire)

L'art. 10 contient une réglementation pareille, d'un point de vue matériel, à ce que régit l'art. 12, par. 1 et 5, de la Convention internationale pour la répression du financement du terrorisme. Il convient donc de se référer aux dites explications¹⁰³.

3.2.4.6 Clauses de «dépolitisation» et de non-discrimination (art. 11 et 12)

Les art. 11 et 12 renferment un contenu matériellement semblable à ce qu'énoncent les art. 14 et 15 de la Convention internationale pour la répression du financement du terrorisme. Il est renvoyé aux dits développements¹⁰⁴.

3.2.4.7 Art. 13 (Remise temporaire de personnes détenues)

L'art. 13 comporte une réglementation matériellement identique à ce que prévoit l'art. 16 de la Convention internationale pour la répression du financement du terrorisme. Il convient de se référer aux explications en relation avec cette dernière disposition¹⁰⁵.

¹⁰¹ Cf. ch. 2.2.6.3.

¹⁰² Cf. ch. 2.2.6.4.

¹⁰³ Cf. ch. 2.2.6.5.

¹⁰⁴ Cf. ch. 2.2.6.7.

¹⁰⁵ Cf. ch. 2.2.6.8.

3.2.5 Art. 14 (Garanties en matière de respect des droits de l'homme)

La disposition de l'art. 14 correspond dans une très large mesure à celle que l'on trouve à l'art. 17 de la Convention pour la répression du financement du terrorisme. Nous renvoyons donc au commentaire de cet article¹⁰⁶.

3.2.6 Art. 15 (Prévention et échange d'informations)

Compte tenu de la nature de la Convention, l'échange d'informations aura lieu essentiellement au niveau des tribunaux et au niveau des autorités de police judiciaire. Les questions de nature technique ou administrative en rapport avec les explosifs relèvent, quant à elles, de l'Office central pour les explosifs, subordonné à l'Office fédéral de la police, qui dispose des contacts nécessaires au niveau national, mais aussi à l'échelle internationale, avec les services spécialisés existant dans les différents pays. Pour le reste, nous renvoyons au commentaire des dispositions analogues figurant à l'art. 18, par. 1 et 3, de la Convention pour la répression du financement du terrorisme¹⁰⁷.

Pour ce qui est des activités décrites à l'art. 15, let. c, cela fait des années que la Suisse, par l'intermédiaire de l'Office central pour les explosifs et du Service de recherches scientifiques, entretient des contacts étroits avec les services compétents dans les autres pays. Dans le domaine du marquage des explosifs utilisés dans l'industrie, la Suisse a même fait œuvre de pionnier. La reprise de cette pratique sous la forme de recommandations dans la Convention montre à quel point il est important que la Suisse poursuive ses efforts dans ce domaine.

3.2.7 Art. 16 (Communication du résultat au Secrétaire général de l'ONU)

L'art. 16 institue un devoir de communication pour les Etats Parties à la Convention. Ces derniers doivent informer le Secrétaire général du résultat définitif des actions pénales engagées contre des auteurs présumés des attentats terroristes à l'explosif.

3.2.8 Art. 17 à 19 (Respect du droit international public)

Les art. 17 à 18 rappellent les principes de l'égalité souveraine des Etats, de l'intégrité territoriale, et de la non-ingérence dans les affaires intérieures.

L'art. 19, par. 1, établit que la Convention ne modifie pas les droits, obligations et responsabilités qui découlent pour les Etats et individus du droit international, particulièrement de la Charte de l'ONU et du droit international humanitaire. Ce premier paragraphe vise à établir des garanties, notamment par rapport à la question sensible

¹⁰⁶ Cf. ch. 2.2.7.

¹⁰⁷ Cf. ch. 2.2.8.1 et 2.2.8.5.

des obligations des forces armées, évoquées au par. 2. Le deuxième paragraphe prévoit l'exclusion du champ d'application de la convention des forces armées en période de conflit armé. Cette situation est régie par le droit international humanitaire. De même, les activités exercées par les forces armées, hors d'un conflit armé, dans l'exercice de leurs fonctions officielles, si elles sont régies par d'autres règles de droit international, ne sont pas non plus couvertes par la présente Convention.

Le projet initialement présenté contenait un art. 3 qui excluait de manière générale du champ d'application de la Convention les forces armées d'un Etat¹⁰⁸. Ainsi, le fait de déposer une bombe, qui est pénalement répréhensible selon les termes de la Convention, n'était pas couverts par la Convention si l'acte était accompli par des forces armées. De plus, un second paragraphe précisait qu'aucune disposition de la Convention ne devait être interprétée comme s'écartant d'autres obligations internationales imposées par le droit international humanitaire. Il importait à la Suisse que les forces armées n'obtiennent pas «carte blanche», et qu'elles ne soient pas habilitées, par exemple, à utiliser des explosifs contre des opposants ou des minorités. Elle a ainsi soumis une proposition de modification en vertu de laquelle la Convention ne s'appliquait pas lorsque les forces armées de l'Etat avaient recours à un engin explosif ou meurtrier dans un conflit armé *conformément* au droit international humanitaire¹⁰⁹. La proposition suisse ne signifiait pas que l'utilisation d'explosifs par les forces armées aurait été généralement interdite dans tous les autres cas. En dehors d'un conflit armé, par exemple, les forces militaires auraient bien évidemment été autorisées à utiliser des explosifs pour contrer un acte représentant une menace pour la collectivité, pour autant que le recours aux explosifs soit nécessaire et proportionnel dans le cas concret. Cette autorisation résulte des principes de la légitime défense et de l'état de nécessité, qui sont reconnus pratiquement partout dans le monde et qui font partie des principes généraux du droit international. Ce que la Suisse tenait à souligner avec sa proposition, c'est que l'utilisation d'explosifs par les forces armées ne serait pas considérée comme un acte légal si elle n'était pas justifiée du point de vue du droit international humanitaire ou si, en temps de paix, elle ne relevait pas d'une obligation militaire.

Cette délicate question a longtemps divisé les différentes délégations. A l'issue de la session du groupe de travail de la sixième Commission en automne 1997, aucun compromis satisfaisant n'avait pu être trouvé. Après d'intenses négociations en marge de la sixième Commission et suite à une proposition du Costa Rica, la Suisse a pu accepter un compromis sur la formulation de l'art. 19. Celui-ci prévoyait une référence aux forces armées dans le préambule de la Convention, selon laquelle l'exclusion de certains actes du champ d'application de la Convention n'excuse ni ne rend licites des actes par ailleurs illicites et n'empêche pas davantage l'exercice de poursuites sous l'empire d'autres lois. Il en ressort clairement que les activités de forces armées ou de civils au service des forces armées¹¹⁰ (p. ex. en tant que membres d'un service de renseignement militaire) qui ne sont pas jugées en fonction du

¹⁰⁸ A/AC.252/L.2.

¹⁰⁹ A/AC.252/1997/WP.30.

¹¹⁰ Selon l'article premier, par. 4, les termes «forces armées» recouvrent non seulement les forces qu'un Etat organise, entraîne et équipe conformément à son droit interne essentiellement aux fins de la défense nationale ou de la sécurité nationale, mais aussi les personnes qui agissent à l'appui des dites forces armées et qui sont placées officiellement sous leur commandement, leur autorité et leur responsabilité.

droit international humanitaire peuvent, le cas échéant, donner lieu à des poursuites pénales, notamment s'ils violent des dispositions légales en temps de paix.

3.2.9 Art. 20 (Règlement des différends)

La formulation de l'art. 20 correspond à celle utilisée dans les autres conventions relatives au terrorisme négociées au sein de l'ONU et auxquelles la Suisse est partie. Comme la procédure de règlement des différends prévue dans la présente Convention est identique à celle qui s'applique à la Convention pour la répression du financement du terrorisme, nous renvoyons aux commentaires relatifs à cette dernière¹¹¹.

3.2.10 Art. 21 à 24 (Dispositions finales)

Les art. 21 à 24 comportent les dispositions finales usuelles concernant la signature, l'entrée en vigueur et la dénonciation de la Convention.

La Convention était ouverte à la signature de tous les Etats du 12 janvier 1998 au 31 décembre 1999, au siège de l'ONU à New York (art. 21, par. 1). Passé ce délai, tout Etat peut encore adhérer à la Convention (art. 21, par. 3). Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion doivent être déposés auprès du Secrétaire général de l'ONU (art. 21, par. 2 et 3). La Suisse fera usage de la possibilité énoncée au paragraphe 3 et adhérera à la Convention.

L'art. 22 établit que la Convention entrera en vigueur trente jours après la 22^e ratification. La Convention est dès lors entrée en vigueur le 23 mai 2001. Pour les Etats qui ratifieraient ou adhéreraient à la Convention après cette date, la Convention entrera en vigueur le 30^e jour à compter du dépôt de leurs instruments de ratification.

Chaque Etat peut dénoncer en tout temps la Convention, en adressant une notification écrite au Secrétaire général de l'ONU (art. 23).

4 Adaptation du droit suisse

4.1 Projet de réglementation

Le projet de réglementation proposé repose sur une nouvelle norme pénale d'ordre général visant à combattre le terrorisme (art. 260^{quinquies} P-CP) ainsi que sur une norme pénale autonome ayant pour objet le financement du terrorisme (art. 260^{sexies} P-CP). Cette dernière ne sera donc pas accessoire à l'acte terroriste à proprement parler, ce qui signifie qu'elle pourra s'appliquer même si l'acte terroriste n'a pas été commis.

Ensuite, la responsabilité de l'entreprise, sur laquelle les Chambres fédérales se sont déjà mises d'accord quant au fond dans le cadre de la révision de la Partie générale du code pénal, est transposée dans la révision qui nous préoccupe, et les art. 260^{quinquies} et 260^{sexies} P-CP sont ajoutés à la liste des infractions pour lesquelles

¹¹¹ Cf. ch. 2.2.12.

Annex 61

Australia Department of Foreign Affairs and Trade, *National Interest Analysis of 18 June 2002*, reprinted in *Australian Year Book of International Law*, Vol. 23 (2004)

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all of us by the proliferation of weapons of mass destruction and their delivery systems, including to non-state actors. These developments have further highlighted the Nuclear Non-Proliferation Treaty's critical importance.

...

Article VI commitments are a central obligation of the Treaty. Useful progress has been made on nuclear disarmament, even though this progress may not have been entirely uniform or consistent. But we expect further action on nuclear disarmament, and remain fully committed to working, by balanced and progressive steps, towards the elimination of nuclear weapons.

...

Universalisation of the Additional Protocol on strengthened safeguards is a key non-proliferation priority and should be supported strongly by the PrepCom. Australia is helping a number of regional countries to ratify and implement Additional Protocols.

...

NPT parties must adhere fully to their NPT and IAEA safeguards commitments. The IAEA is still unable to resume its verification and monitoring activities in Iraq under relevant Security Council resolutions. We call upon Iraq to move immediately to cooperate fully and without condition with UNMOVIC and the IAEA to achieve full implementation of all relevant Security Council resolutions, and its obligations as a party to the NPT.

We remain concerned about the lack of cooperation from the DPRK in fulfilling the obligations under its NPT safeguards agreement with the IAEA. The IAEA's verification task in the DPRK is complex and likely to take 3-4 years. The DPRK must move quickly to cooperate fully with the IAEA to ensure that it benefits fully from the peaceful nuclear cooperation offered to it through the KEDO light water reactor project.

...

The NPT remains the world's best defence against the spread of nuclear weapons. It is the only global treaty dedicated to the containment of nuclear weapons and their eventual elimination. The Treaty delivers substantial benefits to all states. Continued strong support for the NPT is a pre-condition to further progress on the Treaty's goals.

XVI. Criminal Law

International Criminal Court

On 20 June 2002, the Prime Minister, Mr John Howard, issued a press release concerning Australia's ratification of the Rome Statute of the International Criminal Court. An extract from the release follows:

I announce today the intention of the Government to propose ratification of the 1998 Rome Statute providing for the establishment of an International Criminal Court. This decision has been reached after considerable consultation and discussion among Coalition ranks.

The Government believes that the International Criminal Court can make a valuable contribution to the future punishment of persons who commit acts of genocide, crimes against humanity and war crimes.

I am satisfied that with the stipulations to be incorporated in a declaration to be made at the time of ratification that the decision to ratify does not compromise Australia's sovereignty.

It is proposed that the declaration reaffirms the primacy of Australian law and the Australian legal system and declares that no person can be arrested on a warrant issued by the Court or surrendered to the Court without the consent of the Commonwealth Attorney-General.

Additionally, the declaration will provide that it is Australia's understanding that the offences of genocide, crimes against humanity and war crimes under the International Criminal Court Statute will be interpreted and applied in a way that accords with the way they are implemented in Australian law.

The matters dealt with in the Declaration will be incorporated in the Australian legislation implementing our obligations under the International Criminal Court Statute.

Importantly, the legislation will provide that no prosecution is to be commenced, or proceedings conducted, without the consent of and in the name of, the Attorney-General.

The Attorney-General's powers to consent to arrest, surrender or prosecution will also be broadly drafted to allow as wide a discretion as possible, limiting the grounds for judicial review of the exercise of those powers.

The Australian legislation will also include a clause limiting judicial review of any decision of the Commonwealth Attorney-General to give or refuse consent to an arrest on a warrant issued by the Court, the surrender of a person to the Court; or conduct a prosecution under Australian law in relation to the offences contained in implementing legislation. This will limit judicial review of the exercise of the Attorney-General's powers to proceedings by way of prerogative writs in the High Court under the Constitution.

In accordance with the Treaty Australia will have the right to withdraw from the Treaty on 12 months notice. While it is not the intention for such action to be taken without proper consideration it is important that the Australian people understand that the ability to withdraw is available.

Terrorism

On 22 October 2002, the Minister for Foreign Affairs, Mr Alexander Downer answered a question without notice from Mr David Jull in the House of Representatives concerning terrorism. Extracts from Mr Downer's response follow:

I think all of us in this House would agree that the terrorist threat is the greatest challenge that we face as a nation. It is international in scope and is indiscriminate in its application towards victims. We are targets of terrorism for what we stand for, as are other Western countries. Our values and freedoms, nevertheless, are non-negotiable and we will defend them with unrelenting vigour. But the struggle against terrorism cannot be conducted in the way a traditional conflict is fought. Terrorism's global reach—its transnational nature—requires that we work with our regional partners and our allies in a closely coordinated and cooperative way. The government is pursuing this and pursuing the challenge of meeting the terrorist threat at a number of levels and in a number of ways.

First of all, it is clearly important that work continues to place restrictions on the financing of terrorist activities. There are United Nations resolutions and conventions, and there have been a range of different initiatives to try to ensure that individual countries take decisive action against the financing of terrorism. With Indonesia, the Australian government will be co-hosting a regional conference to combat terrorism financing and money laundering in Indonesia in December. That conference will be jointly opened by Foreign Minister Hassan Wirajuda and by me on behalf of Australia.

The second thing I would mention is that to fight terrorism it is very important to enhance the cooperation between intelligence agencies and law enforcement bodies in our respective countries. We have traditional relationships with a number of intelligence agencies, but in recent times the government has been promoting and getting signed memoranda of understanding on counter-terrorism which provide for cooperation between intelligence agencies, with Indonesia, as is well known, and also more recently with Malaysia and Thailand. We are also talking to the Philippines about concluding a similar memorandum of understanding, and the Philippines experience of terrorism is well known to all in this House.

Thirdly, we have to keep working with our regional partners and with other countries to develop domestic legislative frameworks to counter terrorism. This was a particular focus of a regional technical workshop we co-hosted for Pacific island countries in Honolulu in March this year—some time ago. I make the point that to deal with the problem of terrorism each country has to have effective laws which protect civil liberties and human rights and, at the same time, effective laws that are able to deal with the crime of terrorism and the operation of terrorist organisations. The fourth point I would make is that there need to be effective border controls in order to regulate the flow of people into and out of countries. That was a feature of a regional workshop we co-hosted in Bangkok in April this year for ASEAN Regional Forum countries.

...

Finally, it is well known that the close cooperation between Australia and the United States is fundamentally important to our capacity to continue effectively the fight against terrorism. The alliance with the United States is crucial to the efficacy of our efforts in the fight against terrorism and is deeply beneficial to the overall international effort to fight terrorism.

...

Terrorism is not just a regional problem, not just a problem for the Middle East and not just a problem for South-East Asia. This is a global problem and it requires a global response. Our cooperation with our allies such as the United States and working with other countries in the region are going to be central to our capacity to deal with this.

On 31 October 2002, the Minister for Foreign Affairs, Mr Alexander Downer delivered a speech at Chatham House, London, on the global strategic environment from an Australian perspective. Extracts from the Minister's speech concerning terrorism follow:

[S]overeign states themselves have to take responsibility for addressing the problem. It can't just be left to multinational or multilateral organisations and it can't just be left to one country. For example, as we address in our part of the

world the issue of terrorism, the Indonesian Government, the Australian Government, the Malaysian Government, the Singaporean Government, the Philippines Government, all have to take decisive measures themselves internally first and foremost to address this problem. ...

But there is, of course, a substantial role for international co-operation. And there must be international co-operation because this is a trans-boundary issue. One area where there needs to be co-operation is in intelligence sharing. ... Recently we have signed with a number of countries in South East Asia memoranda of understanding on terrorism. We did this before October 12. We signed in February of this year a memorandum of understanding on counter-terrorism with Indonesia. I signed an agreement in the middle of the year with Thailand, a very similar agreement. We have an agreement I've also signed with Malaysia. We are in the process of concluding a similar agreement with the Philippines. This is just one illustration of what Australia is doing, but I do think that countries more generally, particularly those afflicted by the problems of terrorism, which is going to be most countries of the world, they need to work very closely together through intelligence sharing and co-operation, and putting sometimes in place frameworks to do that, such as memoranda of understanding on counter-terrorism.

I think there is also a role for capacity building, to ensure that law enforcement authorities, customs authorities, immigration authorities, have a greater capacity to detect and deal with people who may be or are involved with terrorism. And, in particular, developed countries can provide some direct assistance to developing countries in that area to enhance their capacity to address that problem.

Terrorism – Asset freezing

On 13 December 2002, the Minister for Foreign Affairs, Mr Alexander Downer issued a press release concerning changes to arrangements for freezing terrorist assets. Extracts from the release follow:

UN Security Council Resolution 1373 (2001), passed following the September 11 terrorist attacks in the United States, obliges member states to freeze terrorist assets.

The deaths of so many young Australians in the 12 October Bali bombings are a painful reminder of the continued relevance and urgency of this obligation.

Since 15 October 2001, the Government has used a mechanism contained in the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001 to implement this obligation.

These Regulations are now replaced by a new Part 4 of the *Charter of the United Nations Act 1945*, and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002.

Under the revised mechanism, anybody holding financial or other assets of persons or entities listed as terrorists by the Minister for Foreign Affairs in the Commonwealth Gazette is prohibited from using or dealing with those assets. It is also a criminal offence to give assets of any kinds to such persons or entities. The penalty for these offences is five years imprisonment.

...

This revised mechanism further demonstrates the Government's ongoing commitment to review and revise its anti-terrorism measures in the light of international developments and experience and in consultation with key stakeholders in the community.

Terrorism – International Convention for the Suppression of the Financing of Terrorism

On 18 June 2002, the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999, was tabled in both Houses of Parliament. Extracts from the accompanying National Interest Analysis follow:

The purpose of the Convention is to suppress acts of terrorism by depriving terrorists and terrorist organisations of the financial means to commit such acts. It does so by obliging State Parties to criminalise and take other measures to prevent the provision or collection of funds for the purpose of committing terrorist acts and to cooperate with other State Parties in the prevention, detection, investigation and prosecution of terrorist financing.

Ratifying the Convention is in the national interest because it will dramatically increase the effectiveness of our criminal prohibitions on terrorist financing and ensure that terrorist organisations are unable to obtain resources to support their activities. It will also demonstrate Australia's commitment to cooperating with global counter-terrorism measures.

Although Australia has had legislation in place to criminalise the financing of hostile acts against foreign States by Australians or persons using Australia as a base since the 1970s, there has been limited international assistance in these matters. Australia's legislation was in many respects unique and thus the capacity for Australia to receive international assistance in the investigation and prosecution of these offences was severely inhibited by the "dual criminality rule" that generally applies to such international cooperation. In addition, many States had in place banking secrecy regulations and procedures to prevent cooperation in international investigation of purely fiscal offences which both impeded law enforcement efforts and provided the capacity for terrorists to develop sophisticated financing mechanisms with relative impunity. The Convention removes some of these obstacles. Australia's participation in the Convention will therefore aid Australia's efforts in combating the financing of terrorist acts and organisations.

Terrorism – International Convention for the Suppression of Terrorist Bombings

On 12 March 2002, the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997, was tabled in both Houses of Parliament. Extracts from the accompanying National Interest Analysis follow:

The Convention forms part of a framework of international treaties intended to combat the worldwide escalation of acts of terrorism. Terrorist attacks by means of explosives or other lethal devices have become increasingly widespread, and a review of the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism found that existing multilateral legal provisions did not adequately address these attacks. The

purpose of the Convention is therefore to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators. It also serves to reaffirm the unequivocal condemnation by States of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the territorial integrity and security of States.

Australia already has extensive domestic legislation designed to combat the kinds of acts covered by the Convention. Acceding to the Convention will dramatically increase the effectiveness of these domestic measures, through providing a mechanism for cooperation with other countries in investigating and prosecuting terrorist crimes committed in or against Australia or by Australians.

Terrorism – Prosecution

On 24 October 2002, the Attorney-General, Mr Daryl Williams and the Minister for Justice and Customs, Senator Chris Ellison issued a joint press release outlining new Australian legislation outlawing the murder of Australians overseas. Extracts from the press release follow:

As announced by the Prime Minister today, the Government will move to amend the Criminal Code to create new provisions making it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian outside Australia.

The legislation will ensure that Australia can effectively cooperate with the broadest possible range of countries to combat transnational crimes and prosecute the people responsible for such atrocities as the Bali attacks.

In particular, it will ensure there are no legal loopholes in terms of prosecuting terrorist acts involving murder overseas. It also strengthens legislation in our new counter-terrorism package, which already has extra-territorial effect.

To extradite a suspected offender from a foreign country there must be 'dual criminality' – that is, the conduct must constitute an offence in both Australia and the other country.

Other countries may not have specific counter-terrorism laws, but they will have murder laws. This new offence will fulfil the pre-condition for extradition that there is dual criminality and enable extradition for murder.

The measures announced today will improve Australia's long term ability to target those who are prepared to kill innocent Australians overseas.

Terrorism – Regional cooperation

On 17 September 2002, the Minister for Foreign Affairs, Mr Alexander Downer answered a question without notice in the House of Representatives from Mr Petro Georgiou concerning terrorist threats to Australian interests in South-East Asia. Extracts from Mr Downer's response follows:

[T]he Australian government has been working very closely with regional governments on this whole question of terrorism—not just the United States and other governments beyond the region. We have signed memoranda of understanding on terrorism with Indonesia and Malaysia, and we are in the process of negotiating a like MOU with Thailand. Australia and Indonesia are

going to host a joint conference in Bali in December of this year to combat terrorist financing and money laundering. I met a couple of days ago with the Indonesian Foreign Minister, and both of us are very much looking forward to cohosting this conference, which will be a region-wide conference. It will involve a large number of countries from around the region to reinforce the strength of our regional commitment to work together to deal with the problem of terrorism.

On 4 October 2002, HE Mr John Dauth, Australian Ambassador and permanent representative to the United Nations delivered a statement to the United Nations Security Council concerning threats to international peace and security caused by terrorist acts. Extracts from the statement relating to regional cooperation in terrorist issues follows:

Within our own region, Australia continues to encourage greater cooperation to combat terrorism. As set out in detail in the Pacific Islands Forum statement, delivered by my colleague the distinguished Ambassador of Fiji, the Nasonini Declaration on Regional Security was adopted by the Pacific Islands Forum on 17 August 2002 and recognised the need for immediate and sustained regional action in response to terrorist threats. Australia also sponsored with the United States, New Zealand and the Forum Secretariat, a counter terrorism workshop for Pacific Island countries in March.

Australia and Indonesia announced in September that we will co-host a regional Conference on Combating Money Laundering and Terrorist Financing, in December this year. The conference will augment and contribute to existing initiatives being undertaken by the CTC and other organisations. Australia and Indonesia believe that the meeting will enable countries in our region to strengthen further their individual efforts to prevent and counter money laundering and the financing of terrorism, particularly by identifying capacity-building needs to meet existing and new obligations.

Australia has also been active in the ASEAN Regional Forum context. Together with Thailand we chaired an ARF Workshop on Terrorism Prevention in Bangkok in April 2002. We were pleased to be part of the ASEAN Regional Forum's Declaration on Terrorist Financing at its Ministerial Meeting on 31 July 2002, as well as in the creation of an Intersessional Mechanism on Terrorism.

In addition to these regional initiatives, we consider that bilateral cooperation between governments is also critical in combating terrorism, especially in the exchange of information and intelligence to identify terrorist threats at the earliest possible stage. Australia is seeking closer law enforcement cooperation with partners in our region and has negotiated MOUs on counter-terrorism cooperation with Indonesia, Malaysia and Thailand.

Transfer of Prisoners

On 26 September 2002, the Minister for Foreign Affairs, Mr Alexander Downer issued a press release concerning the ratification by Thailand and Australia of a transfer of prisoners treaty. Extracts from the release follow:

The agreement with Thailand is Australia's first bilateral treaty allowing for the international transfer of prisoners and signals the start of the International Transfer of Prisoners scheme in Australia.

...

Annex 62

United States v. Murrillo, 826 F.3d 152 (Court of Appeals for the 4th Circuit of the United States, 2016)

UNITED STATES of America,
Plaintiff–Appellee,

v.

Edgar Javier Bello MURILLO, a/k/a
Payaso, Defendant–Appellant.

No. 15-4235

United States Court of Appeals,
Fourth Circuit.

Argued: January 28, 2016

Decided: June 14, 2016

Background: Defendant was convicted on a guilty plea in the United States District Court for the Eastern District of Virginia, Gerald Bruce Lee, J., of kidnapping conspiracy and murder of an internationally protected person. Defendant appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

- (1) kidnapping and murder were self-evidently criminal conduct, and thus defendant’s prosecution in the United States for kidnapping and murder was not fundamentally unfair in violation of Due Process;
- (2) Internationally Protected Persons (IPP) Convention gave notice that was sufficient to quell any concern that defendant’s prosecution contravened due process;
- (3) defendant was not required to know his victim’s IPP status to be guilty of murdering an IPP; and
- (4) defendant was not required to know victim’s IPP status to be guilty of conspiracy to kidnap an IPP.

Affirmed.

See also 57 F.Supp.3d 618.

1. Criminal Law ⇨1139

The Court of Appeals reviews de novo a properly preserved constitutional claim.

2. Criminal Law ⇨97(.5)

It is not arbitrary to prosecute a defendant in the United States if his actions affected significant American interests, even if the defendant did not mean to affect those interests.

3. Constitutional Law ⇨4559

Criminal Law ⇨97(.5)

Kidnapping and murder were self-evidently criminal conduct, and thus defendant’s prosecution in the United States for kidnapping and murder in Columbia of a Drug Enforcement Agency (DEA) agent who was an internationally protected person was not fundamentally unfair in violation of Due Process, even though defendant allegedly did not know that agent was an American internationally protected person. U.S. Const. Amend. 5.

4. Constitutional Law ⇨4559, 4560

A defendant who commits a crime outside of the United States is not ensnared by a trap laid for the unwary, in violation of Due Process, when he has engaged in conduct that is self-evidently criminal and is then prosecuted in the United States. U.S. Const. Amend. 5.

5. Constitutional Law ⇨4559, 4560

Criminal Law ⇨97(.5)

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, gave global notice that state parties, including the United States, were required to establish jurisdiction over kidnappings and murders of their internationally protected persons (IPP) wherever those crimes occurred, which was sufficient to quell any concern that defendant’s prosecution in the United States for kidnapping and murder in Columbia of a Drug Enforcement Agency (DEA) agent, who

was an IPP, contravened defendant's due process rights. U.S. Const. Amend. 5.

6. Criminal Law ⇔20

Courts generally interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense.

7. Criminal Law ⇔20

When Congress has said nothing about the mental state pertaining to a jurisdictional element of a criminal statute, the default rule flips: courts assume that Congress wanted such an element to stand outside the otherwise applicable mens rea requirement.

8. Homicide ⇔551

Defendant who was convicted of murdering a Drug Enforcement Agency (DEA) agent, who was an internationally protected person (IPP), in Columbia was not required to know his victim's IPP status, or intend to kill an IPP, to be guilty of murdering an IPP; under statute criminalizing the killing or attempted killing of an IPP, which conferred jurisdiction over the murder of an IPP, including that of an American IPP in another country, the victim's IPP status was clearly intended to be a jurisdictional element of the murder offense, to which mens rea requirement of murder statutes did not apply. 18 U.S.C.A. § 1116(a).

9. Conspiracy ⇔28(3)

Defendant who was convicted of conspiracy to kidnap a Drug Enforcement Agency (DEA) agent, who was internationally protected person, in Columbia, was not required to know his victim's IPP status or intend to kill and IPP to be guilty of conspiracy to kidnap an IPP; elements of statute criminalizing conspiracy to kidnap an IPP did not require a perpetrator to know the circumstances that brought a kidnapping offense within the jurisdiction

of the federal courts, such as whether the victim was an IPP. 18 U.S.C.A. § 1201.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:13-cr-00310-GBL-3)

ARGUED: John Cady Kiyonaga, Law Office of John C. Kiyonaga, Alexandria, Virginia, for Appellant. Ross Brandon Goldman, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:** Stacey K. Luck, Human Rights & Special Prosecutions Section, Leslie R. Caldwell, Assistant Attorney General, Sung-Hee Suh, Deputy Assistant Attorney General, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C.; Dana J. Boente, United States Attorney, Richard Cooke, Assistant United States Attorney, Office of the United States Attorney, Alexandria, Virginia, for Appellee.

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge KING wrote the opinion, in which Judge NIEMEYER and Judge DUNCAN joined.

KING, Circuit Judge:

Defendant Edgar Javier Bello Murillo appeals his convictions in the Eastern District of Virginia arising from the murder in South America of Special Agent James Terry Watson of the Drug Enforcement Administration (the "DEA"). At the time of his death, Agent Watson—as an Assistant Attaché for the United States Mission in Colombia—was an internationally protected person (an "IPP"). Bello, a citizen of Colombia, has not contested his involvement in crimes against Watson. Indeed, Bello pleaded guilty to offenses of kidnapping conspiracy and murder of an IPP. He

reserved the right to pursue this appeal, however, on the ground that his prosecution in this country for offenses committed in Colombia contravened the Fifth Amendment's Due Process Clause. As explained below, we affirm Bello's convictions.

I.

A.

Agent Watson began serving the DEA in the year 2000, having previously worked as a Sheriff's Deputy in Louisiana and as a Deputy United States Marshal in Mississippi.¹ In July 2010, the DEA assigned Watson to its field office in Cartagena, Colombia. That same month, Watson was accredited by the United States and Colombia as an Assistant Attaché for the United States Mission in Colombia. By virtue of his diplomatic status, Watson became an IPP and was thereby protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (the "IPP Convention," or the "Convention"), opened for signature Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.²

Bello drove a taxicab in Bogotá, Colombia, where he conspired with other taxi drivers to mug and rob wealthy passengers through "paseo millonario" ("millionaire's ride") armed robberies. The conspirators would execute their robbery schemes through a series of choreographed maneuvers. First, one taxi driver would pick up an affluent-looking customer and then signal to the others. Next, another taxicab containing additional conspirators would pull in behind the first. Armed with weap-

ons such as tasers and knives, the conspirators from the second taxicab would enter the first and rob its passenger. The assailants would demand from the victim his cash, valuables, credit cards, and personal-identification numbers for bank accounts. Typically, another conspirator—in yet a third taxicab—would support the robbery efforts by blocking traffic, acting as a lookout, or using the victim's bank cards to withdraw cash.

On or about June 20, 2013, a taxicab operated by one of Bello's coconspirators picked up Agent Watson in Bogotá. Carrying a knife, Bello rode in a second taxicab with his codefendant Edwin Gerardo Figueroa Sepulveda. After travelling a short distance with Agent Watson, the driver of the first taxicab pretended that his vehicle was experiencing mechanical problems and stopped, allowing the second taxicab to pull in behind. Bello and Figueroa Sepulveda then exited the second taxicab and entered the first to rob Watson. Inside, Figueroa Sepulveda tased Watson, and Bello stabbed the American diplomat at least four times. Watson ultimately escaped from his assailants, but he later died from the stab wounds. Within a few days, Bello was arrested in Colombia.

B.

1.

On July 18, 2013, the federal grand jury in Alexandria, Virginia, returned an indictment against six defendants, including Bello and lead defendant Figueroa Sepulveda, for their involvement in Agent Watson's murder. In pertinent part, the indictment charged Bello with four offenses: murder

1. As part of his plea agreement with the United States Attorney, Bello stipulated to facts regarding his involvement in Agent Watson's murder. We draw our factual recitation from the record and that statement of facts.

2. The United States signed the IPP Convention on December 28, 1973. The Convention became effective on February 20, 1977, and Colombia adopted it on January 16, 1996.

of an IPP, in contravention of 18 U.S.C. § 1116(a) (“Count 1”); murder of an officer and employee of the United States, in violation of 18 U.S.C. § 1114 (“Count 2”); conspiracy to kidnap an IPP, in contravention of 18 U.S.C. § 1201(c) (“Count 3”); and kidnapping an IPP, in violation of 18 U.S.C. § 1201(a) (“Count 4”). Counts 1, 2, and 4 included allegations of aiding and abetting under 18 U.S.C. § 2.

On August 22, 2013, the United States requested Bello’s extradition from Colombia for prosecution in the Eastern District of Virginia. Pursuant to Colombia’s obligations under the IPP Convention, the Colombian Minister of Justice and Law referred the extradition request to Colombia’s Supreme Court of Justice. On April 2, 2014, that court ruled that Bello could be extradited to the United States for prosecution on Counts 1, 3, and 4—the alleged offenses against an IPP—but not on Count 2.

Thereafter, by an executive resolution of June 18, 2014, the Colombian Minister of Justice and Law—acting on behalf of the President of Colombia—ordered Bello’s extradition to the United States for prosecution on Counts 1, 3, and 4, and denied the extradition request as to Count 2. In so ruling, the Minister relied on the Colombian court decision, observing that “the crime must be considered as committed not only in the place where the events physically happened but also in the territory of the United States of America,” which “has the right to claim jurisdiction to investigate and try the conduct that affected its key interests.” See United States v. Figueroa Sepulveda, No. 1:13-cr-00310 (E.D. Va. Feb. 18, 2015), ECF No. 292-1, at 29-30 (internal quotation marks and

footnote omitted).³ Bello was thereafter extradited to this country and first appeared in the Eastern District of Virginia on July 2, 2014. Two weeks later, the district court dismissed Count 2 as to him.

2.

Invoking the “notice requirement” of the Fifth Amendment’s Due Process Clause, Bello sought dismissal of the three charges on which he had been extradited. See United States v. Figueroa Sepulveda, No. 1:13-cr-00310 (E.D. Va. Sept. 15, 2014), ECF No. 119, at 1. Critical to Bello’s argument was that the government did “not allege (nor, apparently, could it based on the known facts) that the conduct in this case was intentionally directed at a United States citizen, much less an agent of the United States Government.” Id. at 5-6. Bello contended that, “[a]bsent a specific intent to harm American people, property or interests, or knowledge that [his] conduct would do so, it is fundamentally unfair and inconsistent with American notions of due process for [him] to be tried in an American court.” Id. at 6.

As explained in its opinion of November 6, 2014, which relied primarily on our recent decision in United States v. Brehm, 691 F.3d 547 (4th Cir. 2012), the district court denied the dismissal motion. See United States v. Figueroa Sepulveda, 57 F.Supp.3d 618 (E.D. Va. 2014). In so doing, the court ruled that Bello’s “due process rights are not violated by prosecuting him in the United States for the murder and kidnapping of [Agent Watson] because exercising extraterritorial jurisdiction for these offenses is proper under the Fourth Circuit’s test set forth in Brehm.” Id. at 620. Applying the Brehm test, the court

3. The June 18, 2014 executive resolution of the Colombian Minister of Justice and Law ordering Bello’s extradition to this country is contained in materials the Colombian govern-

ment provided to the U.S. Embassy in Bogotá. The United States Attorney filed certified translations of those materials in the district court proceedings.

concluded that Bello's prosecution in the United States was neither arbitrary nor unfair, because Bello's offenses affected a "significant American interest," *id.* at 622, and he had "ample reason to anticipate being prosecuted for his conduct 'somewhere,'" *id.* at 623.

3.

In December 2014, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, Bello executed his plea agreement with the United States Attorney, agreeing to enter conditional pleas of guilty on Counts 1 and 3. The plea agreement reserved to Bello "the right to appeal the Court's adverse determination concerning the defendant's Motion to Dismiss for Violation of the Notice Requirement of the Fifth Amendment Due Process Clause (Docket No. 119)." See *United States v. Figueroa Sepulveda*, No. 1:13-cr-00310 (E.D. Va. Dec. 19, 2014), ECF No. 257, at 6 ¶ 7. The plea agreement specified that "Count 1 charges the defendant with aiding and abetting the murder of an [IPP]," in contravention of 18 U.S.C. §§ 1116(a) and 2, and further explained that "Count 3 charges the defendant with conspiracy to kidnap an [IPP]," in violation of 18 U.S.C. § 1201(c). *Id.* at 1 ¶ 1. On December 19, 2014, the district court conducted a Rule 11 hearing. At the hearing, Bello entered guilty pleas on Counts 1 and 3. In exchange, the government moved to dismiss Count 4 as to him. The court dismissed Count 4 and approved the plea agreement.

On April 16, 2015, the district court sentenced Bello to concurrent sentences of 440 months in prison on Counts 1 and 3.

4. Bello does not contest the district court's ruling that the statutes underlying his convictions on Counts 1 and 3 apply extraterritorially, i.e., they reach offenses committed outside the United States. See *Figueroa Sepulveda*, 57 F. Supp. 3d at 620 (recognizing that "[t]he plain language of the[] statutes rebuts the

Bello timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

[1] Bello's sole claim on appeal is that his prosecution in the United States contravened the Fifth Amendment's Due Process Clause. We review de novo a properly preserved constitutional claim. See *United States v. Hall*, 551 F.3d 257, 266 (4th Cir. 2009).

A.

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." See U.S. Const. amend. V. In our *Brehm* decision, we recognized that the enforcement of an extraterritorial statute "in a particular instance must comport with due process." See *United States v. Brehm*, 691 F.3d 547, 552 (4th Cir. 2012).⁴ We also observed that certain of our sister circuits approach the due process inquiry by asking whether there is "a sufficient nexus between the defendant and the United States," so that applying a particular statute to the accused "would not be arbitrary or fundamentally unfair." See *id.* (internal quotation marks omitted) (citing *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)). We then assessed the constitutionality of Brehm's prosecution under that arbitrary-or-unfair framework.

presumption against extra-territoriality by codifying Congress' intent that extraterritorial jurisdiction be applied regardless of where the offenses occur" (relying on *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991))).

[2] Here, the district court employed the same arbitrary-or-unfair framework, and the parties accede to its applicability in this appeal. We are content to utilize that framework today. Pursuant thereto, we agree with Bello’s concession at oral argument that his criminal prosecution in the United States was not arbitrary. As we indicated in Brehm, it is not arbitrary to prosecute a defendant in the United States if his “actions affected significant American interests”—even if the defendant did not mean to affect those interests. See 691 F.3d at 552–53. Certainly, the United States has a significant interest in protecting its diplomatic agents while they represent this country abroad, and that very interest was affected by Bello’s crimes against Agent Watson.

[3] Bello’s due process claim thus rests solely on the premise that his prosecution in this country was fundamentally unfair, because he did not know that Agent Watson was an American IPP and thus could not have foreseen being haled into a United States court for the offenses he committed in Colombia. We explained in Brehm, however, that “[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.” See 691 F.3d at 554 (quoting United States v. Al Kassar, 660 F.3d 108, 119 (2d Cir. 2011)); see also United States v. Ali, 718 F.3d 929, 944 (D.C. Cir. 2013) (“What appears to be the animating principle governing the due process limits of extraterritorial jurisdiction is the idea that ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’” (quoting Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964))).

[4] Simply put, a defendant is “not ensnared by a trap laid for the unwary” when he has engaged in conduct that “is self-evidently criminal.” See Brehm, 691 F.3d at 554 (quoting Al Kassar, 660 F.3d at 119). Because kidnapping and murder are “self-evidently criminal,” it was not fundamentally unfair to prosecute Bello in the United States. Accord Brehm, 691 F.3d at 554 (concluding that prosecution in United States was not fundamentally unfair where South African defendant working for American contractor stabbed British victim at NATO-operated military base in Afghanistan); Al Kassar, 660 F.3d at 119 (same where foreign defendants supplied weapons to known terrorist organization overseas for use against U.S. citizens and property). Absent fundamental unfairness, Bello’s Fifth Amendment due process claim fails under Brehm.

B.

Brehm also supports the proposition that the IPP Convention alone gave Bello notice sufficient to satisfy due process. In Brehm, the South African defendant was prosecuted in this country for stabbing his British victim at Kandahar Airfield, where the heavy American presence was regulated in part by a written agreement in which the Afghan government authorized ours “to exercise its criminal jurisdiction over the personnel of the United States.” See 691 F.3d at 553 (internal quotation marks omitted). Moreover, Brehm had signed an agreement with the American military contractor that employed him acknowledging the United States’ criminal jurisdiction. See id. at 549. We concluded that Brehm should have reasonably understood that he was subject to prosecution somewhere for the stabbing, “all the more so in light of the relevant provisions of his employment contract.” See id. at 554. That is, not only was Brehm’s conduct “self-evidently crimi-

nal” so as to thwart the argument that his prosecution was fundamentally unfair, but the employment contract “constituted notice of the [United States’ criminal jurisdiction under its agreement with the Afghan government] sufficient to dispel any surprise.” See id.

Along similar lines, the D.C. Circuit has recognized that “a treaty may provide notice sufficient to satisfy due process.” See Ali, 718 F.3d at 945. More specifically, the court of appeals articulated that, when a treaty provides “global notice that certain generally condemned acts are subject to prosecution by any party to the treaty,” the Fifth Amendment “demands no more.” Id. at 944 (citing with approval United States v. Shi, 525 F.3d 709 (9th Cir. 2008)).

Relevant to Bello’s prosecution in the United States, the IPP Convention provides that each signatory nation, or “State Party,” must criminalize particular acts committed against an IPP, including kidnapping and murder. See IPP Convention, art. III, opened for signature Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. The Convention requires each State Party to “take such measures as may be necessary to establish its jurisdiction over [those] crimes,” when “committed in the territory of that State” or when “committed against an [IPP] who enjoys his status as such by virtue of functions which he exercises on behalf of that State.” Id. at art. III, ¶ 1. According to the Convention, the instrument itself may serve “as the legal basis for extradition” between two State Parties. Id. at art. VIII, ¶ 2. The Convention also specifies that the crimes of kidnapping and murdering an IPP “shall be treated, for the purpose of extradition between State Parties, as if [they] had been committed not only in the place in which [they] occurred but also in the territories of the States required to establish their jurisdiction.” Id. at art. VIII, ¶ 4.

[5] The foregoing provisions of the IPP Convention give global notice that Colombia, as a State Party to the Convention, must establish jurisdiction over any kidnapping or murder of an IPP committed in its territory. Meanwhile, other State Parties (including the United States) must establish jurisdiction over the kidnappings and murders of their IPPs, wherever those crimes occur. When an IPP has been kidnapped or murdered in Colombia and the Colombian authorities have apprehended the alleged offender, the Convention affords Colombia the option of prosecuting him or extraditing him to the country that accorded the victim his IPP status. As suggested in Brehm and supported by decisions of our sister circuits, including Ali and Shi, that global notice alone is sufficient to quell any concern that Bello’s prosecution in the United States for his crimes against Agent Watson contravened due process.

C.

Finally, we reject Bello’s contention that because the United States Code provisions implementing the IPP Convention require knowledge of the victim’s IPP status that Bello did not possess, those provisions cannot have put him on notice that he was subject to prosecution in this country. See Reply Br. of Appellant 5 (“The fact that the statutes were never intended to reach Appellant’s conduct informs the fact that he could not infer from the statutes that they could impact his conduct.”). That argument fails at its start, in that the mens rea requirements of 18 U.S.C. § 1116(a) (the murder offense) and 18 U.S.C. § 1201(a)(4) (the object of the kidnapping conspiracy offense) are limited to the intent necessary for murder and kidnapping, and do not include the intent to victimize an IPP. The victim’s IPP status is simply a “jurisdictional element” that allows prose-

cution of murder and kidnapping in our federal courts.

[6, 7] As the Supreme Court recently explained, courts generally “interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense.” See Luna Torres v. Lynch, — U.S. —, 136 S. Ct. 1619, 1630, 194 L.Ed.2d 737 (2016) (relying on Elonis v. United States, — U.S. —, 135 S.Ct. 2001, 2009–10, 192 L.Ed.2d 1 (2015)). Not so, however, with respect to jurisdictional elements. *Id.* at 1631. That is, “when Congress has said nothing about the mental state pertaining to a jurisdictional element, the default rule flips: Courts assume that Congress wanted such an element to stand outside the otherwise applicable *mens rea* requirement.” *Id.*; see United States v. Cooper, 482 F.3d 658, 664 (4th Cir. 2007) (observing that “*mens rea* requirements typically do not extend to the jurisdictional elements of a crime”). Our review of §§ 1116(a) and 1201(a)(4) confirms that they are statutes where “the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal.” See United States v. Feola, 420 U.S. 671, 676 n.9, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975).⁵

1.

[8] Section 1116(a) of Title 18, the statute underlying Count 1, provides that “[w]hoever kills or attempts to kill . . . [an IPP] shall be punished as provided under sections 1111, 1112, and 1113 of [Title 18].” Notably, § 1116(a) does not define “kill” or “attempt.” Instead, those terms derive their meaning from §§ 1111, 1112, and

1113, which spell out the elements of the offenses of murder, manslaughter, and attempted murder or manslaughter, respectively, when committed “[w]ithin the special maritime and territorial jurisdiction of the United States.” Section 1111, for example, specifies that “[m]urder is the unlawful killing of a human being with malice aforethought,” and it distinguishes first-from second-degree murder. In other words, § 1111 identifies the substantive elements of murder, including the mental state required to commit that offense. See United States v. Ashford, 718 F.3d 377, 384 (4th Cir. 2013) (explaining that first-degree murder under § 1111 requires “premeditation,” while second-degree murder requires simply “malice aforethought” (internal quotation marks omitted)).

Read in concert with § 1111, § 1116 confers jurisdiction over the murder of an IPP, including that of an American IPP in another country. See 18 U.S.C. § 1116(c) (providing, in pertinent part, that “the United States may exercise jurisdiction over the” murder of an IPP “outside the United States” if “the victim is a representative, officer, employee, or agent of the United States”). The victim’s IPP status is thus clearly intended to be a jurisdictional element of the murder offense. And nothing in § 1116(a) rebuts the presumption that a perpetrator need not know his victim’s status in order to commit the crime of murdering an IPP. Cf. Feola, 420 U.S. at 684, 95 S.Ct. 1255 (concluding that a statute making it a federal crime to assault a federal officer merely required “an intent to assault, not an intent to assault a federal officer”).

5. The government asserts that Bello’s plea agreement bars him from pursuing his *mens rea* contention. See Br. of Appellee 27 (deeming *mens rea* contention to be “statutory interpretation argument” within Bello’s waiver

of right to appeal). Because Bello proffers the *mens rea* contention solely to support his Fifth Amendment claim, however, it is proper for us to reach—and reject—that argument today.

2.

[9] Bello was charged in Count 3 with the conspiracy offense defined in 18 U.S.C. § 1201(c), which provides that, “[i]f two or more persons conspire to violate [§ 1201] and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished” as provided by law. As relevant here, § 1201(a)(4) punishes “[w]hoever unlawfully . . . kidnaps . . . and holds for ransom or reward or otherwise any person,” when that person is an IPP. As such, § 1201 criminalizes a conspiracy to kidnap an IPP.

Unlike § 1116(a), which cross-references and draws on other sections of Title 18, § 1201(a) spells out the “essential elements” of the substantive kidnapping offense, that is, “an unlawful seizure and holding” of another person. *See United States v. Lewis*, 662 F.2d 1087, 1088 (4th Cir. 1981). Satisfying the elements of § 1201(a), we have observed, “necessarily implies an unlawful physical or mental restraint for an appreciable period against the person’s will and with a willful intent so to confine the victim.” *See United States v. Lentz*, 383 F.3d 191, 201 (4th Cir. 2004) (emphasis and internal quotation marks omitted). In other words, the elements of the kidnapping offense include a mens rea requirement. Those elements do not, however, require a perpetrator to know the circumstances that bring a kidnapping offense within the purview of the federal courts, such as whether the victim was an IPP.

Assessing the kidnapping statute as a whole confirms that the IPP provision—codified in 18 U.S.C. § 1201(a)(4)—is a jurisdictional element of the kidnapping offense. *See Wayne R. LaFave*, 3 Subst. Crim. L. § 18.2(a) (2d ed. 2003) (describing § 1201(a)(4) as one of the “statutorily-declared bases for federal jurisdiction under the kidnapping statute”). That is,

§ 1201(a)(4)’s statutory neighbors speak in terms of jurisdiction, supporting the proposition that § 1201(a)(4) is also jurisdictional. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 135, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) (reading proximate statutory subparagraphs as bearing on one another’s meaning because “[t]he provisions are adjacent and have remarkably similar structures”). More specifically, § 1201(a)(1) criminalizes a kidnapping offense that implicates “interstate or foreign commerce.” Section 1201(a)(2) refers to a kidnapping committed “within the special maritime and territorial jurisdiction of the United States.” Section 1201(a)(3) punishes a kidnapping “within the special aircraft jurisdiction of the United States.” Finally, § 1201(a)(5) criminalizes the kidnapping of a federal officer. Each of the four subparagraphs surrounding § 1201(a)(4) confers federal jurisdiction without altering the substantive elements of the kidnapping offense. *See Lewis*, 662 F.2d at 1090 (concluding that pre-IPP Convention version of § 1201(a) “creates a single crime with four jurisdictional bases rather than four different crimes”).

As with 18 U.S.C. § 1116(a), we discern no indication that Congress intended in § 1201(a)(4) to impose an additional mens rea requirement. Rather, it is clear that a victim’s IPP status is merely a basis for jurisdiction in our federal courts over a kidnapping offense, and that a perpetrator need not know of that status in order to be in violation of § 1201(a)(4) or to engage in a kidnapping conspiracy in contravention of § 1201(c). Accordingly, there is no merit to Bello’s mens rea contention—nor his broader claim that the Fifth Amendment’s Due Process Clause precluded his prosecution in this country—and we must uphold his kidnapping conspiracy and murder convictions.

III.

Pursuant to the foregoing, the judgment of the district court is affirmed.

AFFIRMED



Fernando Contreras ALCALA,
Plaintiff–Appellant,

v.

Claudia Garcia HERNANDEZ,
Defendant–Appellee.

Fernando Contreras Alcala,
Plaintiff–Appellee,

v.

Claudia Garcia Hernandez,
Defendant–Appellant.

No. 15–2471, No. 15–2507

United States Court of Appeals,
Fourth Circuit.

Argued: March 22, 2016

Decided: June 15, 2016

Background: Father brought action under Hague Convention on the Civil Aspects of International Child Abduction, as implemented by International Child Abduction Remedies Act (ICARA), seeking order requiring mother to return couple’s children to Mexico. The United States District Court for the District of South Carolina, R. Bryan Harwell, J., 2015 WL 4429425, declined to issue such order and, 2015 WL 7312891, denied father’s motion to alter or amend its judgment. Father appealed.

Holdings: The Court Of Appeals, Floyd, Circuit Judge, held that:

- (1) as matter of first impression, for child to be “settled” under Hague Convention, child must have significant connections demonstrating secure, stable, and permanent life in his or her new environment;
- (2) son was settled in his new environment; and
- (3) equitable considerations did not warrant son’s return to Mexico.

Affirmed.

1. Aliens, Immigration, and Citizenship
⌘318

Department of Homeland Security’s (DHS) Deferred Action for Childhood Arrivals (DACA) program does not confer formal immigration status, but instead permits participants to defer removal and remain in the United States if they meet certain conditions.

2. Federal Courts ⌘3640

Court of Appeals reviews a district court’s findings of fact for clear error and reviews de novo its construction and application of the Hague Convention on the Civil Aspects of International Child Abduction, Art. 1 et seq., 1988 WL 411501.

3. Child Custody ⌘802

Primary aim of the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the International Child Abduction Remedies Act (ICARA), is to deter parents from taking children across international boundaries in search of a more sympathetic court to resolve custody disputes. 22 U.S.C.A. § 9001 et seq.; Hague Convention on the Civil Aspects of International Child Abduction, Art. 1 et seq., 1988 WL 411501.

Annex 63

Criminal Code of Denmark, section 114

The Criminal Code

Order No. 909 of September 27, 2005, as amended by Act Nos. 1389
and 1400 of December 21, 2005

GENERAL PART

C h a p t e r 1
Introductory Provisions

§1

Only acts punishable under a statute or entirely comparable acts shall be punished. The same rule shall apply to the other legal consequences set out in Chapter 9.

§2

Unless otherwise provided, Chapters 1 to 11 of this Act shall apply to all punishable offences.

C h a p t e r 2
General Conditions Concerning the
Application of the Provisions of the
Criminal Law

§3

(1) Where the penal legislation in force at the time of the criminal proceedings in respect of any act differs from that in force at the time of the commission of that act, any questions concerning the punishable nature of the act and the punishment to be imposed shall be decided according to the more recent Statute, provided that the sentence may not be more severe than under the earlier Statute. If the repeal of the Statute is due to extraneous circumstances irrelevant to guilt, the act shall be dealt with under the earlier statute.

(2) If, in circumstances other than those provided in the last sentence of Subsection(1) above, an act ceases to be lawfully punishable, any punishment imposed for such an act, but not yet served, shall be remitted. The convicted person may demand that the question concerning the remission of the penalty be brought, at the instance of the Public Prosecutor, before the court which passed sentence at first instance. The decision shall be made by Court Order.

§4

§ 110 f

The offences referred to in this Chapter shall, in all cases, be dealt with by public prosecution, to be instituted by the order of the Minister of Justice.

Chapter 13 Offences against the Constitution and the Supreme Authorities of the State

§ 111

Any person who commits an act aimed, by foreign assistance, by the use of force, or by the threat of such, at changing the Constitution or making it inoperative shall be liable to imprisonment for any term extending to life imprisonment.

§ 112

Any person who commits an act directed against the life of the sovereign or of the constitutional regent shall be liable to imprisonment for not less than six years.

§ 113

(1) Any person who interferes with the safety or independence of the Parliament or otherwise commits any act aimed, by the use of force or the threat of such, at extorting any resolution from the Parliament or preventing it from freely exercising its activities shall be liable to imprisonment for any term not exceeding six years or, in particularly aggravating circumstances, to life imprisonment.

(2) The same penalty shall apply to any person who similarly interferes with or exercises coercion against the sovereign or against the constitutional regent or against the ministers, the Constitutional Court or the Supreme Court.

§ 114

(1) Any person who, by acting with the intent to frighten a population to a serious degree or to unlawfully coerce Danish or foreign public authorities or an international organisation to carry out or omit to carry out an act or to destabilize or destroy a country's or an international organisation's fundamental political, constitutional, financial or social structures, commits one or more of the following acts, when the act due to its nature or the context, in which it is committed, can inflict a country or an international organisation serious damage, shall be guilty of terrorism and liable to imprisonment for any term extending to life imprisonment:

- 1) Homicide pursuant to Section 237 of this Act.
- 2) Gross violence pursuant to Section 245 or Section 246 of this Act.
- 3) Deprivation of liberty pursuant to Section 261 of this Act.
- 4) Impairment of the safety of traffic pursuant to Section 184(1) of this Act; unlawful disturbances in the operation of public means of transportation etc. pursuant to Section 193(1) of this Act; or gross damage to property pursuant to Section 291(2) of this Act; if

these violations are committed in a way, which can expose human lives to danger or cause considerable financial losses.

- 5) Seizure of transportation means pursuant to Section 183 a of this Act.
 - 6) Gross weapons law violations pursuant to Section 192 a of this Act or Law about Weapons and Explosives Section 10(2).
 - 7) Arson pursuant to Section 180 of this Act; explosion, spreading of noxious gasses, flooding, shipwrecking, railway- or other traffic-accident pursuant to Section 183(1)-(2) of this Act; health-endangering contamination of the water supply pursuant to Section 186(1) of this Act; health-endangering contamination of products intended for general use etc. pursuant to Section 187(1) of this Act.
- (2) Similar punishment shall apply to any person who, with the in Subsection (1) mentioned intent, transports weapons or explosives.
- (3) Similar punishment shall further apply to any person who, with the in Subsection 1 mentioned intent, threatens to commit one of the acts mentioned in Subsections (1) and (2).

§ 114 a

Any person who

- 1) directly or indirectly provides financial support to;
- 2) directly or indirectly procures or collects means to; or
- 3) directly or indirectly places money, other assets or financial or other similar means at the disposal of; a person, a group or an association, which commits or intends to commit acts of terrorism as included under Section 114 of this Act, shall be liable to imprisonment for any term not exceeding ten years.

§ 114 b

Any person who otherwise by instigation, advice or action contributes to advance the criminal activity or the common purpose of a group or an association, which commits one or more acts included under Section 114 or Section 114 a, No. 1) or 2) of this Act, when the activity or the purpose involves that one or more acts of this nature is committed, shall be liable to imprisonment for any term not exceeding six years.

§ 114 c

Any person who, by any act other than those included under Sections 114-114 b of this Act, participates in or provides significant financial support or other significant support to any corps, group or association, which intends, by use of force, to exert influence on public affairs or give rise to disturbances of the public order, shall be liable to imprisonment for any term not exceeding six years.

§ 114 d

Any person who, by any act other than those included under Sections 114-114 c of this Act, participates in an unlawful military organization or *group*, shall be liable to a fine or to imprisonment for any term not exceeding two years.

§ 114 e

Any person who under aggravating circumstances in contravention of the legislation on nonproliferation of weapons of mass destruction etc.

- 1) exports products with dual use without permission;
- 2) for the use by the authorities in making decisions about products with dual use gives incorrect or misleading information or suppresses information of significance for the decision in the case; or
- 3) acts in violation of conditions, which are stipulated in the authorities' decisions about products with dual use;

shall be liable to imprisonment for any term not exceeding six years.

§ 115

(1) If any of the offences dealt with in Chapter 25, 26 or 27 of this Act is committed against the sovereign or against the constitutional regent, then unless the circumstances are covered by Sections 112 and 113 of this Act, the penalties prescribed in the above chapters for such an offence are doubled.

(2) If any of the said offences is committed against the queen, the queen dowager or the heir apparent, the penalty may exceed the most severe penalty prescribed for any of the offences by up to one half.

§ 116

(1) Any person who prevents or attempts to prevent any holding of elections to the Parliament, to the Assembly of the Faroe Islands or to the municipal or any other public councils or authorities, or who corrupts the outcome of any election or renders it impossible to count the votes, shall be liable to imprisonment for any term not exceeding six years.

(2) The same penalty shall apply where such acts are committed in connection with a referendum in public affairs, as provided by law.

§ 117

Any person who, in the case of elections or referendums referred to in Section 116 of this Act,

- 1) unlawfully obtains authorisation, for himself or for others, to take part in the voting; or
- 2) attempts, by unlawful coercion (as described in Section 260 of this Act), by deprivation of liberty or by taking advantage of a position of superiority, to induce some other person to vote in a particular way or to abstain from voting; or
- 3) causes, by deceit, some other person, against his intention, to abstain from voting or brings it about that such a person's vote is rendered invalid or that it has an effect different from that intended; or
- 4) grants, or promises or offers any pecuniary favour with a view to making a person vote in a particular way or abstain from voting; or
- 5) receives, or demands or accepts the promise of any pecuniary favour against voting in a particular way or against abstaining from voting; shall be liable to a fine or to imprisonment for any term not exceeding two years.

Annex 64

Code pénal français, art. 122-4

Chemin :

Code pénal

- ▶ Partie législative
 - ▶ Livre Ier : Dispositions générales
 - ▶ Titre II : De la responsabilité pénale
 - ▶ Chapitre II : Des causes d'irresponsabilité ou d'atténuation de la responsabilité

Article 122-4

N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires.

N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal.

Liens relatifs à cet article

Cité par:

LOI n°2016-41 du 26 janvier 2016 - art. 41, v. init.
Avis - art., v. init.
Code de justice militaire - art. 396 (Ab)
Code de justice militaire. - art. L311-14 (V)
Code de la santé publique - art. L3411-8 (V)

Codifié par:

Loi n°92-683 du 22 juillet 1992 (V)

Annex 65

Code pénal français, art. 421-2-2

Chemin :

Code pénal

- ▶ Partie législative
 - ▶ Livre IV : Des crimes et délits contre la nation, l'Etat et la paix publique
 - ▶ Titre II : Du terrorisme
 - ▶ Chapitre Ier : Des actes de terrorisme

Article 421-2-2

- ▶ Créé par Loi n°2001-1062 du 15 novembre 2001 - art. 33 JORF 16 novembre 2001

Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte.

Liens relatifs à cet article

Cité par:

Avis - art., v. init.
Délibération n°2018-139 du 19 avril 2018 - art., v. init.
Code de procédure pénale - art. 28-1 (V)
Code de procédure pénale - art. 706-17 (MMN)
Code monétaire et financier - art. L561-22 (V)
Code pénal - art. 421-2-3 (V)
Code pénal - art. 421-5 (V)

Codifié par:

Loi 92-686 1992-07-22

Annex 66

Constitution de la République française

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

CONSTITUTION

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TITRE IX LA HAUTE COUR

Article 67

Le Président de la République n'est pas responsable des actes accomplis en cette qualité, sous réserve des dispositions des articles 53-2 et 68.

Il ne peut, durant son mandat et devant aucune juridiction ou autorité administrative française, être requis de témoigner non plus que faire l'objet d'une action, d'un acte d'information, d'instruction ou de poursuite. Tout délai de prescription ou de forclusion est suspendu.

Les instances et procédures auxquelles il est ainsi fait obstacle peuvent être reprises ou engagées contre lui à l'expiration d'un délai d'un mois suivant la cessation des fonctions.

Article 68

Le Président de la République ne peut être destitué qu'en cas de manquement à ses devoirs manifestement incompatible avec l'exercice de son mandat. La destitution est prononcée par le Parlement constitué en Haute Cour.

La proposition de réunion de la Haute Cour adoptée par une des assemblées du Parlement est aussitôt transmise à l'autre qui se prononce dans les quinze jours.

La Haute Cour est présidée par le Président de l'Assemblée nationale. Elle statue dans un délai d'un mois, à bulletins secrets, sur la destitution. Sa décision est d'effet immédiat.

Les décisions prises en application du présent article le sont à la majorité des deux tiers des membres composant l'assemblée concernée ou la Haute Cour. Toute délégation de vote est interdite. Seuls sont recensés les votes favorables à la proposition de réunion de la Haute Cour ou à la destitution.

Une loi organique fixe les conditions d'application du présent article.

TITRE X DE LA RESPONSABILITÉ PÉNALE DES MEMBRES DU GOUVERNEMENT

Article 68-1

Les membres du Gouvernement sont pénalement responsables des actes accomplis dans l'exercice de leurs fonctions et qualifiés crimes ou délits au moment où ils ont été commis.

Ils sont jugés par la Cour de justice de la République.

La Cour de justice de la République est liée par la définition des crimes et délits ainsi que par la détermination des peines telles qu'elles résultent de la loi.

Article 68-2

La Cour de justice de la République comprend quinze juges : douze parlementaires élus, en leur sein et en nombre égal, par l'Assemblée nationale et par le Sénat après chaque renouvellement général ou partiel de ces assemblées et trois magistrats du siège à la Cour de cassation, dont l'un préside la Cour de justice de la République.

Toute personne qui se prétend lésée par un crime ou un délit commis par un membre du Gouvernement dans l'exercice de ses fonctions peut porter plainte auprès d'une commission des requêtes.

Cette commission ordonne soit le classement de la procédure, soit sa transmission au procureur général près la Cour de cassation aux fins de saisine de la Cour de justice de la République.

Le procureur général près la Cour de cassation peut aussi saisir d'office la Cour de justice de la République sur avis conforme de la commission des requêtes.

Une loi organique détermine les conditions d'application du présent article.

Article 68-3

Les dispositions du présent titre sont applicables aux faits commis avant son entrée en vigueur.

TITRE XI LE CONSEIL ÉCONOMIQUE, SOCIAL ET ENVIRONNEMENTAL

Article 69

Le Conseil économique, social et environnemental, saisi par le Gouvernement, donne son avis sur les projets de loi, d'ordonnance ou de décret ainsi que sur les propositions de loi qui lui sont soumis.

Un membre du Conseil économique, social et environnemental peut être désigné par celui-ci pour exposer devant les assemblées parlementaires l'avis du conseil sur les projets ou propositions qui lui ont été soumis.

Le Conseil économique, social et environnemental peut être saisi par voie de pétition dans les conditions fixées par une loi organique. Après examen de la pétition, il fait connaître au Gouvernement et au Parlement les suites qu'il propose d'y donner.

Article 70

Le Conseil économique, social et environnemental peut être consulté par le Gouvernement et le Parlement sur tout problème de caractère économique, social ou environnemental. Le Gouvernement peut également le consulter sur les projets de loi de programmation définissant les orientations pluriannuelles des finances

Annex 67

Michel Virally, *Souveraineté des Etats et autorité du droit*, in PANORAMA DU DROIT INTERNATIONAL CONTEMPORAIN: COURS GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 183 (1983)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

DEUXIÈME PARTIE

SOUVERAINETÉ DES ÉTATS ET AUTORITÉ DU DROIT

Les chapitres regroupés dans cette partie ne sont pas exactement sur le même plan que ceux qui composent les deux autres. Ces derniers ont un objet substantiel (dans le langage juridique traditionnel, on dirait matériel) : ils analysent les droits et les obligations des acteurs internationaux dans leurs rapports mutuels. Pour employer une autre terminologie, également classique, ils sont consacrés à des règles « primaires ».

Dans cette partie, au contraire, il s'agit d'examiner les mécanismes fondamentaux grâce auxquels l'ordre juridique international remplit les fonctions indispensables à son fonctionnement. Il s'agit des procédures, ou des règles « secondaires », qui sont au service des autres règles et se retrouvent donc dans tous les chapitres du droit. A juste titre, le juriste y attache la plus grande importance. Ces règles secondaires forment la partie essentielle et parfois unique de tout exposé général du droit international. Dans le présent cours, elles occupent une place centrale entre les deux autres parties, qui en dépendent également, mais elles seront exposées plutôt brièvement, car elles sont supposées les mieux connues. Il s'agira, simplement, de les replacer dans le cadre de réflexion qui est le nôtre et non de les traiter de façon complète et approfondie. On restera ainsi fidèle à la méthode, annoncée au début, qui consiste à passer le plus vite sur les points les mieux traités ailleurs.

Tout ordre juridique doit remplir trois fonctions fondamentales relatives à son propre fonctionnement⁵¹.

La première consiste à déterminer les modes de formation du droit, par lesquels l'ordre juridique se crée lui-même, s'autoproduit. Il s'agit de la création et du développement de sa propre substance. C'est ce qu'on nomme habituellement les sources du droit. Ce sera l'objet du chapitre IV.

La seconde fonction porte sur l'application du droit : comment le droit passe de l'affirmation de soi à sa réalisation dans les rapports sociaux, donc à la régulation effective de la société qu'il est appelé à gouverner. Cette fonction diffère clairement de la précédente,

mais n'en est pas séparée : l'application du droit réagit nécessairement sur sa formation et un ordre juridique valable est aussi un ordre respecté dans les faits. Le chapitre V y sera consacré.

Le règlement des différends qui surgissent inévitablement des oppositions existant au sein de toute société peut être considéré aussi comme une fonction sociale d'une importance considérable, dans laquelle le droit a un rôle éminent à jouer : la fonction de pacification. Celle-ci ne relève pas, cependant, du droit seul et, d'un point de vue strictement juridique, le règlement des différends n'est qu'un aspect de la création du droit (règlement de situations individuelles et droit «jurisprudential») et de son application. Il ne correspond donc pas à une fonction juridique spécifique. Il soulève, néanmoins, des problèmes assez particuliers et assez complexes pour mériter d'être examiné à part, ce qui sera l'objet du chapitre VI.

La troisième fonction inhérente à tout ordre juridique est celle de son organisation, ou de sa structuration, en vue d'instituer les autorités chargées de remplir les fonctions précédentes, ou d'y collaborer, et, plus largement, d'agir pour le compte de la société tout entière : c'est elle qui, dans l'ordre interne, permet l'édification sur des bases stables et ordonnées de l'appareil d'Etat. Bien qu'elle n'ait pas cette tâche dans l'ordre international, elle a aussi son rôle à jouer au niveau interétatique.

D'un point de vue strictement logique, l'examen de cette troisième fonction aurait sa place dans la présente partie. Pour des raisons pratiques, il a paru préférable de le renvoyer au début de la troisième partie, parce qu'elle constitue un aspect important de l'organisation de l'interdépendance.

Par. 3. Les obligations de règlement pacifique

Les différends surgissant entre deux Etats troublent évidemment leurs relations mutuelles. Il y a donc un grand intérêt pour les Etats désireux de préserver celles-ci de tout ce qui peut les mettre en danger de trouver rapidement les moyens de les régler, ce qui peut être difficile lorsque les passions sont soulevées par la survenance d'un différend et que la tension a déjà monté. Pour cette raison, des engagements établissant une obligation de règlement pacifique et prévoyant le recours à une procédure déterminée ont été introduits dans des traités bilatéraux d'amitié et de bon voisinage. Des traités ayant le même objet ont même pu constituer, tout aussi logiquement, le substitut d'un traité d'amitié. A certaines époques (au début du XX^e siècle et surtout entre les deux guerres), un réseau dense d'accords bilatéraux a pu ainsi être constitué dans le but de prévenir toute tension dans les rapports internationaux.

De tels engagements ne sont pas dépourvus de contradictions. L'apparition de différends est certes inévitable, même entre les Etats politiquement les plus proches et dont les intérêts sont les plus convergents, mais le mode de règlement le plus simple et le plus souple est toujours l'accord négocié directement entre les parties. Si les relations entre deux Etats sont véritablement amicales, le recours à la négociation sera spontané et suffira à tout : les obligations de recourir à des moyens plus sophistiqués de règlement pacifique seront inutiles. En revanche, si les relations politiques générales deviennent mauvaises, on peut se demander si l'existence d'une obligation de règlement suffira à remédier à l'absence de volonté de règlement.

Les obligations de règlement pacifique établies dans le cadre de traités multilatéraux répondent à une intention un peu différente ; il s'agit généralement d'assurer le maintien de la paix et de la sécurité internationales : l'obligation de règlement constitue alors un corollaire de l'interdiction du recours à la force (ou, avant que ce principe ait été accepté, un substitut à cette interdiction). C'était déjà l'objet des Conventions de La Haye de 1899 et de 1907 sur le règlement des conflits internationaux, ce fut l'objet du Pacte de la Société des Nations (art. 12, 13, 15) et c'est aujourd'hui celui des dispositions de la Charte des Nations Unies en la matière (art. 2, par. 3, et 33, par. 1). En raison de cette finalité générale, le système ne présente pas les contradictions inhérentes aux engagements bila-

téraux, mais on peut s'interroger sur sa portée effective. Celle-ci dépend en fait (comme dans le cas des engagements bilatéraux) du contenu de l'obligation et des conditions de fonctionnement du mécanisme auquel elle se rapporte.

Bien entendu, des obligations de règlement pacifique peuvent aussi être formulées dans le seul but de résoudre les difficultés soulevées par l'application d'un traité (bilatéral ou multilatéral) portant sur un objet quelconque, mais limité, c'est-à-dire ne concernant pas les relations politiques générales des parties : clause compromissoire ou protocole annexe (et, éventuellement, facultatif) de règlement des différends. Leur efficacité soulève les mêmes problèmes.

1) *Le contenu et la portée des obligations de règlement*

Il existe aujourd'hui une obligation très générale de règlement des différends : c'est celle qui résulte des articles 2, paragraphe 3, et 33, paragraphe 1, de la Charte des Nations Unies, que l'on peut considérer comme constituant un principe du droit international général (cf. la résolution 2625, qui le compte parmi les sept principes qu'elle codifie).

Elle constitue, en fait, un corollaire du principe de prohibition du recours à la force, qui interdit le règlement des différends par le recours à des moyens non pacifiques, mais elle a aussi une fonction de prévention, puisqu'elle met à la charge des Etats une obligation de règlement de tous les différends « dont la prolongation est susceptible de menacer le maintien de la paix et de la sécurité internationales ». En outre, elle doit prévenir aussi de futures sources de tension, puisqu'elle impose que les règlements à intervenir soient établis

« de telle manière que la paix internationale et la sécurité internationale *ainsi que la justice* ne soient pas mises en danger. »

Toutefois, l'obligation résultant de la Charte se caractérise avant tout par le principe du libre choix des modes de règlement par les parties et par le fait qu'il s'agit seulement d'une obligation de moyen : les Etats ont seulement le devoir de « *rechercher la solution* » des différends qui les opposent. Ceci a pour conséquence de réduire la portée effective de l'obligation, *en fait*, à la méthode la

plus générale et la moins organisée : à une simple obligation de négocier.

La Cour internationale de Justice a eu l'occasion (dans les affaires du *Plateau continental de la mer du Nord*, *CIJ Recueil 1969*, p. 47) d'indiquer que l'obligation de négocier était relativement contraignante : elle oblige à ouvrir des négociations (ou à tenter de le faire, ou à ne pas s'y dérober systématiquement), mais aussi à ne pas s'en tenir rigidement à sa propre position (y compris, peut-on ajouter, sur les conditions mises à l'ouverture d'une négociation). Il est impossible, néanmoins, d'obliger un Etat à faire les concessions qui seules permettraient de parvenir à un accord (ne serait-ce que parce que ce serait, du même coup, admettre que l'autre Etat était justifié à exiger que ces concessions soient faites). Un tiers ne peut se substituer au gouvernement d'un Etat pour déterminer ce qu'impose la défense de ses intérêts. En réalité, en assumant une obligation de négocier, l'Etat se réserve le droit au désaccord — donc le droit d'empêcher le règlement — à la seule condition de se comporter de bonne foi, ce qui peut difficilement être contrôlé.

L'efficacité de l'obligation de négocier est donc limitée aux hypothèses où la volonté de règlement existe chez toutes les parties — c'est-à-dire aux cas où son utilité est la moins évidente.

Les aides à la négociation par l'intervention de tiers ne pouvant elles-mêmes, normalement, pas faire l'objet d'obligations, la tendance a donc été de rendre obligatoire le recours aux modes juridictionnels. Toutefois, tous les différends ne se prêtant pas à un règlement de ce type, il a été nécessaire de construire la distinction entre les différends justiciables et les autres, les premiers étant ceux qui portent sur une question de droit et les seuls susceptibles, par conséquent, de faire l'objet d'une obligation de règlement juridictionnel. C'est la voie ouverte par les Conventions de La Haye, sur le plan multilatéral, et suivie par tous les accords en la matière (y compris le Statut de la Cour internationale de Justice : art. 36, par. 2). L'inconvénient est, évidemment, que les différends purement politiques, qui peuvent être les plus graves, échappent à toute obligation.

Les conventions les plus perfectionnées ont alors introduit une combinaison entre la conciliation (qui constitue une procédure organisée pour parvenir à un règlement par accord), s'appliquant, en principe, aux différends purement politiques, et l'arbitrage ou la justice internationale pour les différends justiciables. Ainsi,

chaque type de différend fait l'objet d'une obligation spécifique de règlement. La conciliation, toutefois, ne conduit pas nécessairement à une solution, puisque les propositions de la commission de conciliation doivent être acceptées par les parties, qui restent juridiquement libres de les rejeter.

2) *Le «verrouillage» des obligations de règlement*

Les premiers accords portant obligation de règlement des différends comportaient des failles béantes, qui les vidaient pratiquement d'une grande partie de leur contenu, en permettant aux parties de s'en affranchir dans tous les cas politiquement difficiles (et recelant donc des risques de tension). C'était le cas, en particulier, avec les fameuses réserves portant sur l'honneur, ou «les intérêts vitaux» ou «les intérêts d'un tiers». En outre, la difficile mise sur pied d'une procédure arbitrale recelait de multiples occasions, pour un Etat réticent, de paralyser pratiquement le recours à cette procédure.

Le progrès du droit s'est donc effectué par un verrouillage progressif de toutes les possibilités laissées aux Etats de se dégager pratiquement des obligations qu'ils avaient assumées. L'institution d'une Cour permanente de Justice internationale a, à cet égard, constitué un progrès considérable (indépendamment du fait qu'elle constituait un organe juridictionnel accessible à tout moment par accord entre les parties). Le recours au président de la Cour pour la désignation des arbitres, au cas où les Etats n'y procéderaient pas, en a été un autre. De même la possibilité donnée au tribunal arbitral de rédiger lui-même les questions auxquelles il aurait à répondre, si les parties n'y parvenaient pas. Les modèles de règlement arbitral résultant d'accords multilatéraux allaient dans le même sens.

Le mécanisme le plus parfait a été établi par l'Acte général de Genève, du 26 septembre 1928. Dans son application la plus complète, l'Acte général prévoyait le recours au règlement judiciaire pour les différends justiciables et à la conciliation pour les autres. En cas d'échec de la conciliation, le différend non réglé était soumis à l'arbitrage, et le tribunal arbitral autorisé à statuer, dans ce cas, *ex aequo et bono* (le recours à l'arbitrage étant, d'autre part, toujours possible sur une base volontaire). Le système garantissait ainsi que tout différend serait soumis à une procédure de règlement

permettant d'aboutir, dans des délais plus ou moins rapides, à une solution obligatoire pour les parties. Un réseau très dense de traités bilatéraux de conciliation et d'arbitrage, conçus sur ce même modèle, a été établi à la même époque (plus de deux cents traités en vigueur en 1940).

Or, le fait frappant est que l'Acte général de Genève n'a pas été utilisé dans la pratique avant l'affaire des *Essais nucléaires*, en 1973, soit quarante-cinq ans après sa conclusion. Quant aux traités bilatéraux, ils ont été tout simplement oubliés et peuvent probablement être considérés comme tombés en désuétude, bien que la possibilité théorique d'y recourir ne puisse être complètement exclue.

Cette constatation est, au premier abord, surprenante. On pourrait s'attendre à ce que, lorsque deux Etats sont liés par un accord de règlement aussi serré, l'un d'entre eux au moins veuille l'utiliser en cas de différend.

Il serait nécessaire de procéder à des recherches assez fouillées pour parvenir à une explication sûre. Il semble bien, cependant, que les Etats répugnent, dans la pratique, à déclencher une procédure dont ils ne savent pas quel sera le point d'aboutissement. On le voit à l'hésitation marquée, dans beaucoup de cas, à faire fonctionner un mécanisme d'arbitrage obligatoire, ou à saisir la Cour internationale de Justice dans les cas où existe un lien de juridiction obligatoire. Cette réticence est plus forte pour la conciliation, qui peut aboutir à une proposition inacceptable, mais dont la seule existence affaiblira la position de l'Etat qui la refuse. La perspective apparaît encore plus redoutable, si l'échec de la conciliation conduit à un arbitrage forcé, où la décision sera rendue *ex aequo et bono*. Les systèmes de règlement les plus perfectionnés (c'est-à-dire les plus fermés à toute échappatoire) sont donc aussi les plus inquiétants. D'où leur non-utilisation dans la pratique. Mais ceci ne signifie pas qu'ils soient sans effet : ils peuvent avoir une valeur dissuasive et convaincre les Etats de se montrer plus souples dans la négociation, pour ne pas s'exposer à leur mise en œuvre.

De façon plus générale, on peut constater une sous-utilisation des accords établissant une obligation de recourir à un mode juridictionnel de règlement des différends. Il devient alors intéressant d'examiner dans quels types d'affaires les Etats, soit spontanément, soit sur la base d'un tel accord, ont recours à ce mode de règlement : dans quels cas le considèrent-ils comme un moyen pratique de résoudre les difficultés qui les opposent à d'autres Etats ?

Section II. Le champ opératoire du règlement juridictionnel

Règlement judiciaire et règlement arbitral présentent des traits à bien des égards différents. Il n'est pas évident, *a priori*, que les types d'affaires dans lesquelles les Etats considèrent le règlement arbitral comme utile et approprié soient les mêmes que ceux où le règlement judiciaire fait l'objet du même jugement. Il faut donc consacrer à chacun une étude séparée.

Par. 1. Le règlement judiciaire

La question ayant été examinée dans un article relativement récent⁸⁰, il sera possible d'être bref.

En vue de tenter de mieux comprendre la pratique des Etats, la jurisprudence des deux Cours a fait l'objet d'un relevé systématique afin de classer les affaires dont elles ont été saisies par genres, d'après la nature des problèmes auxquels elles se rapportent. Ce relevé a porté d'abord sur les affaires soumises au contentieux, mais aussi sur celles ayant fait l'objet d'une demande d'avis consultatif. Dans ce cas, la Cour ne règle évidemment pas un différend, mais il se peut que l'avis consultatif soit demandé afin d'aider à trouver une solution à un différend surgi au sein de l'organisation demanderesse ou porté devant elle. Il est donc intéressant de voir dans quels cas les Etats qui sont à l'origine d'une telle demande, ou qui ont seulement voté en sa faveur, ont considéré que la Cour pourrait jouer un rôle utile dans la recherche d'une solution. La question, en effet, n'est pas de savoir si l'arrêt ou l'avis de la Cour a permis de régler le différend considéré (ce qui serait une question relative à l'efficacité de l'action des deux Cours), mais de déterminer quand les Etats estiment approprié de faire intervenir la Cour de La Haye dans le déroulement d'un différend.

La constatation remarquable à laquelle conduit cet examen est que la totalité des affaires portées devant les deux Cours se rattachent à un très petit nombre de rubriques⁸¹, ce qui démontre une concentration de l'activité de la justice internationale dans quelques domaines des relations internationales, en dehors desquels les Etats ne considèrent pas le règlement judiciaire comme approprié pour résoudre les difficultés qui les opposent.

Définies de façon empirique ces rubriques sont : 1) des affaires liées à des événements exceptionnels (suites de guerre, conséquences

directes d'incidents militaires ou de désordres intérieurs, affaires de décolonisation); 2) des affaires relatives à la protection des biens et des personnes (publics ou privés); 3) des affaires portant sur l'existence, le cadre spatial, l'attribution ou l'exercice de droits de juridiction (souveraineté territoriale ou droits souverains, y compris les différends frontaliers et les délimitations maritimes); 4) des questions de droit des organisations internationales.

On peut exclure de cette liste les questions de droit des organisations internationales, qui font seulement l'objet d'avis consultatifs et se rapportent à des désaccords d'un type très particulier, difficilement assimilables aux différends interétatiques classiques et non susceptibles de menacer la paix et la sécurité internationales. De même, la première rubrique ne définit pas un type particulier d'affaires. Elle fait apparaître que beaucoup d'affaires ne vont devant la Cour de La Haye qu'en raison des circonstances exceptionnelles dans lesquelles elles se sont produites, ce qui n'est pas sans intérêt pour comprendre le rôle de la Cour dans la société internationale (et surtout ce qu'il fut après la première guerre mondiale). Mais toutes les affaires classées sous cette rubrique se rattachent quant au fond à une des rubriques 2 et 3.

Une dernière observation, enfin, doit être faite. Si les affaires de protection de personnes et de biens (dont la plupart relèvent de la protection diplomatique) ont leur spécificité du point de vue de l'Etat demandeur, la question posée à l'Etat défendeur se rapporte encore une fois à l'exercice de ses droits de souveraineté sur son territoire ou à un exercice extraterritorial de ces droits.

Finalement, les seules affaires portées *en fait* devant les deux Cours se rapportent à des questions relatives à des droits de juridiction, c'est-à-dire portent sur quelques-unes des questions traitées dans les chapitres II et III de ce cours (même si elles soulèvent aussi des questions se rapportant à d'autres chapitres, notamment, de façon très générale, aux chapitres IV et V). Les différends relatifs à des questions examinées dans d'autres chapitres ne sont pratiquement jamais déférés à la Cour de La Haye (ce qui signifie, en particulier, l'exclusion de tout ce qui concerne la coopération internationale).

Il s'agit, bien évidemment, de problèmes qui sont au centre du système de relations internationales contemporain, mais on reste cependant assez loin de la juridiction à vocation tout à fait générale, destinée à jouer dans l'ordre international un rôle comparable

à celui des tribunaux nationaux dans l'ordre interne, que suggèrent son Statut et les textes relatifs à sa compétence. La compétence de la Cour est très générale *en droit*. Son champ opératoire est *en fait* sensiblement plus limité. Les raisons de cette situation seraient à analyser. Elles tiennent probablement davantage aux réalités politiques de la vie internationale qu'à la Cour elle-même (considérée sous l'angle de sa procédure ou de sa jurisprudence).

Par. 2. Le règlement arbitral

L'examen de l'histoire de l'arbitrage moderne suggère des conclusions presque identiques, ce qui confirme que ce ne sont pas les particularités de l'organe de juridiction qui sont à l'origine de la situation observée.

Les conclusions à tirer de l'observation de la pratique arbitrale sont d'autant plus intéressantes que le nombre des affaires est beaucoup plus élevé et que cette pratique s'étend sur une période de temps beaucoup plus longue, correspondant à des moments très différents de la société internationale.

Si on prend comme point de départ l'inventaire établi par le professeur Stuyt pour les arbitrages de 1794 à 1970⁸² et qu'on le prolonge jusqu'en 1983, on parvient à un total de quatre cent quarante-sept affaires⁸³. Parmi elles, on ne trouve, pour des raisons assez évidentes, aucune affaire portant sur des questions de droit des organisations internationales. On constate qu'un très grand nombre se rapportent à des suites de guerre (ou à des opérations de guerre : notamment des prises maritimes) ou à des troubles intérieurs, mais sans former une catégorie à part. Une rubrique, d'autre part, doit être ajoutée, qui ne se rapporte pas à des problèmes de juridiction : il s'agit des dettes d'Etats et autres obligations financières publiques (vingt-quatre affaires), c'est-à-dire d'un contentieux qui est réglé aujourd'hui dans bien des cas par voie de renégociation, mais qui, au XIX^e siècle, a donné lieu fréquemment à des interventions militaires : il y a là une évolution intéressante.

Toutes les autres affaires, sauf dix d'entre elles (soit 413 sur 447), portent sur des questions de juridiction dans le sens précisé plus haut (dont 166 sont liées à des événements de guerre ou à des troubles intérieurs et 290 relèvent de la protection diplomatique — ce sont d'ailleurs souvent les mêmes). Des dix affaires non classées quatre se rapportent à des questions de droits monarchiques ou de

succession dans des familles princières, dont le caractère d'arbitrage international au sens moderne de l'institution est des plus contestables. Ce ne sont donc, finalement, que six affaires qui n'entrent pas dans la grille de classement, ce qui est négligeable⁸⁴.

Ces constatations confirment que le champ opératoire du règlement juridictionnel reste bien limité aux questions de juridiction, au sens large, avec un élargissement temporaire aux relations financières internationales⁸⁵.

En fait, ce champ est encore plus étroit : seules, en effet, sont portées devant l'arbitrage les affaires ne mettant pas en jeu des intérêts politiques trop considérables (ceci est particulièrement apparent en matière de différends frontaliers ou de questions d'attribution de souveraineté), mais présentant une importance suffisante pour mériter l'organisation d'une procédure aussi complexe (et coûteuse, bien que le coût de beaucoup d'arbitrages anciens ait été fort réduit par rapport aux normes contemporaines). Ce sont donc, finalement, les affaires moyennes qui, seules, vont devant les arbitres : affaires soulevant des problèmes juridiques complexes (notamment en matière frontalière) ou des questions de fait difficiles (notamment en matière de dommages aux personnes et aux biens).

La même observation pourrait être faite pour le règlement judiciaire.

Annex 68

Glanville Williams, *Oblique Intention*, Cambridge Law Journal, Vol. 46 (1987)

OBLIQUE INTENTION

GLANVILLE WILLIAMS

WHY is it that intention, or intent, one of the basic concepts of the criminal law, remains so unclear? Judges decline to define it, and they appear to adjust it from one case to another.

Part of the trouble is the disagreement on the subject of intention among jurists generally. The philosophers who have lately arrived on the scene, hoping to help the lawyers to solve their legal problems, in fact give only limited assistance. Their philosophical interest stems from the fact that intention is an important ethical concept, but they do not relate their discussions to any particular ethical theory, and they do not sufficiently consider the specific requirements of the criminal law. Indeed, they mix up the ordinary meaning of the word "intention" with its desirable legal meaning. To be sure, the meaning of intention as a technical term of the law ought to be close to the literary and popular one, but there are sound reasons for saying that the two should not always be identical.

Added to the confusion of counsel is the fact that the judges sometimes wrap up excuses into the meaning of intention, though rationally excuses should have nothing to do with the matter.¹

Judges reject the proposition that the legal concept of intention in relation to the consequences of action necessarily involves desire of the consequence. This is quite right, and a useful beginning; but the recent pronouncements of the lords get no further. They do not acknowledge the truth that intention generally does involve desire, and they do not say when it does not.

What the courts ought to hold appears to me to be clear. (1) Except in one type of case, intention as to a consequence of what is done requires desire of the consequence.² Of course, intention, for the

¹ An example is the statement that "wilfully" lets in a defence of claim of right: see my *Textbook of Criminal Law*, 2nd edn 140. Other examples are given later.

² See the helpful analysis by the philosopher R. A. Duff in [1980] *Crim.L.R.* 149. This analysis is of what the author calls "intended action," by which he means "action with intent." Under the scheme of the Draft Code (see later) the analysis applies to acting "purposely"; the code uses the word "intentionally" more widely, to cover oblique intent as well.

lawyer, is not a bare wish;³ it is a combination of wish and act (or other external element⁴). With one exception, an act is intentional as to a consequence if it is done with (motivated by) the wish, desire, purpose or aim (all synonyms in this context⁵) of producing the result in question. (2) The one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties. A person can be held (but will not always be held) to intend an undesired event that he knows for sure he is bringing about.

(1) The first proposition is disputed by some writers, particularly the two philosophers, just mentioned, who have taken an interest in the English criminal law. Their principal argument is that one can intend to do various unpleasant things, *e.g.* visiting the dentist; therefore intention need not involve desire.⁶ I would have thought that the error in this is too obvious to need stating. The premise is true, but the conclusion does not follow. Obviously, people go to the dentist in order to get certain benefits (relief from pain or the preservation of the teeth). To get these benefits, the possibility of pain or discomfort is accepted. It is accepted not as an end in itself but as part of the package, and the package as a whole is desired—otherwise one would not go to the dentist. The pain taken by itself is not desired, but the proposition was not that the patient intends the pain but that he intends to visit (intentionally visits) the dentist.

The writers who deny the relevance of desire replace it with the word “purpose.” But does not purpose imply desire? One can have an undeclared purpose, but not an undesired purpose. “Undesired purpose” is a contradiction in terms.

(2) The second proposition seemed to be on its way to legal acceptance until recent pronouncements of the lords. Perhaps the lords intended to negative it. Or perhaps they did not. More of this later.

³ It would not be a misuse of language to assert that a person who is seriously planning a crime has an intention to commit the crime although he has not yet taken any step to that end. But the assertion would have little legal significance, since the law generally takes no notice of mere mental states. See, however, the following note.

⁴ But the external element may be a criminal omission; this can be intentional, in which case there is nothing but a non-event plus a state of mind.

⁵ Another philosopher, Professor Alan White, suggests a distinction (92 L.Q.R. 574): a person may go to Australia with the intention of staying for not more than a year; this is his intention when he goes, but not his purpose in going. If he goes to Australia with the intention of visiting his grandchildren, that is a purpose. I would suggest that “goes to Australia” is ambiguous. When the traveller embarks, his intention (and purpose) is to travel to Australia (not necessarily his *only* purpose). When he arrives in Australia *that* intention is fulfilled. At the same time, he intended (and purposed) to return within a year. Of course he may change his intention. I cannot think of any context in which the point would create a legal problem.

⁶ See Alan White in 92 L.Q.R. 576 and R. A. Duff in [1986] Crim.L.R. 773. For a lawyer’s opinion in support see Donald Stuart in [1968] Crim.L.R. 649. As will be shown, the judges seem to take the same view.

In one application, at least, the second proposition is accepted as almost universally true. Where the defendant desires result *x*, and anyone can see, by merely considering *x*, that another result, *y* (forbidden by law), will also be involved, as the direct consequence of *x* and almost as part and parcel of it, then the defendant will be taken to intend both *x* and *y*.

Three men accidentally killed a girl in horseplay. Being frightened, they hid the body under a pile of stones. It was held that they were guilty of conspiracy to prevent the burial of a corpse.⁷ The Court of Appeal upheld a direction that “if the defendants agreed to conceal the body and the concealment in fact prevented burial, then the offence was made out, although prevention of burial was not the object of the agreement.”

A result that is either witnessed or foreseen as certain is almost always regarded as sharing the intentional nature of an act where it is either the contemporaneous (concurrent) result or the immediate consequence of the act. A person will normally be taken to intend something that he is consciously doing, or that follows under his nose from what he is then doing.⁸

Take *Hills v. Ellis*,⁹ where a concerned onlooker took hold of a policeman’s arm in an effort to persuade him not to make an arrest. The onlooker’s chief desire, object, purpose and motive was to prevent the constable from making, as he thought, a mistake; but he presumably knew that he was hindering him slightly; therefore he was, in law, guilty of wilfully obstructing him. As was said in another case, “if the defendant did an act which he realised would in fact have the effect of obstructing the police he would be guilty of having done so ‘wilfully.’”¹⁰

Decisions on the meaning of “wilfulness” in law, like *Hills v. Ellis*, are not conclusive on the legal meaning of intention, because the courts make “wilfulness” cover both intention and recklessness. Still, the decision accords with others turning specifically on intention.

Using the word “intention” in this way admittedly involves an extension beyond its normal meaning in the language. The normal meaning connotes desire. A philosopher writes: “What I do knowing I am doing it need not be done intentionally, as when I know that I am

⁷ *Hunter* [1974] Q.B. 95.

⁸ Mere knowledge is not, of course, enough to constitute intention if the defendant can do nothing about it. This proposition is particularly important in relation to offences of omission and situational offences. If a patient in hospital gets to know that his child at home is being neglected, he does not at that moment himself intentionally or wilfully neglect the child, if he cannot do anything to prevent the neglect continuing. See Glazebrook in *Reshaping the Criminal Law* (1978) 117–118. Similarly, where a person is non-culpably in possession of a contraband object the law allows him a reasonable time to surrender it to the police.

⁹ [1983] Q.B. 680

¹⁰ *Lewis v. Cox* [1985] Q.B. 509.

hurting your feelings but not doing so intentionally.”¹¹ The remark is true for ordinary speech, and true in law for offences involving the “hurting of feelings”; but the law is much more concerned with hurting bodies than with hurting feelings. If I drive over you because I am in a hurry and you will not get out of the way, I drive over you intentionally, and it would be no use my saying that my sole intention was to make progress. For legal purposes the meaning of intention has to be widened to this extent.

Similarly, a surgeon intentionally wounds his patient when he inserts the scalpel. He does not, of course, commit a crime of intention, but that is because he has the justification of consent. Lord Hailsham on one occasion denied this, and put the surgeon’s defence on lack of intent;¹² this is an example of the judicial tendency already mentioned, to bring in defences under the heading of lack of intention. In the unlikely case of a surgeon kidnapping his recalcitrant patient and making various incisions in him, entirely for the patient’s benefit, the surgeon would be guilty of the offence of wounding with intent; yet his intention to make the incisions would be the same as in an ordinary medical operation.¹³

The law should generally be the same where the defendant is aware that a consequence in the future is the certain (though undesired) result of what he does. He is liable for a crime of intention if the foreseen though undesired consequence is inseparably bound up with the desired consequence. This opinion has been supported by some writers,¹⁴ though not all.¹⁵ More importantly, it has been accepted by several of the major reform bodies of the common-law world. If such a variety of intention is accepted we need a name for it, the best being Bentham’s coinage of “oblique intention”¹⁶ (though the meaning he attached to this phrase is not quite the one we now need¹⁷). Direct

¹¹ Alan White in 92 L.Q.R. 582.

¹² *Hyam* [1975] A.C. at 77C.

¹³ Nevertheless, judges sometimes deny that the defendant intended a result when they wish to procure his acquittal and see no other way open. In *Att.-Gen. for Northern Ireland’s Reference* [1977] A.C. 105 a soldier fired his SLR rifle at a fleeing suspect who was less than 20 yards away, after shouting “Halt”; the man was killed. Lord Diplock approved the ruling of the trial judge that “in the agony of the moment the accused may have acted intuitively or instinctively without foreseeing the likely consequences of his act beyond preventing the deceased from getting away.” This is hard to accept. The proper ground of acquittal (though one that may be politically difficult) would be that shooting was or was believed to be the only way of preventing the escape of a person who, if the suspicion was well founded, was a dangerous criminal.

¹⁴ See Williams, *Criminal Law: The General Part*, 2nd edn 38ff.; Williams, *The Mental Element in Crime* (Jerusalem 1965) Chap. 1; Smith and Hogan, 5th edn 51; citations by Donald Stuart in 15 *Crim.L.Q.* 162 (Can.).

¹⁵ Donald Stuart in [1968] *Crim.L.R.* 649, and writers there cited.

¹⁶ Bentham, *Introduction to the Principles of Morals and Legislation* (ed. Burns and Hart 1970) 86–87.

¹⁷ Bentham used the phrase to cover consequences foreseen as “likely,” but this meaning of intention is now, rightly, rejected as being too wide. The alternative expression “indirect intent” is not so good as “oblique intent.” If you intend to do *x* in order to achieve *y* you “indirectly” intend *y*, in a sense, but it is not oblique intent.

intention is where the consequence is what you are aiming at. Oblique intention is something you see clearly, but out of the corner of your eye. The consequence is (figuratively speaking) not in the straight line of your purpose, but a side-effect that you accept as an inevitable or "certain" accompaniment of your direct intent (desire-intent). There are twin consequences of the act, *x* and *y*; the doer wants *x*, and is prepared to accept its unwanted twin *y*. Oblique intent is, in other words, a kind of knowledge or realisation.

When one speaks of the unwanted consequence as being "certain", one does not, of course, mean certain. "Nothing is certain save death and taxes." For example, a person who would otherwise have been the victim of the criminal's act may be warned in time, or providentially happen to change his plans, and so escape what would otherwise have been his fate. Certainty in human affairs means certainty as a matter of common sense—certainty apart from unforeseen events or remote possibilities. Realisation of practical certainty is something higher in the scale than appreciation of high probability.

The general acceptance of the doctrine of oblique intent

The notion of oblique intent has been accepted in some other countries, as for example Sweden,¹⁸ and the United States in the Model Penal Code (s.2.02(2)), which has been implemented in many of the States; also in the proposed new Canadian code.¹⁹ In England it has been accepted by the Law Commission,²⁰ the Criminal Law Revision Committee,²¹ and more recently the framers of the Draft Code.²² The codification team realised that there is not a single concept of intention in law, but two: a wider concept bringing in knowledge without desire and a narrower concept confined to desire. To accommodate both concepts the Draft Code provides the lawgiver with two words, "intention" and "purpose." "Intention" brings in oblique intent; "purpose" does not.

A person acts in respect of an element of an offence—"purposely" when he wants it to exist or occur;²³ "intentionally" when he wants it to exist or occur, [or]²⁴ is aware that it exists or is almost

¹⁸ See *The Penal Code of Sweden*, tr. Thorsten Sellin (Ministry of Justice, Stockholm, 1965) 10.

¹⁹ Law Reform Commn of Canada, Report 30, cl. 2(4)(b). This proposal uses the single word "purposely" to cover both direct and oblique intention, which leaves a legislator no word to express direct intention alone. This, I think, is a mistake.

²⁰ *The Mental Element in Crime*, Law Com. No. 89 (1978).

²¹ 14th Report, Cmnd 7644 of 1980, para. 10.

²² Cl. 22.

²³ Duff in [1986] Crim.L.R. 773-774 criticises this for omitting to require that the actor must act as he does because he wants the element to exist or occur. But it seems to me that this requirement is fairly implied in the formula.

²⁴ I propose the insertion of the word "or" for greater clarity.

certain that it exists or will exist or occur; “knowingly” when he is aware that it exists or is almost certain that it exists or will exist or occur.²⁵

I incline to think that “almost certain” is too lax. A person who is almost certain of a result would better be said to think it highly probable than certain. He may be almost certain when he retains a small but appreciable doubt. Lord Hailsham expressed the notion of oblique intent more narrowly by saying that “intention” includes “the means as well as the end and the inseparable consequences of the end as well as the means.”²⁶ (What he presumably meant was “the consequences known to the defendant to be inseparable in ordinary human experience”.) I would call it “virtual certainty,”²⁷ though “practical certainty” (the expression chosen by the Model Penal Code) would be an acceptable alternative. The code should proceed to define virtual certainty as a certainty that in the ordinary course of events the consequence will follow unless something unexpected supervenes to prevent it.²⁸

Illustrations of oblique intent

Examples of oblique intent in relation to future consequences are probably rare in situations of interest to the law, since almost always a person who foresees an illegal consequence as the virtually inevitable result of his act will desire it (if not as a final end, then as an instrumental end). In the two cases before the Appeal Committee in the last few years where the notion of intention was reassessed (*Moloney*²⁹ and *Hancock*³⁰), many remarks were uttered that may or may not have been meant to refer to oblique intent, but this doctrine was not (or need not have been) in issue. Either the defendants in those cases foresaw that death or grievous bodily harm was the inevitable consequence of their acts (in which case they clearly desired such consequence, since no other interpretation of their conduct was reasonably possible), or they did not foresee this (in which case no question of oblique intent arose).³¹ But a crux case of oblique intent had previously been put by Lord Hailsham when he made the

²⁵ I would add the words “and could avoid such element by altering his conduct.” See n.8 above.

²⁶ *Hyam* [1975] A.C. at 74C.

²⁷ The Law Reform Commn of Canada at one time favoured this phrase (*Homicide*, Working Paper No. 33 of 1984), but in its final Report (n.19 above) it avoids (or conceals) the issue by saying that “a person acts purposely as to a consequence if he acts in order to effect that consequence or another consequence which he knows involves that consequence.” Knows for a certainty or knows for a probability? Would it not be better to bring the point out into the open?

²⁸ This was the formulation of Lord Bridge in *Moloney*, but it is not clear whether he was speaking of oblique intent or direct intent. See text below at n.52.

²⁹ [1985] A.C. 905.

³⁰ [1986] A.C. 462.

³¹ This is convincingly demonstrated by R. A. Duff in [1986] Crim.L.R. 774–775.

statement already quoted:³² suppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side-effect. To say that the villain *desired* or *purposed* to kill the occupants of the plane would not be a statement of truth; but it is possible for the law to say that he is to be taken as having *intended* their deaths. Lord Hailsham was prepared to hold this, which enabled him to come to the conclusion that “if any passengers are killed he is guilty of murder, as their death will be a moral certainty if he carries out his intention.”³³

Common sense, I think, approves this way of looking at the matter; the case should not merely be regarded as one of manslaughter by recklessness. Public opinion would be outraged if the bomber got off a charge of murder for killing the plane-load of people, on the argument that he would not have minded if they had all survived, provided that he could obtain the sum insured. The outrage would be just as great if there were an acquittal of murder or of intentionally causing grievous bodily harm when a robber, escaping from the scene of his crime, drives very fast at a constable who is blocking the way, and kills or seriously injures him. The robber may admit that he knew the officer was bound to be seriously injured if not killed, but assert that he did not wish to injure or kill him—only to escape.³⁴

Consider, as another example, a case put by R. A. Duff:³⁵ a terrorist sets a bomb, giving timely warning to the public and desiring only to cause alarm or damage to property, but knowing for certain that a bomb disposal expert will attempt to deal with it and will (because the bomb is unusually constructed) be killed in the process. If the expert is killed, the terrorist should obviously be guilty of murder. (Some may say that he should be guilty of murder if he knowingly subjected police officers to a terrible risk, without realisation of the certainty of causing death; but that is a different issue.)

³² Note 12 above. Lord Hailsham took the illustration from a Report of the Law Commission (*Imputed Criminal Intent*, Law Com. No. 10 para. 18); its unsung source was my book *The Mental Element in Crime* (Jerusalem 1965) 34–35.

³³ Lord Hailsham was giving judgment in a case (*Hyam*) in which it was held that murder could be committed without intention, by knowingly running a risk of a certain degree of gravity. But his sentence previously quoted shows that he regarded his hypothetical not as an instance of risk-taking but as one of intention. The actual decision in *Hyam* was set aside in *Hancock* [1986] A.C. 462; see Duff in [1986] *Crim.L.R.* 775–776.

³⁴ If the robber thought that there was an appreciable possibility that the officer might be able to jump out of the way, the case would be one of extreme recklessness, not intention (even conditional intention). See below at n.69 as to the distinction between recklessness and conditional intention. Admittedly the distinction involves some subtlety, but any distinction between intention and recklessness involves subtlety.

³⁵ [1986] *Crim.L.R.* 777–778. The author, who argues for the narrow definition of intention, recognises that the terrorist must as a practical matter be convicted of murder, and proposes that a new head of mental element for murder should be added.

Arguments for recognising oblique intent

That cases of the types mentioned should be treated in the same way as ordinary cases of intention is obvious, but opinions differ between two methods of carrying out the policy. One method would be that already proposed: to relax the definition of intent sufficiently to allow oblique intent as a kind of intent. The other would be to redefine all crimes of intention, when it is desired to bring in oblique intent, by making express provision for it.

The second alternative would involve defining murder, for example, as causing death (i) with intent to cause death or serious injury, or (ii) with knowledge that such death or injury is virtually certain. This would make the law perfectly clear, but the definitions of the relevant crimes would become slightly more cumbersome. There appears to be no possibility that Parliament would now revise the law of murder to make specific provision for this additional mental state (upon which the prosecution would rarely need to rely), and any attempt to do so would reopen the whole thorny issue of risk-taking and murder. And not only murder but also various other crimes requiring intention would need the extended definition.

The first alternative would avoid this drawback. As was shown before, there are solid reasons for saying that oblique intent is recognised in the law as it stands, and if the courts accept this opinion no legislative departures are needed.

The case for taking a broad view of intention is particularly strong where the desired consequence is inseparably bound up with the foreseen though undesired consequence. (i) Consider *Arrowsmith v. Jenkins*.³⁶ A political campaigner commenced to address people on the highway, and continued to do so although she knew that she was causing the highway to be blocked, to a degree that (whether she knew it or not) the law regarded as unreasonable. She was convicted of wilfully obstructing the highway, even though her purpose was to hold a meeting, not to obstruct the highway. In the circumstances, holding the meeting was the same thing as obstructing the highway; they were simply two sides of the same coin. (ii) The following were the facts of a notorious Brighton case of 1871.³⁷ A woman inserted strychnine into a chocolate and attempted to administer it to V. The chocolate she gave having been found to be poisoned, the woman said that she did not know it, and tried to prove her innocence by showing that poisoned chocolates were circulating in the locality. She did this by introducing strychnine into a confectioner's stock of chocolates; and the buyer of

³⁶ [1963] 2 Q.B. 561; cp. *Lewis v. Dickson* [1976] Crim.L.R. 442. The proposition in the text still stands, although the courts have relaxed their opposition to meetings on the highway.

³⁷ See 121 N.L.J. 780.

some chocolates died. The poisoner was held guilty of murder; yet her primary intent was to dispel the suspicion against her. She did not want anyone other than V to die, and would not have felt frustrated if, by chance, no one died. In those days the crime of murder was much wider than now; but if the poisoner felt sure that her poisoned chocolates would kill someone, would she not still be rightly convicted of murder on the ground that she intended to kill, notwithstanding that she did not desire to do so?

A peculiar group of cases are those where the law theoretically requires proof of fact y but the courts regard it as readily satisfied by proof of x . A publisher may be convicted of conspiracy to corrupt public morals, obscenity, or blasphemy, on account of an assumed intent to commit these crimes, if he knowingly publishes matter which the jury find to have a tendency to corrupt public morals, to deprave and corrupt those to whom it is published, etc.; and no evidence is needed to support the jury's conclusion. Strict proof of the purported conclusion would be practically impossible, requiring a large sociological enquiry and a consensus on disputed values. The courts simplify the matter by making the equation $x = y$, x being the physical event that the defendant intends (the publication) and y being the jury's determination that it amounts to y .³⁸

Objections to the doctrine of oblique intent

Two objections have been made. The first is that the doctrine expands the ordinary meaning of intention. Undesired consequences of action are not usually counted as intended. A person who intends to achieve x , while fully expecting x (if he achieves it) to be accompanied by y , will not regard himself as having failed if he achieves x but by some chance y does not occur.³⁹ So he does not intend y in the sense of direct intention.

True, but the objection can be answered. To reject the doctrine of oblique intent would involve the law in fine distinctions, and would make it unduly lenient. Also, the enlargement of the legal meaning of intent to cover oblique intent, that is to say the known side-effect of a desired end, is quite small (much smaller than that involved in the

³⁸ See *Kneller (Publishing etc.) Ltd* [1973] A.C. 435 at 462. Cp. *Chandler* [1964] A.C. 763, where the lords seemed in effect to create an unbreakable link between freedom from obstruction for air force machines and the "safety or interests of the State". However obvious the connection may be, should not the jury be left to decide it? They would, of course, be allowed to decide it as a matter of common sense or public knowledge, without evidence.

³⁹ The point is pressed by Duff in [1980] Crim.L.R. 150-151; but he modifies his position by accepting that oblique intent can come within the notion of "intentional action," though not of "intended action." This is too subtle a distinction to be useful for legal purposes. Neither judge nor jury would see any difference of meaning between saying that a killing was intentional and that it was intended; between saying that D intentionally killed V and saying that D killed V by an act intended to kill V.

judges' previous attempt, now abandoned, to make intention cover knowledge of mere probability). Generally speaking, the courts should attach ordinary meanings to the words of the law; certainly these words should not be wrenched far away from their ordinary meanings; but a small departure is sometimes permissible on grounds of policy. I do not think that any jury would have trouble in understanding and accepting the slight extension of "intention" here proposed.⁴⁰

Until recently Lord Diplock and others were saying, in effect, that the notion of intention covered recklessness. The courts have now given up the struggle to maintain this unreasonable and unjust position, but what will happen if they swing to the opposite extreme and renounce oblique intent as well? Cases of oblique intent will fall back into recklessness, but is that an appropriate category? Suppose some scandalous cases arise in which people who have brought others to coolly calculated (but not purposed) death or serious harm are acquitted of murder or of intentionally causing grievous bodily harm. Might that lead to a campaign to bring all recklessness back into intention? Be sensible, and accept the compromise that oblique intention, but not recklessness, is a kind of intention.

The second objection to a general doctrine of oblique intent is that its results may sometimes be out of accord with our feelings of justice, or perhaps of verbal fitness. Duff advances three types of case as possible illustrations.⁴¹ He does not assert that the doctrine is inapplicable in these cases, but only that a conscious decision should be made on whether to apply it or not; nevertheless his discussion seems to imply his own inclination to say that it should not apply. Here are the three cases.

(1) *Implied malice in murder*. A person has knowingly caused serious injury, and so has brought about a death though it was not his purpose to do so. If he purposed to cause the injury he is guilty of murder. But should he be guilty of murder if he did not purpose it? I find it hard to imagine circumstances in which this could raise a practical problem; in the Draft Code it could perhaps be settled one way or the other by using either the concept of intention or that of purpose, according to the policy decision that has been made. (The draftsmen have in fact used that of intention, but added a requirement of awareness that the injury may kill; this seems to me to be perfectly satisfactory.)

⁴⁰ The opposite objection is also advanced: that the doctrine of oblique intent is unnecessary, since direct intent does not involve desire. Reasons for rejecting this position were given at n.6 above.

⁴¹ [1980] Crim.L.R. 157.

(2) *Attempts*. Duff seems to favour the view that these cannot be committed with an oblique intent. Like Smith and Hogan, and the code drafting team, I disagree. Certainty should be enough, when it is enough for the crime in view.

A hypothetical illustration may be based upon the Brighton case already mentioned. Assume that D knew she had inserted a fatal dose of poison into the confectioner's chocolates, but that her activities were discovered before anyone consumed a chocolate from the poisoned stock. It is obvious to me that this should be attempted murder, even though D's object was not to kill members of the public but merely to save herself from a charge of attempting to murder V.

The bomb-on-the-plane villain should be guilty of attempted murder if he is arrested the moment he puts the bomb on the plane. The robber who drives furiously to get away, and continues on his course without slackening speed when he sees a police officer standing in his path, believing that the officer has no chance of escape, should be guilty of attempted murder if the officer quite remarkably manages to avoid the vehicle. In practice, of course, proof of the oblique intent would often be problematic; and villains who behave like this are regularly (and scandalously) convicted merely of a driving offence.⁴²

(3) "*With intent*" crimes. A number of crimes are worded in terms of doing *x* with intent to do or produce *y*. Duff asks us to consider the possibility that the phrase should be read as referring to purpose, so as to exclude the doctrine of oblique intent.

One thing is clear: there can be no universal rule on offences of "with intent to" applicable to the law as it stands. Take section 18 of the Offences against the Person Act 1861, creating the crime of wounding or causing grievous bodily harm with intent (i) to do g.b.h. or (ii) to resist or prevent lawful apprehension. Intent (ii) is an intent to produce a further consequence, and may possibly be read as requiring a purpose to produce it. But intent (i) merely makes the crime one of intentionally wounding or causing g.b.h. No further consequence is involved, and the crime cannot reasonably be construed as one of purpose. The Draft Code (clause 74) proposes to reword it in a way that makes this clear.

There is another reason for denying that offences of doing an act "with intent to" something else require direct intent. Doing an act with intent to *y* involves the same intentionality as intentionally doing *y*. If the latter can be committed with oblique intent, so, surely, can the former. For example, there should be no difference of meaning between (i) doing an act with intent to impede a prosecution and

⁴² See John Spencer in [1985] Crim.L.R. 29.

(ii) intentionally impeding a prosecution, except that (i) covers preparatory acts as well as the completed act of impedance. Formula (i) therefore covers a wider class of cases than (ii), not a narrower one.

Certainly there are some odd decisions on “with intent to” crimes, which apparently support the idea that a praiseworthy or venial motive can negative the intent that would otherwise be found. But the decisions, when examined, will be found not to involve oblique intention.

Take the controversial case of *Steane*,⁴³ where the charge was of doing an act likely to assist the enemy with intent to assist the enemy. It was held that although Steane (a British subject resident in Germany on the outbreak of war in 1939) knowingly assisted the enemy by broadcasting for them, the jury were entitled to find that he did not intend to assist the enemy, because his intent was to save himself and his family from persecution.

This ground of decision was plainly wrong. Steane intentionally assisted the enemy. As Lord Morris said on one occasion, when a person acts under duress his act is “done most unwillingly but yet intentionally”.⁴⁴ Steane intended to broadcast for the enemy and also intended to protect himself and his family from the terrifying pressures that the Nazis could exercise; the second intent did not negative the first. The first intent was, indeed, necessary to effect the second. So the decision, though sometimes discussed in connection with oblique intent, did not in fact involve this concept. Steane had two direct intents: to assist the enemy, and (thereby) to gain safety for himself and his family.

This criticism of the reasoning does not mean that the actual decision was wrong. Duress is a defence to a criminal charge; there was evidence of duress before the jury; and they should have been instructed upon it.⁴⁵ Steane’s conviction would have been properly quashed on account of this misdirection.

Then again there is the decision in *Brindley*,⁴⁶ where the charge

⁴³ [1947] K.B. 997, commented upon in the N.I. C.A. in *Lynch* [1975] N.I. at 49F–H; Williams, *C.L.G.P.* 2nd edn 40; Williams, *The Mental Element in Crime* (Jerusalem 1965) 21–23. Lord Simon of Glaisdale in *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. at 699, after expressing some discomfort with *Steane*, said: “I do not suggest that the actual decision was wrong; but I would support it on the alternative ground that, when a person is placed in an unusual and stressful situation, it is unsafe to assume, even prima facie, that he intends the natural and probable consequences of his acts; so that the direction to the jury was misleading and inadequate.” This seems to me merely to restate the decision.

⁴⁴ *Lynch*, last note, at 670B.

⁴⁵ Although defence counsel mentioned the defence of duress, the Court of Criminal Appeal did not adjudicate upon it, saying that the burden of proof of duress was upon the defendant. This opinion was inconsistent with *Woolmington* [1935] A.C. 462 and is now rejected (*Bone* [1968] 1 W.L.R. 983, 2 All E.R. 644). Anyway, there was surely sufficient evidence of duress to take the defence to the jury. It is now recognised to be the duty of a trial judge to leave defences to the jury of which there is evidence even though they have not been relied upon by defence counsel.

⁴⁶ [1971] 2 Q.B. 300.

was of doing an act with intent to impede the apprehension or prosecution of a person for an arrestable offence (Criminal Law Act 1967 s.4(1)). The defendant witnessed the offence being committed by an acquaintance, but denied to the police that he had seen it. On appeal against conviction, it was argued for the defendant that the jury ought to have been directed to consider whether he might have had some intent other than that of impeding arrest and prosecution. The appeal was dismissed, but only on the ground that there was no duty to give the proposed direction because no other intent had been suggested by the defence. A somewhat similar point had arisen in the earlier case of *Jones*,⁴⁷ where the defendant had made untrue statements concerning articles found in his house, and was convicted as accessory after the fact to the theft of these articles by his wife (this type of complicity is now repealed). The conviction was quashed, one of the reasons being that the jury had not been directed on the point that the defendant might have given the answers he did to avoid prosecution himself, apart from any consideration for his wife. Were these decisions correct? Not, surely, on the ground that the offence required direct intent. It should be no defence to a charge under the section considered in *Brindley* for the defendant to say that he told the lies to carry out a promise he had made to his friend, or to get the police out of his house (where their presence was lawful), or because he did not want to contradict someone else who had told the same lies. As in *Steane*, such ulterior intents could not, in logic or on the usual view of the law, negative the primary illegal intent that was the basis of the charge.

It certainly seems from these cases on doing acts "with intent to" that the courts may hold that even a direct intent can be effaced by a venial motive. But if there is such a rule for these crimes, it must surely apply to all crimes of intention, for the reasons already stated.

Moreover, if a requirement of intention lets in an open-ended list of excuses, this will greatly impair the certainty, and possibly the effectiveness, of the criminal law. Defences like private defence and duress have been laboriously circumscribed after centuries of consideration. Are these and other possible defences to be set wholly at large when the crime requires intention? Would the jury be free to allow a defence that a terroristic crime was carried out for political purposes? Or a defence by an animal-rights campaigner that he only burnt down a laboratory in order to prevent cruelty to animals? Are purposes like these to be accepted as negating criminal intent?

The question before the court in *Steane* and *Brindley* was whether considerations of self-protection or the protection of others saved the

⁴⁷ [1949] 1 K.B. 194.

defendant from conviction. The courts seem in effect to have answered yes, but placed their decision upon the concept of intention. If a purpose of protection (including, as in *Brindley*, avoidance of the consequences of breaking English law) excludes intention, why did it not exclude liability in the case of conspiracy to prevent burial?⁴⁸ The object of the defendants in that case was obviously to protect themselves from some charge in respect of causing the girl's death, yet they were not allowed a defence. The proper course would be either to allow self-protection as a specific defence to the charge, with such restrictions as may be thought proper, or to allow no defence but to expect the defendant's dilemma to go in mitigation.

The obscurity of the lords' opinions

Some judges have accepted the doctrine of oblique intent, as for example Lord Hailsham in the passage already cited.⁴⁹ But others, and particularly the lords in some recent cases, show no understanding of it, or else express themselves so hazily that one is not quite sure what they think. The most remarkable feature of these decisions is the elaborate effort the judges make to avoid articulating a definition of the concept that they are talking about.

Even Lord Bridge, a judge of high esteem, has to be included in this criticism, on account of his judgment in *Moloney* (where he was delivering in effect the decision of the Appeal Committee). In making the following comments on his words I must (as on a previous occasion) trust to being able to draw upon his fund of forgiveness. My remarks should not be taken as lessening the appreciation due to him for the part he took in ridding the law of the confusion between probability and intention.

Some parts of his judgment were apt to express the notion of oblique intent (though he never used the expression). He said that a given intent is "established" when the actor foresees the "natural" consequence of his act, using this expression in the special sense that "in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent

⁴⁸ *Hunter*, above n.7.

⁴⁹ *Hyam*, above at n.12. But Lord Hailsham has now laid himself open to criticism on the point. Having accepted the notion of oblique intent in *Hyam*, he failed to provide for it in his remarks in *Moloney* [1985] A.C. at 913E, where he said: "Foresight and foreseeability are not the same thing as intention although either may give rise to an irresistible inference of such". Foresight of a consequence as certain should generally be accounted "the same thing as intention".

See also *Jim Smith* in the C.C.A., [1961] A.C. at 297ff., explained by J. C. Smith in [1986] Crim.L.R. 181-182. The C.A. was reversed by the lords; *hinc illae lacrymae*. In *Moloney* (as explained and corrected in *Hancock*) the lords reversed themselves and departed from *Jim Smith*, and the C.A. in *Hancock* consequently declared that the law was back to the situation in which it was when the C.C.A. decided *Jim Smith*: [1985] 3 W.L.R. at 1019A. This should mean that we have won back the rule for known certainties; but, as will be shown, the point is still unclear.

it.”⁵⁰ Then he put the point in negative form, saying that “the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.”⁵¹ The use of the word “establish” in both sentences seems to indicate that he was advancing a proposition of law, that such foresight amounts in law to intention. Read in this way, both sentences are broadly acceptable on the subject of oblique intent, subject to comparatively minor qualifications.⁵²

The inference that in both sentences Lord Bridge was speaking of oblique intent is supported by the fact that he emphatically rejected the notion that intention involves desire. And he must have been thinking of oblique intent in the second sentence, for otherwise this sentence would be plainly wrong. If intention as to a consequence always requires (connotes) desire, then it is not true that knowledge of the overwhelming probability of the consequence invariably established intention. The doer may realise that there will be all sorts of undesired side-effects of his conduct, and selfishly or philosophically ignore them. That he goes ahead in spite of them does not show that he desires them. But it is equally untrue to say that the foreseen probability “must be little short of overwhelming before it will suffice to establish the necessary intent” if Lord Bridge was speaking of direct intent, desire-intent, because any degree of known possibility, if coupled with other adequate evidence, can establish direct intent.

One cannot help wondering whether the learned lord spoke in riddles because he was intimidated by history. To asseverate that the defendant’s realisation of the certainty of the consequence is intention in law, irrespective of his purpose, might have been thought to put the

⁵⁰ [1985] A.C. at 929B.

⁵¹ *Ibid.* at 925H. See the discussion of Lord Bridge’s propositions in the judgment of the C.A. in *Hancock* [1985] 3 W.L.R. at 1017H.

⁵² (1) It was unwise to introduce the word “natural.” If, as appears, Lord Bridge meant it is a synonym for “virtually certain,” it was a poor choice, because the two expressions are not synonyms in ordinary speech. Lynn in 137 N.L.J. 871 gives an example: “Conception is a ‘natural’ consequence of sexual intercourse but it is not necessarily probable”—much less (we may add) certain. It was because they saw that “natural” does not even mean “probable” that the lords later, in *Hancock* [1986] A.C. 462, disapproved the use of this word, when standing by itself without the addition of “probable,” in instructing juries; they evidently thought that it could convey too wide a meaning. It follows that they did not think that “natural” made a suitable synonym for “virtually certain” (though unfortunately they said nothing on virtual certainty, and nothing that could be read as an endorsement of the doctrine of oblique intention). (2) It was perhaps impolitic of Lord Bridge to refer to probability, even though qualified as “overwhelming probability,” without again insisting that what is here in issue is virtual certainty. “Virtual certainty” has, to my mind, a greater degree of precision than “overwhelming probability.” It starts from the clear notion of certainty and weakens it only slightly by the adjective “virtual,” which is better than admitting the probability, however qualified, is sufficient. (3) If by the words “establish the necessary intent” Lord Bridge meant “justify a verdict of intent irrespective of desire, this being the one case where intent does not imply desire,” then his words would be in substance acceptable, but he should have said that such knowledge is intention in law. It is a case not of *x* establishing *y* but of *x* being *y*.

clock back to *Jim Smith (D.D.P. v. Smith)*⁵³ and the unhappy reign of the “natural and probable consequence” rule. Perhaps Lord Bridge thought, consciously or unconsciously, that the best way of achieving a satisfactory result while keeping clear of the troubles of the past was to adopt the course he did: to say that intention need not involve desire; to leave the word “intention” undefined; and to allow the jury to be told that they can regard the intention as established if they find that the consequence in question was certain in the ordinary course of events. The judge can then sit back with a fair assurance that the jury will find that the certain consequence was intended even though they know that the defendant did not desire it. If the jury return to court and ask precisely what intention means in law, the trial judge must fudge the matter as best he can.

A practical solution, perhaps, but is all this obfuscation necessary? Those of us who in the past have argued against the “natural and probable consequence” rule were directing ourselves specifically against equating knowledge of probability with intention. There is no objection, in general, to equating knowledge of certainty with intention.

Another unhappy aspect of Lord Bridge’s opinion is that he said more than once that results are not intended merely because they are known to be probable (in varying degrees); in these passages he made no reservation for cases where the probability is so high as to amount, in human terms, to certainty. For example, he declared, following Lord Reid, that the reason why probability does not amount to intention is because it has many degrees, and that “it is neither practicable nor reasonable to draw a line at extreme probability.”⁵⁴ Why then (the innocent reader may enquire) did Lord Bridge in another part of his judgment propose a special rule for “overwhelming probability”? Is overwhelming probability, which produces a line, different from “extreme probability,” which does not? This seems to have been his meaning, but he did not make the point clear. Nor did he do so in another place, where he asked whether the defendant’s foresight of an eventuality “as a probable consequence of his voluntary act, where the probability can be defined as exceeding a certain degree, is equivalent or alternative to the necessary intention.” On this Lord Bridge said “I would answer this question in the negative.”⁵⁵ In excluding a “probability defined as exceeding a certain degree” he could hardly have meant to exclude from the concept of intention what he elsewhere called foresight of an overwhelming probability, because he said that the latter can “establish” intention. In what sense does it

⁵³ [1961] A.C. 290.

⁵⁴ [1985] A.C. at 928E.

⁵⁵ *Ibid.*, at 928A.

establish intention? If the meaning is that foresight of overwhelming probability is conceptually the same thing as intention, then this would be very satisfactory; but in this case it must be “equivalent or alternative to the necessary intention”, which Lord Bridge comprehensively denied.

His treatment of the badly-reasoned decision in *Steane*⁵⁶ creates another area of doubt as to his meaning. Lord Bridge quoted a dictum of Lord Goddard C.J. with approval, saying that he knew of “no clearer exposition of the law”;⁵⁷ apparently he did not notice the fallacy in the judgment. He also failed to realise the conflict between his acceptance of *Steane* and a hypothetical he propounded in another part of his judgment. He said:

A man who, at London airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. . . . By boarding the Manchester plane, the man conclusively demonstrates his intention to go there.”⁵⁸

This hypothetical was intended to demonstrate that “intention is something quite distinct from motive or desire”, but in this it evidently fails. How far is it true that the man did not want to go to Manchester? In a sense he did not (this was not a perfect solution of his problem), but in a sense he did (given the choice, he preferred to go to Manchester rather than remain where he was).⁵⁹ And why did not Lord Bridge reflect that when *Steane* broadcast for the enemy he “conclusively demonstrated” his intention to help them?

These obscurities in the judgment in *Moloney* have meant that the lower courts may now be in somewhat of a muddle. The practice proposed in one case⁶⁰ by the Court of Appeal, acting in the dim and delusive light of *Moloney*, was to tell the jury that a person may intend to achieve a certain result whilst at the same time not desiring it to come about; they must not find that he intended the result merely

⁵⁶ Above, n.43.

⁵⁷ [1985] A.C. at 929D.

⁵⁸ *Ibid.*, at 926E.

⁵⁹ Duff in [1986] Crim.L.R. 777 points out that if the traveller were asked whether he intended to travel to Manchester, his answer might depend upon the context of the question. This is true. But lawyers are concerned only with legal contexts. To put the question in a context relevant to the criminal law one has to imagine such an offence as intentionally going to Manchester, or taking a plane ticket with intent to travel to Manchester. If the traveller in the hypothetical were charged with such an offence, he should not have any defence based on the concept of intention, even if intention be defined in terms of purposive action. The traveller should not be heard to say “It was not my purpose to go to Manchester, because my purpose was to escape from the police”: on the facts supposed the two purposes would be coherent, not contradictory.

⁶⁰ *Nedrick* [1986] 1 W.L.R. 1025; see the critical editorial note in Crim.L.R. 742.

because he foresaw it as probable; and if he thought that the risk of its happening was very slight, then it may be easy for them to conclude that he did not intend it; they are not entitled to infer the necessary intention unless they feel sure that the result was a virtual certainty (barring some unforeseen intervention) and the defendant appreciated this. Although this mode of instruction perhaps "works" well enough, there are several objections to it.

(1) It unnecessarily mystifies the concept of intention (as Professor J. C. Smith has pointed out). The instruction leaves the legal notion of intention unexplained, telling the jury what the definition is not, without telling them what it is. The jury are instructed that they may infer this undefined and apparently unknowable entity from given facts, without informing them what is the thing that they are supposed to be inferring.

(2) This mystery-making occurs because the instruction fails to state that intention normally involves desire (alternatively expressed as purpose), the only exception being the case of realisation of virtual certainty. This exception apart, the test is: would the defendant have felt that he failed in his purpose if the expected result did not happen?

(3) The jury, having been told (i) that they "must not" find intention merely because the defendant foresaw the result as probable, will be puzzled when they are then told (ii) that if the defendant foresaw a very slight risk of the result "it may be easy" for them to conclude that he did not intend it. Proposition (ii) is merely a weaker case of (i), and in the absence of other clues to intent proposition (ii) should follow *à fortiori* from (i); they *must not*.

(4) The instruction misleadingly states that intention cannot be inferred unless the defendant appreciated that the result would be a virtual certainty. On the contrary, whenever it can be inferred from the evidence as a whole that the defendant desired the result to follow from his acts, this means that he intended it, whether he foresaw it as a virtual certainty or as any degree of probability down to an outside chance. The judges disable themselves from giving the jury this clear instruction because for obscure reasons they balk at acknowledging the significance of desire (or purpose) in the concept of intention.

Basically, the trouble arises because the judges are mixing up two questions: the evidence that justifies a genuine inference of desire or purpose, and the evidence that compels an automatic conclusion of intention (irrespective of desire) as a matter of law (*i.e.* where the result was foreseen as certain). On the first question, the Court of Appeal has now proposed a model direction that should have been adopted centuries ago.

You can only decide what [the defendant's] intention was by

considering all the relevant circumstances and in particular what he did and what he said about it.⁶¹

This is perfectly adequate for desire-intent, and needs to be supplemented only in cases calling for an instruction on oblique intent.

Limitations of the doctrine of oblique intent

The doctrine of oblique intent does not always work satisfactorily. Three types of exception to it are suggested by the case-law: offences of producing mental stress; some instances of complicity; and treason.

(1) *Offences of producing mental stress.* Duff suggests that the unintended though known or foreseen by-product of action should not be counted as part of intended action unless its expected occurrence should have figured in the deliberation that informed the action.⁶² This misty formulation seems to mean that the defendant is not to be taken to have intended the undesired consequence if he thought he was justified (morally? legally?) in bringing it about. The author gives an illustration based upon the civil case of *Lang v. Lang*:⁶³ a man treats his wife in a certain way that is unwelcome to her, believing that he has a right as husband to do so, and wishing her to continue to live with him, but knowing that his conduct will cause her to leave (because she has plainly said so). If he continues with the conduct and she leaves, does he intentionally drive her out? The question arose under the law of constructive desertion as it was formerly understood (it would have little relevance under the present law). The husband does not drive his wife out with direct intent, obviously; and would it be fair to bring in oblique intent?⁶⁴

There is a general difficulty here which may be stated as follows. A doctrine of oblique intention is acceptable in cases involving physical injury to other people; we are all expected to avoid acts that, as we know, cause such injury. But laws against causing affront or other mental stress to others are more problematic. Many things that we do, and perhaps quite justifiably do, may cause affront in varying degree. We may know this, and yet refuse to change our behaviour, because we think that we have a right to act as we do. Are we then to be regarded as having intended to cause the affront?

The question rarely arises in our criminal law, which does not create a general offence of affronting or annoying other people. But

⁶¹ O'Neill (1986) *The Times*, 17 October.

⁶² [1980] Crim.L.R. 152. Duff also makes the point that side-effects should not be counted as intentional if they are insignificant; but this consideration cannot arise in legal matters, where the side-effect is the *actus reus* of a crime.

⁶³ [1955] A.C. 402 (P.C.); but see *Gollins v. Gollins* [1964] A.C. 644.

⁶⁴ Duff would apparently agree that the husband in the case put "acted intentionally" in causing his wife to leave; he questions only whether the husband intentionally caused her to leave. This shows the thinness of the verbal line that Duff would have us draw.

consider *Sinnasamy Selvanayagam*,⁶⁵ which went to the Judicial Committee of the Privy Council on appeal from the courts of Ceylon. The board expressed the opinion that a person who unlawfully occupied a house by remaining after notice to quit could not be convicted of the statutory offence of remaining in occupation with intent to annoy the owner if his dominant intention was to retain his home, even if he knew that the owner was annoyed.

The opinion was just, and was a proper interpretation of the statutory offence. The statute, as worded, applied only to those who occupied other peoples' houses with spiteful motives. It did not apply to squatters who occupied or retained occupation without intent to annoy. If the intent to annoy were construed to include oblique intent it would have virtually no limit, because all squatting in dwelling houses annoys the owner as soon as he comes to know of it. If the legislature did not mean to confine the offence to spiteful squatters, it should have used other wording. The interpretation of the statute should not be widened merely because purely spiteful squatters in houses are an unknown species. (Squatters may be spiteful, but will have other motives besides spite.)

My conclusion from Duff's example and from the Judicial Committee case is that offences of causing stress, annoyance etc. are in a special position. It will probably be easy to find an intention in the statute creating such an offence not to cover oblique intent. In the proposed code, the matter could be dealt with by wording such offences in terms of purpose.

(2) *Questions of accessoryship*. The doctrine of oblique intent should not invariably be allowed to fix a person with intentional participation in the misbehaviour of other people merely because he foresees such misbehaviour. For example, it should not apply on facts like those in the Salvation Army case, *Beatty v. Gillbanks*.⁶⁶

(3) *Treason*. The doctrine of oblique intent was in effect rejected in *Ahlers*.⁶⁷ The defendant was a German consul⁶⁸ in Britain who the day after the outbreak of war in 1914 helped Germans of military age to return to Germany. Ahlers was charged with treason in the form of "adhering to the King's enemies." His defence was that what he did

⁶⁵ [1951] A.C. 83.

⁶⁶ (1882) 9 Q.B.D. 308. To provide for this case, the Law Commission Working Party on Codification recommended that the extended meaning of intention to include oblique intent should be declared not to apply to the illegal conduct of other persons (Law Com. No. 89 (1978) 56). The Commission silently dropped this proposal in its own recommendations: see Williams in [1978] Crim.L.R. 588.

⁶⁷ [1915] 1 K.B. 616.

⁶⁸ German in origin, he was a naturalised British subject, but would in any case have been subject to our law of treason by reason of his residence here.

was lawful, or anyway that he believed it to be lawful. Both defences were rejected but his conviction was quashed for misdirection on the point of intention, since on a proper direction the jury might not have found that his acts “were necessarily hostile to this country in intention and purpose.”

The case is reminiscent of *Steane*, but differs from it in an important way. *Steane*, notwithstanding the court’s denial of the fact, intended to assist the enemy; this intention was direct, even though instrumental. It could not be inferred that Ahlers directly intended to assist the enemy, either as an instrumental or as a final end. His aim may not have been to assist Germany’s war effort but only to do his duty as consul in repatriating German citizens. Any intent that might be debited to him could only be oblique.

The court’s refusal to find a treasonable intent was in effect a denial of oblique intent in the circumstances; and it was a humane decision, because if the defendant’s conviction of treason had stood he could have been hanged. (The prosecution of Ahlers was far less defensible than the German charge against Edith Cavell, our national heroine, who helped Allied soldiers who were prisoners of war to escape from German-occupied territory.) Quite apart from this, the decision was proper, because otherwise too large an extension would have been given to the crime of treason. On the principle argued for by the prosecution, British business men living abroad who went on with their businesses during the war could be convicted of treason if they knew their activities helped the enemy, even though that was not their purpose. The lesson from *Ahlers* is that treason (at least in the form of adhering to the Sovereign’s enemies) as the gravest crime must be limited to acts done purposely, so excluding oblique intent.

In these three types of case—offences of causing stress etc., some (but not all) cases involving questions of complicity as accessory, and treason—I would hope that the code uses the notion of purpose. Pending the enactment of a code, the courts should interpret a requirement of intent in general to include oblique intent, but exceptionally, where justice so requires, to exclude it.

But the word “purpose” is not powerful enough to keep judges to the strait and narrow path of logic. The courts may still say (though they should not say) that purposed consequence *x* is the equivalent of, or to be bracketed with, foreseen consequence *y*, so that *y* is to be treated as purposed along with *x*. Ahlers, it might be said, must have known that helping men of military age to return to Germany increased Germany’s military strength, so that his intent to do the first necessarily involved an intent to do the second. But the argument would be flawed. Ahlers had a strong case for saying that by the contemporary custom of nations people were allowed a short period

after the outbreak of war to repatriate themselves; and this was recognised as part of English law in an Order in Council. The court dismissed the argument, and got rid of the Order in Council by saying that it was *ultra vires* in this respect. The decision was questionable, but the court was surely right in accepting Ahlers's second line of defence, that he did not intend to give aid to the enemy. He acted as he did because he reasonably believed himself to be acting lawfully in performance of his consular duty.

However, confining liability by reference to purpose should not save the person who intends to achieve purpose *y* by means of an instrumental purpose *x*. "There are few ways," said Dr. Johnson, "in which a man can be more innocently employed than in getting money." But a man who is hired to produce a criminal result would not be allowed to say (even on a charge of purposing) that he cared nothing about the criminal objective and was concerned only to get payment for what he did.

Conditional oblique intent

It may sometimes seem difficult to distinguish conditional oblique intent from recklessness, but I think that the difficulty can be resolved by asking the right questions.

We are considering an act having two consequences: the desired consequence (*x*) and the consequence not desired but known to be inevitable (*y*). Where the defendant knew that *x* could be achieved only on a certain condition, and that on the same condition *y* would also follow, the case is clearly one of oblique intention in respect of *y*, although the intention was conditional. (It could of course be charged as recklessness if the prosecution were prepared to mitigate the charge.) Where on the other hand the defendant expected to be able to achieve *x* unconditionally, or on a condition not applicable to *y*, so that he may succeed in *x* without involving *y*, it follows that he does not foresee *y* as a certainty (*i.e.* as a certain accompaniment of success in his primary intention), and is not guilty of oblique intention in respect of *y*, but only, at most, of recklessness.⁶⁹

⁶⁹ See J. C. Smith in [1974] *Current Legal Problems* 116–119, commenting upon a previous discussion of my own. I would follow Smith's opinion, apart from his final reservation, which suggests that the notion of conditional intention should be applied only to conditional desire. I do not see any reason of policy for such a rule, and a distinction between oblique intent and primary intent in this single particular would look esoteric in a criminal code. (Professor Smith and his team did not venture to incorporate it in their Draft Code!)

Annex 69

Frances Mautner-Markhof, International Institute for Applied Systems Analysis,
Processes of International Negotiations (1989)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Processes of International Negotiations

edited by Frances Mautner-Markhof



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This applies, *a fortiori*, to international negotiations where a special kind of communication, *persuasion*, is predominant. Communication is designed to influence others by modifying their behavior and/or beliefs and attitudes [cf. Simons (1976: 21), Reardon (1981: 25)]. Negotiation, then, can be seen as mutual persuasion attempts. Successful negotiation "requires of each participant the ability not only to persuade but to be persuaded" (Keller, 1956: 181). In other words, persuasion may be seen as "a species of the genus commonly labeled *learning*" (Miller, 1980: 17). Consequently, negotiation entails a learning process of sorts: "Since negotiation involves value change and accommodation, it is a learning process in which each party is both teacher and student" (Zartman and Berman, 1982: 19).

It is my contention that in analyzing this multifaceted communication process we might draw on approaches to social communication that hitherto have not been applied systematically to the study of international bargaining: (1) semiotics and discourse analysis, which focus on signs and texts and the production of meaning; and (2) attribution theory and "judgment" research, those branches of cognitive theory whose main concern is the causal interpretation of information on the part of individuals.

These approaches adhere to that school in the study of communication which sees communication as the production and exchange of meanings. Their main concern is how messages interact with people in order to produce meaning (Fiske, 1982: 2-3). They see *signification* as an active process and use verbs such as "create", "generate", or "negotiate" to refer to this process (cf. Fiske, 1982: 49).

23.3. Semiotics and Discourse Analysis

Semiotics is the study of *signs* and the way they acquire meaning. Signs are "artifacts or acts that refer to something other than themselves, that is they are signifying constructs" (Fiske, 1982: 2). Semioticians emphasize the arbitrary nature of signs. The meaning of a sign rests on social convention. Signs are organized into systems of signification, or *codes*, which rely on a shared cultural background [cf. Fiske (1982: 68), Eco (1971: 13; 1985: 161)]. To uncover — or "dis-cover" (Blonsky, 1985: xxxix) — such codes is the task of semiotics.

Discourse analysis focuses primarily on *texts* and *discursive practices* rather than individual "signs", yet shares with semiotics the basic assumption that "the conditions surrounding the production of a system of meaning are none other than socio-historical and intersubjective" (Kristeva, 1985: 211).

The flow of statements and meanings in any discursive practice, even the most austere, descriptively oriented ones are part of historically engendered, social practices which precede any speaker/author and, in addition, guide interpretive practices deployed on texts once they are produced (Shapiro, 1984: 2).

Codes and discourses depend upon a shared cultural background, upon "the unwritten, unstated expectations that derive from the shared experience of members of a culture" (Fiske, 1982: 82). Even within one society there may be several subcultures that produce different codes and discourses.

How, then, does this relate to international negotiations? Two sets of subcultures seem to condition communication in international negotiations: the national subcultures of the participating states, on the one hand, and a "negotiator subculture" on the other. The notion that national subcultures produce national "negotiating styles" has been developed by scholars and practitioners alike (cf. Jönsson, 1978). Less attention has been devoted to the shared norms, expectations, and discursive practices among diplomatic negotiators. Yet it seems reasonable to assume that there exists a distinct negotiator subculture and concomitant code.

Signs show varying degrees of *convention*, ranging from the purely idiosyncratic and private to the truly conventional and collective, and varying degrees of *constraints*, ranging from the arbitrary to the iconic (cf. Heradstveit and Bjorgo, 1986: 32-34). A piece of modern art is an idiosyncratic sign; a treatise on art history uses conventional signs (scientific language). The word "herrar" written on a door is an arbitrary sign (as any non-Swedish-speaking male in distress can verify); a drawing of a male silhouette is an iconic sign, ostensibly intelligible across language barriers.

Most signaling in a bargaining context, though not totally idiosyncratic and arbitrary, is less than conventional and iconic. This, in combination with the existence of multiple subcultures, makes the signification process problematic in international negotiations. When interpreted by members of different subcultures who bring different codes to them, signs may produce different meanings. Negotiators, therefore, have to be content with saying both less and more than they mean: less, because their verbal and nonverbal signaling will never immediately convey their meaning; more, because their signaling will always convey messages and involve them in consequences other than those intended (cf. Pocock, 1984: 32).

23.4. Attribution and "Judgment" Theories

Cognitive psychology explores the signification process from the viewpoint of the senders and receivers of messages. In recent decades various branches of cognitive psychology have converged into a common information-processing framework, inspired to a considerable degree by cybernetics. This has entailed important shifts in fundamental "model of man" assumptions. First, the conception of man as a passive agent who merely responds to environmental stimuli has given way to a conception of man as selectively responding to and actively shaping his environment. In addition, within the conceptualization of man as an active agent, there has been a shift away from cognitive balance theories viewing man as a "consistency seeker" to attribution theories viewing man as a "problem solver" or "naive scientist" (George, 1980: 56).

Whereas cognitive consistency theorists assume that people see what they expect to see by assimilating incoming information to pre-existing images and interpreting new information in such a way as to maintain or increase balance, attribution theorists are concerned with the individual's attempts to comprehend the causes of behavior and assume that spontaneous thought follows a systematic course that is roughly congruent with scientific inquiry.

No longer the stimulus-response (S-R) automaton of radical behaviorism, promoted beyond the rank of information processor and cognitive consistency seeker, psychological man has at last been awarded a status equal to that of the scientist who investigates him. For man, in the perspective of attribution theory, is an intuitive psychologist who seeks to explain behavior and to draw inferences about actors and their environments (Ross, 1977: 1974).

Attribution theory focuses on the perception of causation. Specifically, attribution theorists seek to discover the principles of "naive epistemology", the rules and heuristics laymen use in gathering and interpreting data. There are several competing models of the attribution process. For instance, theorists differ in their assessment of laymen's causal sophistication. Whereas Harold Kelley's influential work (1967, 1971) emphasizes the similarities with statistical rules of inference, the "judgment" school highlights biases in people's judgment (cf. Fischhoff, 1976). These differences do not seem to be as sharp today, when most attribution theorists tend to agree that people rely on certain "judgmental heuristics" or cognitive rules of thumb rather than analysis of covariance, but that this does not necessarily imply irrationality.

Perception researchers have shown that in spite of, and largely because of, people's exquisite perceptual capabilities, they are subject to certain perceptual illusions. No serious scientist, however, is led by such demonstrations to conclude that the perceptual system under study is inherently faulty. Similarly, we conclude from our own research that we are observing not an inherently faulty cognitive apparatus, but rather, one that manifests certain explicable flaws (Nisbett and Ross, 1980: 14).

Whereas semiotics and discourse analysis offer valuable concepts and classifications, attribution theory has yielded several hypotheses of obvious relevance to the study of communication processes in international negotiation. Let me briefly outline a few and suggest how they may apply to international negotiations.

23.4.1. "Representativeness" and "availability" heuristics

People tend to rely on "judgmental heuristics" that reduce complex inferential tasks to simple judgmental operations. The representativeness heuristics implies "the application of relatively simple resemblance or 'goodness of fit' criteria to

problems of categorization" (Nisbett and Ross, 1980: 22). In the context of international negotiations, this points to the common tendency among statesmen to think in terms of historical analogies. In Ernest May's (1973: ix) apt summary:

Framers of foreign policy are often influenced by beliefs about what history teaches or portends. Sometimes, they perceive problems in terms of analogies from the past. Sometimes, they envision the future either as foreshadowed by historical parallels or as following a straight line from what has recently gone before.

The availability heuristic means "objects or events are judged as frequent, probable, or causally efficacious to the extent that they are readily 'available' in memory" (Nisbett and Ross, 1980: 7). Psychological research indicates that vivid information is more likely to be stored and remembered than is pallid information (cf. Nisbett and Ross, 1980: 45). Translated to international negotiators, this implies that certain traumatic events are readily available and therefore tend to condition their interpretation of moves in the bargaining situation at hand.

People are strongly influenced by events that are recent, that they or their country experienced first-hand, and events that occurred when they were first coming to political awareness. ... Many statesmen saw World War I as avoidable, and this fed appeasement. In turn, the obvious lesson of the 1930s was that aggressors could not be appeased and so post-World War II decision makers were predisposed to see ambiguous actions as indicating hostile intentions (Jervis, 1985: 22).

23.4.2. The fundamental error of attribution

Attribution theorists have pointed to a common tendency to overemphasize *dispositional* factors (stable personal traits) when explaining or interpreting the behavior of others, while stressing *situational* factors to account for one's own behavior. This hypothesis goes back to Fritz Heider's pioneering work in the 1950s in which he argued that people tend to attribute their own reactions to the object world and those of others, when they differ from their own, to personal characteristics in others (cf. Kelley, 1967: 221). This idea was developed by Edward Jones and Richard Nisbett (1971: 80), who brought the difference between actors and observers to the fore, pointing to "a pervasive tendency for actors to attribute their actions to situational requirements, whereas observers tend to attribute the same action to stable personal dispositions".

Translated to international relations, Daniel Heradstveit's (1979) study of Arab and Israeli elite perceptions suggests that among adversaries the tendency is to explain one's own "good" behavior as well as the adversary's "bad" behavior in dispositional terms. Conversely, "bad" behavior of one's own side and "good" behavior by the other are attributed to situational factors. In brief, "I am essentially good, but am occasionally forced by circumstances to behave badly, whereas you are bad but are occasionally forced by circumstances to behave well".

The fundamental attribution error has been observable in US–Soviet negotiations over the years. The tendency to judge the adversary by who they are rather than by what they do has frequently blinded the superpowers to important nuances and changes in the adversary's negotiating behavior.

23.4.3. Exaggerating the centralization, planning and coordination of others

The fundamental attribution error is often coupled with, and reinforced by, a common tendency to see the behavior of the adversary as more centralized, planned, and coordinated than it actually is (Jervis, 1976: 319–332). Henry Kissinger's (1979: 52) observation on US–Soviet perceptions provides a good illustration:

The superpowers often behave like two heavily armed blind men feeling their way around in a room, each believing himself in mortal peril from the other whom he assumes to have perfect vision. Each side should know that frequently uncertainty, compromise, and incoherence are the essence of policy-making. Yet each tends to ascribe to the other a consistency, foresight, and coherence that its own experience belies.

23.4.4. The principle of non-common effects

When a perceiver observes an action and at least some of its effects, his basic problem is to decide which of these effects, if any, were intended by the actor. The "principle of non-common effects", formulated by Edward Jones and Keith Davis (1965), holds that it is behavior that conflicts with expectations that tells us most about an actor. Jones and Davis (1965: 228) argue that "the more distinctive reasons a person has for an action, and the more these reasons are widely shared in the culture, the less informative that action is concerning the identifying attributes of the person"; and also that "behavior which conforms to clearly defined role requirements is seen as uninformative about the individual's personal characteristics, whereas a considerable amount of information may be extracted from out-of-role behavior" (Jones and Davis, 1965: 234). In the context of international negotiations this points to two sets of expectations derived from the national and negotiator subcultures, respectively: national stereotypes, on the one hand, and "normal" diplomatic bargaining behavior, on the other.

Also of relevance to negotiations is the observation that "beneficial actions tend to be much more ambiguous than harmful actions when it comes to deciding on the actor's true intention or his ultimate objectives in the situation. The ambiguity of beneficial actions centers around the extent to which ulterior,

manipulative purposes may be served by them" (Jones and Davis, 1965: 259). Especially in negotiations between adversaries, concessions are frequently interpreted as tactical tricks, designed to lull one's vigilance.

23.4.5. The false consensus proposition

Related to the principle of non-common effects is the proposition that people tend to "see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, and inappropriate" (Ross, 1977: 188). One consequence of the propensity to assume that others generally share our reactions is "a tendency to attribute differing views to the personal characteristics of their holders" (Kelley and Michela, 1980: 464).

For example, to Western negotiators a pragmatic, "inductive" approach is normal: specific details are worked out before the general agreement is wrapped up, following Talleyrand's advice that "On s'arrange plus facilement sur un fait que sur un principe". Soviet negotiators, by contrast, prefer a "deductive" approach, insisting on an "agreement in principle" before negotiating the details of the agreement. This is considered the normal method — witness, for instance, the Soviet chief negotiator, Tsarapkin, in the nuclear test ban negotiations (quoted in Jönsson, 1979: 71):

If we insist on first reaching agreement on the basic question this is not due to any personal considerations of ours, but is a natural requirement for conducting negotiations in a normal and businesslike manner.

Consequently, he described the Western approach as inappropriate:

You are proposing to work on the details before agreeing on the foundation. This is tantamount to putting up a building without a foundation or a framework. Such a building will, however, collapse while it is still under construction (quoted in Jönsson, 1979: 72).

23.4.6. Misinterpreting the effect of one's own actions on others

Harold Kelley (1971: 8) has made an observation of direct relevance to negotiations:

Interdependent persons often have occasion independently and simultaneously to plan and commit themselves to actions having mutual consequences. ... Failing to take account of these temporal patterns, persons may seriously misinterpret the effects their actions have on others.

In a negotiatory setting, this means that each party “tends to attribute to himself those actions of the other person that are consistent with the attributor’s own interest” (Kelley, 1971: 19). The other side of the same coin is the common failure to realize that one’s own behavior may be seen as threatening by the other side.

You yourself may vividly feel the terrible fear that you have of the other party, but you cannot enter into the other man’s counter-fear, or even understand why he should be particularly nervous. For you know that you yourself mean him no harm, and that you want nothing from him save guarantees for your own safety; and it is never possible for you to realize or remember properly that since he cannot see the inside of your mind, he can never have the same assurance of your intentions that you have (Herbert Butterfield, as quoted in Jervis, 1976: 69).

23.4.7. Exaggerated confidence in one’s inferential capability

Robert Jervis (1986: 495) has argued that, “Since people often underestimate ambiguity and overestimate their cognitive abilities, it is likely that statesmen think that they can draw more accurate inferences from what the other state is doing than in fact they can”. Others have commented on the tendency among decision makers to “perceive more order and certainty than exists in their uncertain, disorderly environments” (Kinder and Weiss, 1978: 723) and to make “unwarranted assumptions of certainty regarding opponents’ intentions and the correctness of one’s chosen policy” (Snyder, 1978: 353). Conversely, it has been argued that “the ideal negotiator should have a high tolerance for ambiguity and uncertainty as well as the open-mindedness to test his own assumptions and opponent’s intentions” (Karrass, 1970: 37).

To summarize, international negotiators may be regarded as “intuitive semioticians”. Attribution theory complements semiotics, insofar as it points to certain “judgmental heuristics” employed by “intuitive semioticians” when interpreting signaling in international negotiations. This brief outline of relevant hypotheses derived from attribution theory has been suggestive rather than exhaustive. In my continued research I shall elaborate these and other hypotheses in order, at the next stage of research, to survey diplomatic history for examples and counter-examples by which the hypotheses may be confirmed, disconfirmed, or modified.

23.5. The Paris Peace Conference of 1919

The second subproject consists of an in-depth case study of the extensive negotiations following World War I, carried out by research assistant Stefan Persson. In contrast to most contemporary diplomatic negotiations, the Paris Peace Conference is extremely well-documented. Not only are almost all central

documents from the interstate negotiations published, but also the archives of the main actors have been opened to researchers. We are thus able to gain insights into the internal, within-nation bargaining process as well.

Briefly, the study is organized as follows (cf. Persson, 1986). First, agenda items where turning points can be identified in the negotiation process are selected for study (the Saar issue is one such agenda item). Second, extant theoretical works on negotiation are surveyed in search of explanations of change and adjustment on the part of the negotiating actors. Three distinguishable perspectives — the manipulative, cybernetic, and cognitive — suggest themselves.

The first perspective, which draws on yet departs from game theory, is what Oran Young (1975: 317) has labeled a “manipulative” conception of bargaining. This perspective focuses on the attempts by each player to outwit the other by means of “strategic moves” — such as commitments, threats, and promises — designed to modify the opponent’s utilities and probabilities. Thomas Schelling (1963, 1966) is a prominent representative of this approach.

The “manipulative” conception is based on the assumption of *uncertainty* rather than complete information on the part of the negotiating actors, as in game theory. The choices of two or more actors engaged in strategic interaction are reciprocally contingent, which inevitably leads to an “outguessing” regress (Young, 1975: 14). Negotiation is thus seen as “the manipulation of the information of others in the interests of improving the outcome for one’s self under conditions of strategic interaction” (Young, 1975: 304). In the game-theoretical vernacular, the manipulative perspective focuses on bargaining tactics designed to change the adversary’s expected payoffs. Change in a negotiation is the result of successful manipulation of the opponent’s calculation of utilities and probabilities.

The cybernetic perspective regards bargaining as a “self-stabilizing (i.e., outcome-reaching) process of output and feedback” and the bargaining actors as “a pair of linked servomechanisms” (Zartman, 1976: 37). Trial-and-error search, information processing, and uncertainty control are basic elements of the cybernetic understanding of bargaining. Uncertainty is assumed to be of even more fundamental importance than in the “manipulative” conception. Negotiators normally experience structural uncertainty; that is, “the nature of the possible outcomes and not just the probability associated with different outcomes is unknown” (Winham, 1977: 101). The cybernetic understanding of the bargaining process, in short, “is more akin to fitting the pieces into a puzzle than to convergence along a continuum” (Winham, 1977: 101).

In contrast to the game-theoretical rationality assumption, according to which each actor performs a comprehensive search and a detailed evaluation of all available alternatives, the cybernetic perspective suggests that “the central focus of the decision process is the business of eliminating the variety inherent in any significant decision problem” (Steinbrunner, 1974: 56). In a bargaining context, this implies searching for a *formula*, “a shared perception or definition of the conflict that establishes terms of trade” (Zartman and Berman, 1982: 95). One implication of viewing negotiation as a process for eliminating variety and reducing uncertainty is that “the development of common perceptions becomes more important than the exchange of concessions” (Winham, 1977: 97). Change

in negotiation, according to the cybernetic understanding, is produced by finding a common formula rather than by successfully applying manipulative tactics.

The cognitive perspective, finally, focuses on the belief systems of the negotiating actors.

It is often impossible to explain crucial decisions and policies without reference to the decision-makers' beliefs about the world and their images of others. That is to say, these cognitions are part of the proximate cause of the relevant behavior and other levels of analysis cannot immediately tell us what they will be (Jervis, 1976: 28).

Each actor comes to the negotiations with a set of beliefs and expectations about himself, the adversary, and the bargaining issues, based on previous experiences. As soon as negotiations begin, each actor is in a position to test and either validate or adjust his initial expectations. To understand the ensuing negotiation process, we need to explore the belief systems of the actor.

Since each party to a conflict reacts not to the situation as perceived by the other but rather to the situation as seen from his own perspective, the nations are not reacting directly to each other. Under these conditions it is necessary to understand the perspectives guiding each national unit's activity, and thus how these perspectives differ, in order to grasp the actual flow of strategic interaction (Lockhart, 1979: 38).

In comparison with the manipulative and cybernetic conceptions, the cognitive perspective emphasizes the obstacles to change in negotiations. First, *incompatible beliefs* frequently complicate and aggravate international negotiations. Second, belief systems tend to be *resistant to change* (see Jervis, 1976: 291-296). Change is seen to occur when the negotiating actors modify "peripheral" beliefs; "central" beliefs are considered stable and unaffected by persuasion attempts in negotiations.

As this brief outline indicates, the three perspectives offer different explanations of change in international negotiations — successful manipulation of expected payoffs according to the manipulative perspective, reduced uncertainty through a common formula according to the cybernetic perspective, and modified belief systems according to the cognitive perspective. The different perspectives will be applied to the Paris Peace Conference in an attempt to assess their usefulness and degree of compatibility.

23.6. Cognitive Mapping

The cognitive mapping technique was developed in the early 1970s by a group of researchers at Berkeley, including Robert Axelrod, Michael Shapiro, and Matthew Bonham. It is a method of reconstructing the beliefs of actors on a specific issue, coded in terms of concepts and causal links between concepts.

Drawing on graph theory, maps are constructed on which concepts are represented by points and causal links by arrows. An arrow with a plus sign indicates a positive causal link ("leads to", "contributes to", "increases", etc.), and an arrow with a minus sign a negative causal link ("prevents", "aggravates", "diminishes", etc.). All the causal chains, or "cognitive paths", of the studied actor are combined into maps. This map of the actor's belief structure allows us to assess the "centrality" of various concepts in terms of the number of arrows leading into it and out of it [for descriptions of the cognitive mapping technique, see Axelrod (1976), Bonham *et al.* (1979), Shapiro and Bonham (1982)].

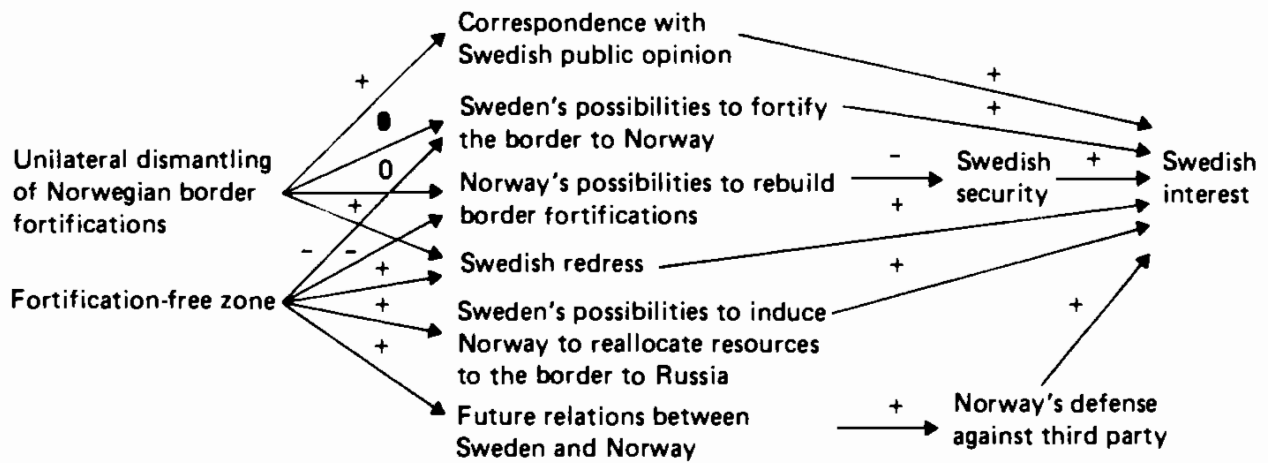
Our research project includes a collaborative effort with Michael Shapiro and Matthew Bonham to modify the cognitive mapping technique to make it applicable to international negotiations (see Bonham *et al.*, 1987). This represents a continuation of work begun earlier on developing a cognitive mapping approach to collective decision-making. It is based on two shifts in the structure of previous theoretical thinking. First, the emphasis is on discursive rather than psychological imagery. Second, the idea chain or "path" is favored over the person or "actor" for purposes of elaborating the dynamics of the survival of alternative understandings of the bargaining issues. The cognitive map is thus conceived less as a psychological template than as a *discursive space* — an integrated set of categories, descriptions, explanations, and evaluations that direct not only identifiable settlements but, more generally, the "reality" perspective within which the possibilities and conditions of settlements emerge.

Rather than conceiving of persons having positions that they bring to decisions and then hold to them or alter them in confrontation with other positions, we conceive of positions as having persons. As a process of negotiation unfolds, its degree of success, within our conception, is to be related to the degree to which the parties can construct a shared discursive space, which amounts to their building of a shared "reality".

23.6.1. Example: Dissolution of the Swedish–Norwegian union

A preliminary study using cognitive mapping in its traditional actor-oriented variety may serve as an illustration of the direction of our recent thinking. The study concerned the negotiations on the dissolution of the Swedish–Norwegian union in 1905. Cognitive maps were constructed for the majority group in the internal Swedish deliberations (*Figure 23.1*) and for the General Staff of the Swedish military (*Figure 23.2*) as well as for the Swedish and Norwegian negotiators (*Figures 23.3* and *23.4*).

A first observation concerns the marked differences between the internal and external cognitive maps for the Swedish side. Whereas the military-security aspects of the Norwegian border fortifications were peripheral in the internal deliberations and were downgraded by the General Staff, they were centrally located in the argumentation of the Swedish negotiators. This illustrates, first of all, the need to take internal bargaining into account in studies of international



- + positive causal relationship, for instance increases
- negative causal relationship, for instance decreases
- 0 will not hurt, does not prevent, is not harmful to
- θ will not help, does not promote, is of no benefit to
- does not matter for, has no effect on, has nor relation to

Figure 29.1. Swedish majority group: internal bargaining.

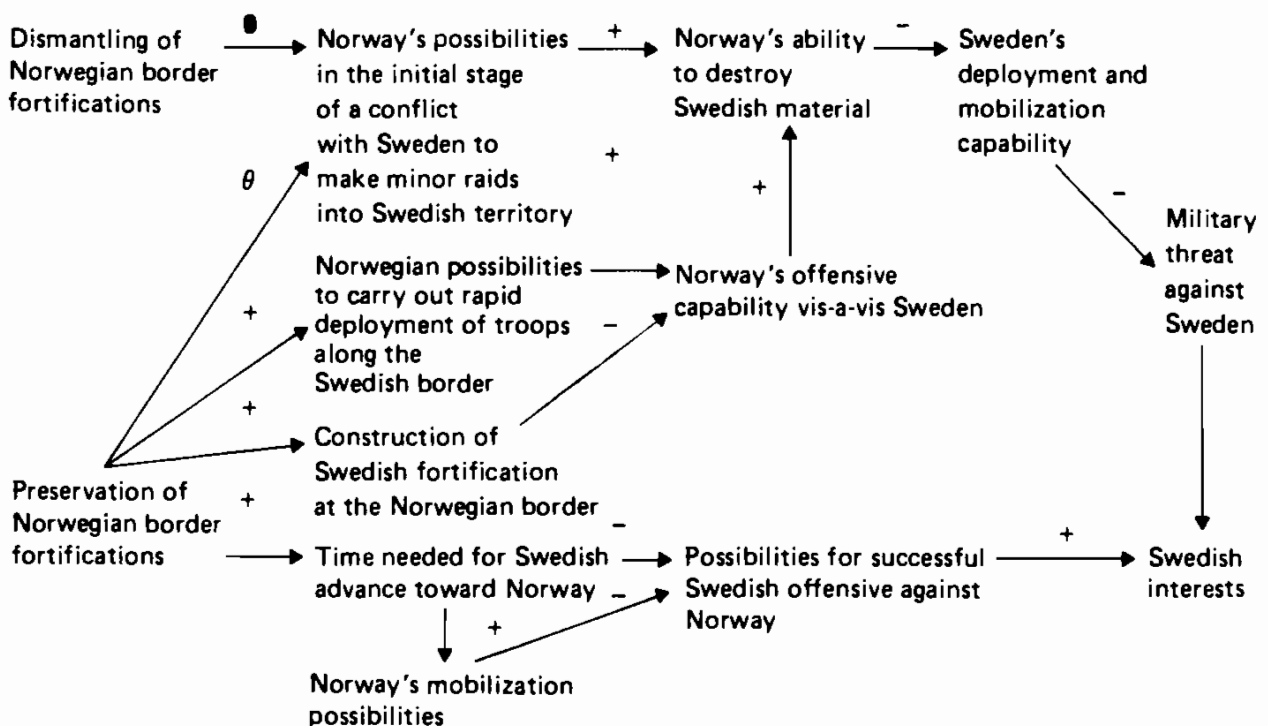


Figure 29.2. The Swedish General Staff.

negotiations. But it also points to other strands of our recent concern with “discursive space”.

It seems plausible to conclude that the external Swedish posture was tactically motivated. The Swedes did not consider it tactically sound to emphasize national honor or prestige concerns, which were central in the internal discussions, since that would make it impossible for Norway to accept the Swedish

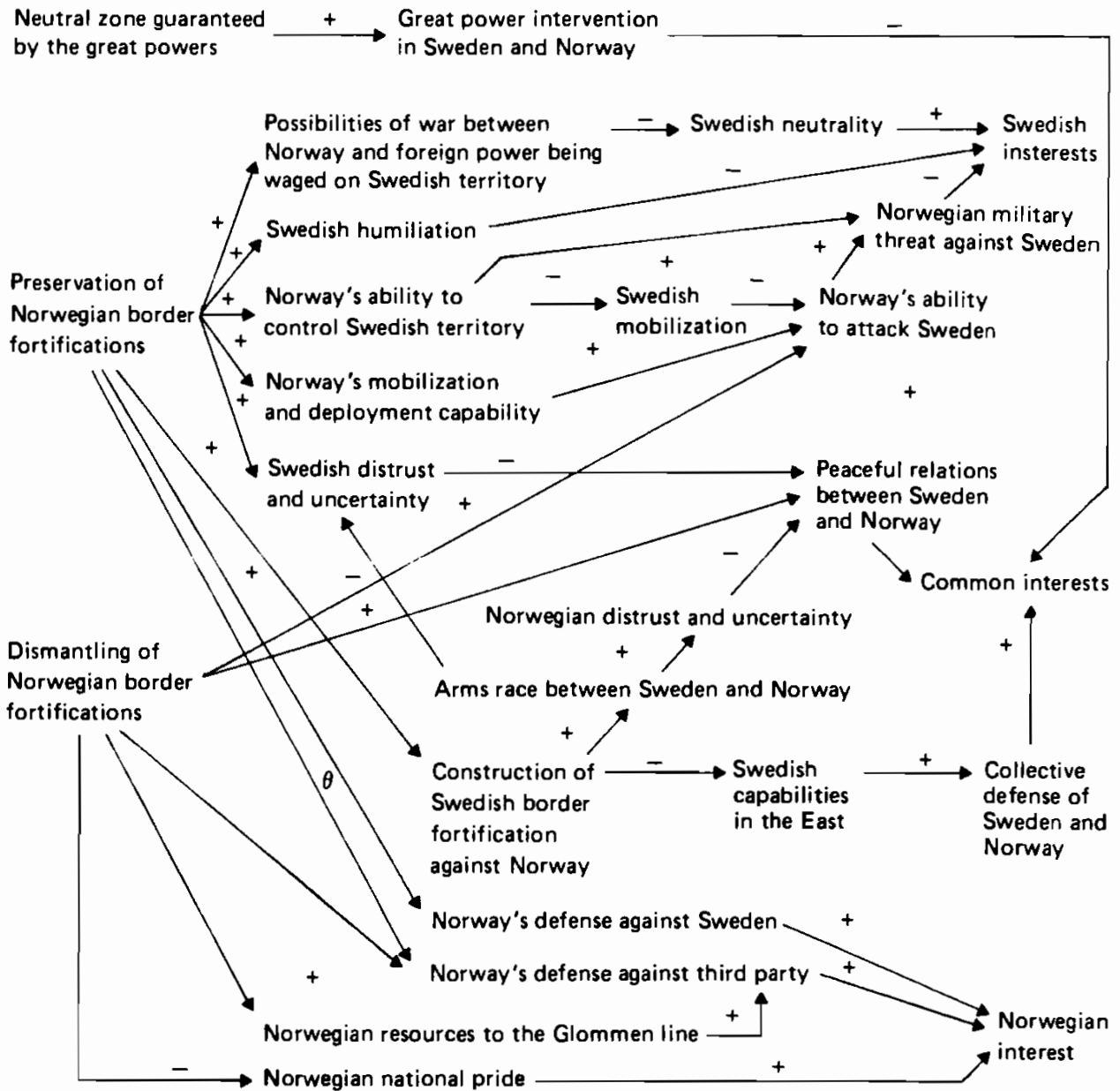


Figure 23.3. The Swedish negotiators.

demands without humiliation or loss of prestige. Moreover, there is reason to assume that similar considerations were behind the Norwegian posture in the Swedish–Norwegian negotiations. In other words, both sides chose a military-security discourse in their bilateral negotiations, while engaging in a prestige-status discourse at home (note the residue of “Swedish humiliation” and “Norwegian humiliation” in the maps of the negotiations). The similarities in the external discourse extended to individual concepts and paths. Witness, for instance, the prominence of the concept “peaceful relations between Sweden and Norway” in both cognitive maps. Also, concern about what effect dismantling or preservation of the border fortifications might have *vis-à-vis* third parties is reflected in both maps.

The discursive space of the Swedish–Norwegian negotiations of 1905 suggests that an agreement would require a formula that took into account the bilateral security concerns as well as defense against third parties, while avoiding

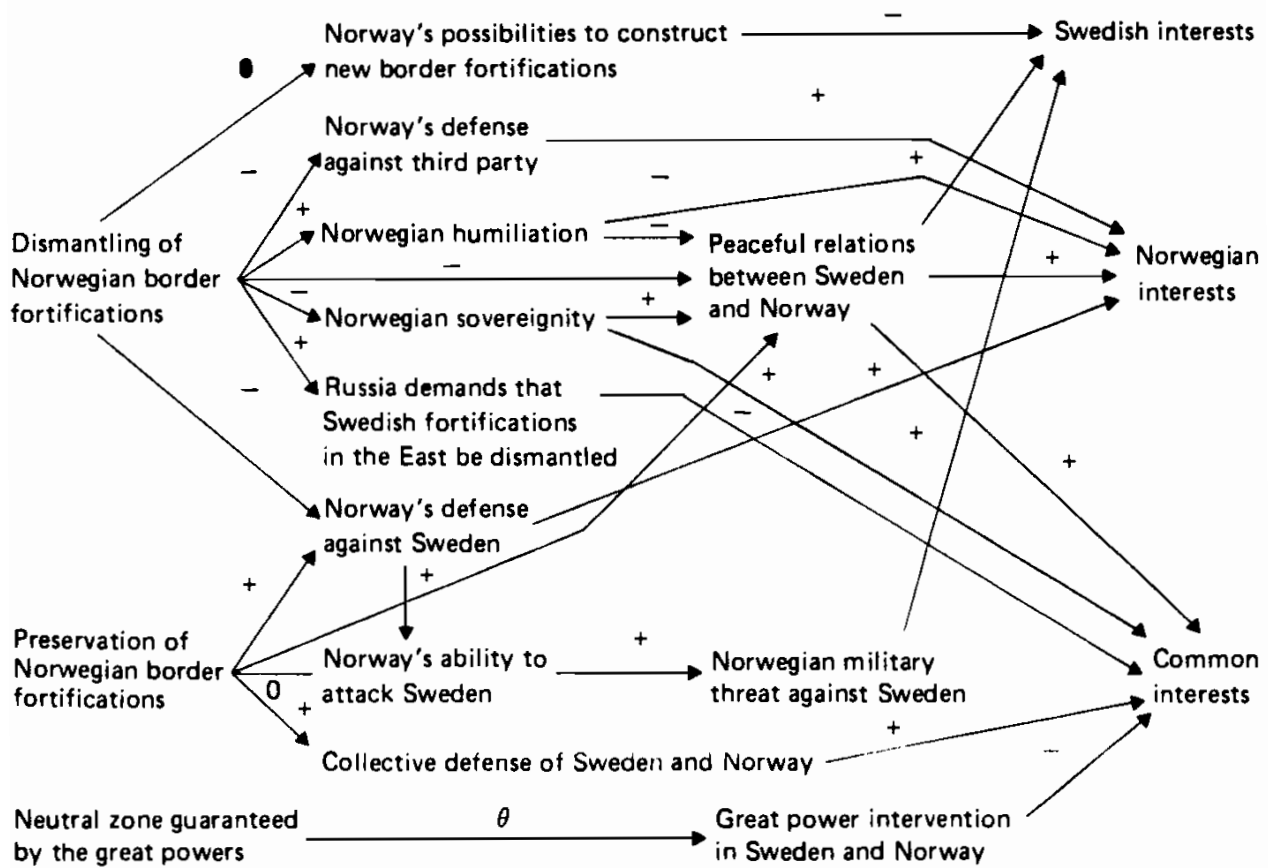


Figure 23.4. The Norwegian negotiators.

humiliation of either of the negotiating nations. The concept of a “neutral zone”, which was introduced by the Norwegians and had figured marginally in the internal Swedish debate (Vedung, 1971: 332), constituted such a formula.

23.6.2. Example: Paris Peace Conference of 1919

Another example is taken from the 1919 Paris Peace Conference. In a meeting between President Wilson, Mr. Lloyd George, and M. Clemenceau in Paris on March 27, 1919 (Mantoux, 1964), Wilson’s discursive chain begins with the category “excessive demands” and is linked to other categories by implication connections (which can be represented by signed arrows — see Figure 23.5).

According to Wilson’s discursive chain, excessive demands create the impression of injustice, thus providing Germany with reasons for seeking revenge and creating discontent among the German people. Discontent leads to conflict and sows the seeds of future war. According to Wilson, these consequences can be avoided by “negotiations with moderation and equity”, a category that reduces the impression of injustice.

M. Clemenceau’s reply produces a reality that differs from that of Wilson’s by using a national character discourse to explain the behavior of Germany (Figure 23.6). The “German spirit” creates the desire to impose force on others and

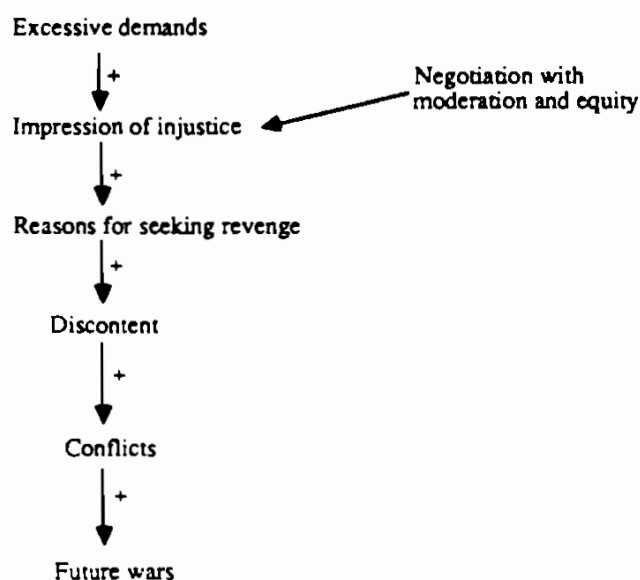


Figure 23.5. Cognitive map fragment for Wilson: March 27, 1919, 11:00 a.m.

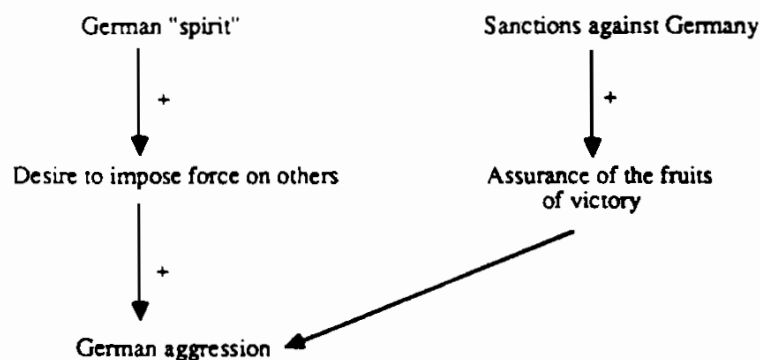


Figure 23.6. Cognitive map fragment for Clemenceau: March 27, 1919, 11:00 a.m.

leads to aggression. This can be avoided, according to Clemenceau, by imposing sanctions on Germany to assure the fruits of victory.

Clemenceau reminded the other negotiators quite explicitly that the interpretive practice of France differed from those of the United States and Great Britain.

I beg you to understand my state of mind, just as I am trying to understand yours. America is far away, and protected by the ocean. England could not be reached by Napoleon himself. You are sheltered, both of you; we are not.

When Wilson proposed his idea of justice as the avoidance of “excessive demands” on Germany, Clemenceau proposed instead multiple interpretations of justice. He argued that “What we regard as just here in this room will not necessarily be accepted as such by the Germans”, and he offered some evidence for differentiating the term: “Note that no one in Germany draws a distinction between just and unjust demands of the Allies”. Later, in an attempt to build support for his position, he proposed another concept of justice:

There is a sense of justice as between allies which must be satisfied. If this feeling were violently thwarted, either in France or in England, grave danger might follow. Clemency toward the conquered is good; but let us not lose sight of the victors.

By introducing a new notion of justice and playing on the fears of "grave danger" (i.e., revolutionary movements), Clemenceau attempted to evoke a discursive space he shared with Lloyd George.

It should be evident from this example that much of what was at stake in the interaction between Wilson and Clemenceau involved not just differences in beliefs or other individual cognitive elements, but differences in the discursive spaces within which options were to be understood and valued. Hence, what we will attempt to recover, working within the bounds of our theoretical model, are the discursive spaces within which the Paris Peace Conference negotiations took place.

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Annex 70

Glen Plant, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, *International Comparative Law Quarterly*, Vol. 39 (1990)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

GLEN PLANT*

I. INTRODUCTION

ON 7 October 1985, four armed men claiming to represent the Palestine Liberation Front took control of the Italian-flag cruise liner *Achille Lauro* on the high seas about 30 miles off Port Said and held the crew and passengers' hostage. They had boarded her in port in Genoa posing as legitimate passengers. They demanded the release of 50 Palestinian prisoners held in Israel and threatened to blow up the ship, if intervention were attempted, and to start to kill the passengers, if their demands were not met.¹ Subsequently, a Jewish American passenger, Mr Klinghoffer, was shot dead and his body thrown overboard. Several days later the four men gave themselves up to the Egyptian authorities.

On 11 October an Egyptian civilian aircraft was intercepted by United States military aircraft over the Mediterranean Sea and instructed to land at an air force base in Sicily. Four Palestinians on board were detained by the Italian authorities and subsequently indicted and convicted in Genoa for offences related to the hijacking of the ship and the death of Mr Klinghoffer.² Italy refused a request from the United States for their extradition.³

The President of the UN Security Council condemned the incident in a statement on behalf of all its members;⁴ and a resolution on terrorism adopted by consensus by the UN General Assembly in December 1985

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1. *The Times*, 8 and 10 Oct. 1985, p. 1.

2. *Idem*, 12 Oct. 1985, p. 1. In addition, two of their accomplices were tried and convicted in Italy and four other offenders tried and convicted *in absentia*.

3. *Ibid.* See Cassese, "The International Community's Legal Response to Terrorism" (1989) 38 I.C.L.Q. 589 at pp. 601-2.

4. At the 2,618th Meeting of the Security Council on 9 Oct. 1985, the President issued a statement which, among other things, resolutely condemned "this unjustifiable act of hijacking as well as other acts of terrorism, including hostage-taking": UN Doc.S/17554, 9 Oct. 1985.

(Resolution 40/61) included a paragraph requesting the International Maritime Organisation ("IMO") to recommend appropriate action.⁵ Italy put forward a proposal, later co-sponsored by Austria and Egypt, to negotiate a convention against maritime terrorism.

Negotiations on the basis of drafts prepared by the three co-sponsors were conducted under the auspices of the IMO. A Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("the Convention") was adopted and opened for signature at a diplomatic conference held in Rome between 1 and 10 March 1988, together with an accompanying optional protocol, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("the Protocol").⁶ The Convention provides that a person alleged to have committed a broad range of acts connected with attacks against ships or persons on board should either be extradited or have his case submitted to the appropriate national authorities with a view to prosecution. States parties are in some instances obliged and in others permitted to establish their jurisdiction with respect to such matters. It contains, in addition, provision for a possible review conference and provisions concerning co-operation, prevention, the transmission of information, the treatment to be accorded to alleged offenders and the power of a master to deliver alleged offenders to the authorities of a State party other than the flag State. The Protocol makes similar provision in relation to fixed platforms located on the continental shelf, except that there is no equivalent of the master's power of delivery.

There are in force a number of multilateral conventions concerning international terrorist acts of a type similar to this, which are referred to generally below as "the precedents" or as "prosecute or extradite" conventions. The Montreal and Hague Conventions⁷ ("the aviation precedents") provide for "prosecution or extradition" of offenders or alleged offenders in cases of serious offences affecting the safety of aircraft in flight. Just prior to the diplomatic conference at which the IMO instruments were agreed, the Montreal Convention was supplemented

5. U.N.G.A. Res.40/61, 9 Dec. 1985 (operative para.13). The IMO had, on its own initiative, by Assembly Res.584(14) of Nov. 1985, established a working group to study possible international measures to ensure passenger and crew safety, especially in ports. This led to the adoption in Sept. 1986 of a set of "Measures to Prevent Unlawful Acts against Passengers and Crews on Board Ships".

6. The text of the Convention is contained in IMO Doc.SUA/CONF/15/Rev.1, 10 Mar. 1988 and of the Protocol in IMO Doc.SUA/CONF/16/Rcv.2, 10 Mar. 1988 and reproduced in (1988) 27 I.L.H. 668.

7. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, 23 Sept. 1971: U.K.T.S. No.10(1974); the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague, 16 Dec. 1970: U.K.T.S. No.39(1972).

with a Protocol concerning attacks at airports serving international civil aviation.⁸

No such convention has ever been agreed before in relation to ships or to fixed platforms, but the Hostages, Internationally Protected Persons and Physical Protection of Nuclear Material Conventions, all "prosecute or extradite" conventions, require States parties to establish jurisdiction over the offences covered by those conventions whenever those offences are committed (among other places) on board a ship "registered in that State".⁹ Thus, if and when the Convention comes into force, a State party both to it and to one or more of the three above-mentioned conventions might have a choice of conventions when the acts in question take place *on board* (but not simply *against*) a ship *and* that ship is registered in that State. This may give rise to certain questions of conflict of conventions, especially in view of the fact that, while language used in the IMO instruments is frequently borrowed from these precedents, they have been negotiated at different times and in several different forums,¹⁰ and this has resulted in some divergence of language and of substance in comparable provisions (*infra* section V).

Professor Malvina Halberstram, a member and sometime head of the United States delegation to the IMO negotiations, has discussed in a recent article¹¹ the application of the law of piracy to the *Achille Lauro* case, as well as the negotiation of the Convention and Protocol up to the second session of the Ad Hoc Preparatory Committee to the diplomatic conference. It is not the intention of this author to debate the application *vel non* of the law of piracy in such cases, but rather to expand upon the discussion of the two instruments, taking into account the important changes made at the diplomatic conference which finalised them.

8. The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, 23 Feb. 1988: U.K.T.S. Misc. No.6(1988); Cmd.378.

9. The International Convention against the Taking of Hostages, done at New York, 18 Dec. 1979 to 31 Dec. 1980: U.K.T.S. No.81(1983) (Art.5(1)(a)); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, done at New York, 14 Dec. 1973 to 31 Dec. 1974: U.K.T.S. No.3(1980) (Art.3(1)(a)); and the Convention on the Physical Protection of Nuclear Material, done at New York and Vienna, 3 Mar. 1980: U.K.T.S. Misc. No.27(1980) (Art.8(1)(a)).

10. The Hostages and Internationally Protected Persons Conventions were negotiated in the 6th Committee of the U.N.G.A., the latter following preparatory work by the ILC and the Protection of Nuclear Materials Convention in the IAEA.

11. Malvina Halberstram, "Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety" (1988) A.J.I.L. 269-310.

15);²⁰ and dispute settlement and the final articles (Articles 16 to 22). The Protocol will be discussed in section IV.

A. *The Preamble*

Most of the preambular paragraphs derive from the precedents and were relatively uncontroversial. The preamble was used, however, to accommodate a compromise concerning two of the important political questions left to be decided by the diplomatic conference.²¹ First, whether or not there should be some exception from the operation of the Convention for acts carried out for political motives, notably acts of national liberation movements. Second, whether or not language should be included indicating culpability either of persons acting on behalf of States (so-called "State-sponsored terrorism") or, indeed, of States themselves (so-called "State terrorism").

The seventh and eighth preambular paragraphs were agreed as elements of a "package deal" achieved on the last day of the diplomatic conference, following informal consultations, in which certain Arab delegations on the one hand and the United Kingdom, United States and certain other Western delegations on the other played a prominent role. The seventh preambular paragraph recalled and recited operative paragraph 9 and the eighth preambular paragraph operative paragraph 1 of the UN General Assembly Resolution 40/61 (1985) mentioned above. Operative paragraph 9 of the resolution urged States to contribute to the progressive elimination of the underlying causes of terrorism, listing colonialism, racism and fundamental violations of human rights as examples; operative paragraph 1 unequivocally condemned all acts of terrorism, wherever and by whomever committed. Neither paragraph had appeared in earlier draft texts, but early during the diplomatic conference the Algerian delegation had proposed,²² with support from several other Arab delegations, the insertion of a paragraph similar to the seventh preambular paragraph as adopted, except that it employed the words "in particular" in relation to paragraph 9 of the resolution; this might have implied that it was more important than the other provisions of the resolution, including paragraph 1. The compromise solution involved placing the two paragraphs together in a manner which gave equal weight to the views of those requiring an unequivocal

20. Any reference to an article in this text which does not specify that it is a reference to either a Convention or a Protocol article should, unless it is indicated otherwise, be taken as a reference to the Convention article and also, where appropriate, to that article as extended *mutatis mutandis* to the Protocol.

21. See Halberstram, *op. cit. supra* n.11, at pp.305-308.

22. IMO Doc.SUA/CONF/CW/WP.13, 3 Mar. 1988. See also P. Kirsch, "The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism" (1989) 12 *Dalhousie L.J.* 5, 26-27.

condemnation of terrorism and those attaching priority to dealing with the political problems which they see as a part of the cause of resort to terrorism. A close examination of the seventh preambular paragraph shows that it merely recalls a paragraph of a non-binding resolution which urges States to contribute to the progressive elimination of the *underlying causes* of terrorism and, in doing so, to pay special attention to situations in which the activities of national liberation movements are particularly pertinent. It does not suggest that acts of national liberation movements are in any way exempted from the scope of the Convention.

The "package deal" also involved dropping several related proposals. The President of the Conference was able to announce on its last day, following two days of informal consultations, that Kuwait was willing to drop its proposal for a new Article 11A expressly providing for a political offence exception.²³ The Saudi delegation did not insist on its proposal to include various references in the text of the Convention and Protocol to "crimes" committed by governments.²⁴ Although this proposal had attracted some support, notably from Arab delegations, it aroused strong opposition from other delegations on the ground that governments could not be subject to national criminal law rules and procedures. Before the diplomatic conference the Kuwaiti delegation suggested an alternative preambular reference to State-sponsored acts,²⁵ but this was also resisted on the ground that it was unnecessary, since the acts covered by the Convention are expressed to be acts committed by "any person", and this includes, as a matter of course, acts of a person sponsored by a State. It was also objected that inclusion of such a term might have adverse consequences upon the interpretation of the precedents.

Another political issue resolved by a preambular reference, but not of the same order of importance in the debate, was that of avoiding the appearance of giving legitimacy to States' responses to international terrorism which exceeded their rights in international law. It will be recalled that the United States Air Force carried out a raid against Libya in 1986 in view of Libya's support for terrorist activities and also that it intercepted an Egyptian aircraft following the *Achille Lauro* incident. The 13th preambular paragraph, which affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law", represents a compromise

23. IMO Doc.SUA/CONF/CW/WP.7/Rev.1, 3 Mar. 1988. (Also see *infra* section III.D.6.)

24. This proposal, also made at the preparatory sessions, was introduced to the diplomatic conference in IMO Doc.SUA/CONF/CW/WP.14, 3 Mar. 1988.

25. IMO Docs.PCUA 2/4, May 1987, and SUA/CONF/12, 17 Feb. 1988. See also PCUA 2/5, paras.65-68, 2 June 1987.

substituting for a seemingly more accusatory paragraph suggested by the Soviet delegation.²⁶

In a rather different vein, the 11th preambular paragraph notes "that acts of the crew which are subject to normal shipboard discipline are outside the purview of this Convention". It is designed to ensure that disciplinary offences traditionally dealt with by the master will not be interpreted as falling within the description of the conduct constituting the substantive element of the offences. Since express references in "prosecute or extradite" conventions to political intent or to "terrorism" or "terrorist" are unacceptable to a number of States, the acts constituting the offences in those conventions must be positively enumerated, and this can never be done precisely enough to ensure the inclusion of all acts desired to be covered and exclusion of all acts not desired to be covered.²⁷ Proposals, moreover, to include in the preamble provision expressly excluding from the scope of the Convention such acts as football hooliganism and Greenpeace-style environmental organisations' seaborne protest operations were not pressed on the understanding that such acts were to be considered not to be included in its scope.²⁸

B. Ships Covered by and Geographical Scope of the Convention (Articles 1 to 4)

The discussions of the definition of "ship" for the purposes of the Convention, the exclusion of certain categories of ship from its scope and the Convention's geographical scope were interrelated throughout the negotiations. The decision to include an optional Protocol on fixed platforms, moreover, necessitated consistency between the definition of "ship" in the Convention and use of the term "fixed platform" in the Protocol. As many ships and platforms as possible were to be covered by the instruments whenever the offence involved an "international element" which took the incident in question beyond the scope of matters properly governed by national law alone.

The primary task was to choose between a negative approach to the scope of the Convention, listing ships and geographical circumstances in which it *did not* apply, a positive approach, listing those circumstances in which it *did* apply, and a mixed approach. Several variations on the

26. IMO Doc.PCUA 1/WP.17, 5 Mar. 1987, and see Kirsch, *op. cit. supra* n.22, at pp.28-29.

27. For a discussion of the virtues and vices of the "inductive approach" see G. Levitt, "Is Terrorism Worth Defining?" (1986) XIII Ohio Northern Univ. L.Rev. 97, 97 and 108-112.

28. The FRG delegation had suggested in IMO Doc.SUA/CONF/WP.11, 2 Mar. 1988, that a preambular provision would suffice to exclude such acts.

Annex 71

M. Cherif Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, Emory International Law Review, Vol. 4 (1990)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

EFFECTIVE NATIONAL AND INTERNATIONAL ACTION AGAINST ORGANIZED CRIME AND TERRORIST CRIMINAL ACTIVITIES

M. Cherif Bassiouni*

I. INTRODUCTORY OBSERVATIONS ON OFFENSES CATEGORIZED AS "ORGANIZED CRIME" AND "TERRORISM"

Every form of violence is potentially terror-inspiring to its victim and to those it indirectly affects, whether committed by an individual, an organized group or the agents of a state.¹ However, not all criminal activities that are deemed to be terror-inspiring are within the general meaning of "terrorism." Likewise, not all group activities committed by persons who are seeking to further a group criminal goal or activity are deemed "organized crime." Both of these selectively applied labels depend on a social-political judgment which may or may not further depend on a deliberate criminal justice policy.

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¹ See Bassiouni, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism,"* in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS*, XV-Liii (M.C. Bassiouni ed. 1989) [hereinafter *LEGAL RESPONSES TO INTERNATIONAL TERRORISM*]. For relevant U.N. reports and studies, see generally, U.N. Secretariat Discussion Guide (A/CONF. 144/PM. 1); *Report of the Meeting of the ad hoc Group of Experts on International Cooperation for the Prevention and Control of the Various Manifestations of Crime, Including Terrorism*, presented to the International Institute of Higher Studies in Criminal Sciences and the Centro Nazionale di Prevenzione e Difesa Sociale (Siracusa, January 24, 1988); *Report on the Effective National and International Action Against (a) Organized Crime; (b) Terrorist Criminal Activities*, Interregional Preparatory Meeting for the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders (Vienna, March 14-18, 1988) (A/CONF. 144/PM.I, April 11, 1988).

What essentially distinguishes "organized crime" and "terrorism" with respect to all the offenses falling within these two categories is a single characteristic, namely the motive of the actor. While "organized crime" is characterized by a profit motive, and "terrorism" is characterized by an ideological motive.²

Beyond this distinction, "organized crime" and "terrorism" characteristics may overlap, depending upon the strategic or tactical goals of its adherents in the course of a specific criminal activity or as part of a pattern of activities. There are several examples of this. First, by definition, organized crime cannot be committed by a single individual while terrorism can be. Virtually all crimes in both these categories of conduct are committed by groups. Second, "organized crime" is virtually always committed with profit as a motive, although it could sometimes, like "terrorism," be committed for an intermediate power-oriented goal. "Terrorism" however, is most usually committed for a power outcome or motivated by the ideology of the actors, although they too, for tactical reasons, may also resort to conduct which has a profit motive similar to "organized crime." Third, some "organized crime" activities are consensual in nature, e.g., drug distribution, and do not depend upon a terror-inspiring effect. However, "organized crime" does use violence to inspire terror among extortion victims and competitors for power, including rival gangs and even among the forces of order in some societies. Conversely, a "terrorist" organization may engage in some act of violence or other criminality without seeking a terror-inspiring effect, e.g., the execution of a member who has become unreliable, or counterfeiting done to generate funds for revolutionary activity. Finally, "organized crime" groups can be large or small, with or without international connections, and can be capable of reaching into socio-political layers of given society or

² For a discussion of "terrorism," see Bassiouni, *Ideologically Motivated Offenders and the Political Offense Exception in Extradition - A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969). For a discussion of "organized crime," see Cressey, *The Functions and Structure of Criminal Syndicates*, in TASK FORCE REPORT: ORGANIZED CRIME, (President's Commission on Law Enforcement and Administration of Justice, 1969) Appendix A at 25; G. TYLER, *ORGANIZED CRIME IN AMERICA* (1962); E.H. SUTHERLAND, *WHITE COLLAR CRIME* (1949); E. REID, *MAFIA* (1964); *La Mafia Oggi: Individuazione Del Fenomeno E Sistemi Di Lotta*, 2 ATTI E DOCUMENTI ISISC, (G. Tinebra ed. 1988).

be outcasts, such groups may engage in every form of common criminality. The same characteristics apply in part to "terrorist" groups, with the notable exception that "terrorism" may include state-action supported by or conducted under state policy. Public officials may be part of "organized crime" as well as "terrorism."

As indicated above, unlike "terrorism," "organized crime" requires group participation and is essentially motivated by profit, although this does not exclude resort to the use of terror-inspiring means in order to achieve its goals. "Organized crime," like "terrorism," may also seek to destabilize governments and governmental authority, but only for the purpose of being able to operate with greater freedom without governmental controls.

Thus, the ultimate fundamental goals of "organized crime" differ substantially from those of "terrorism," as do the fundamental motives of the perpetrators. Furthermore, while the perpetrators of "terrorism" may have a political goal which ultimately results in acts of terror-violence, those engaged in "organized crime" do not have such finality of goals and inherently seek the perpetuation of the organization. By its very nature, "organized crime" tends to grow and develop, whereas "terrorism" may not. Because of the profit motive factor in "organized crime," the links with other like-minded groups, nationally or transnationally, can be broader and more durable than the occasional or temporary alliances that groups engaging in "terrorism" may forge with others. The greater durability of "organized crime" alliances is premised on the fact that the greed factor is a stronger basis for mutuality of interests and is more stable than the commonality of ideological values, goals and strategies among those engaging or supporting groups. The political agendas of the latter are of far less universal and permanent human appeal than the financial motivation of "organized crime."

Despite their distinctive characteristics, both "organized crime" and "terrorism" have become part of the world community's consciousness, as a result of improved and increased international communication, and mobility. Furthermore, due to mass global communication, societies and governments are more conscious of the national and transnational implications of these activities. In-

deed, the mass media's psychological impact has become so overpowering that it has become part of the problem, at least with respect to encouraging "terrorist" acts by guaranteeing a global audience if an atrocity is sufficiently vicious and well staged.³ Conceptually, the media has also contributed to ineffective analysis of the appropriate response to "organized crime" and "terrorism," by using these terms as sensational labels, without clear or consistent definition of their meaning and scope. The need for clarification of the misleading nature of these labels is addressed below.

II. RELATIONSHIP BETWEEN "ORGANIZED CRIME" AND "TERRORISM"

Persons engaging in "organized crime," being profit motivated, commit consensual or violent crimes, or both, depending upon which is the more effective means to achieve financial gain. "Terrorism" by definition relies upon violence, or its threat, and the resulting terror-inspiring consequences, for a political outcome. The violence resulting from either "organized crime" or "terrorism," or indeed any other type of violence, can be placed on a single continuum. Distinctions as to goals, means, perpetrators and victims are socio-political judgments often made in furtherance of a criminal justice policy in order to devise and apply social and legal controls.⁴ It is also axiomatic that all forms of violence cause harm to persons and things, and that all societies grade the nature and severity of that harm in order to develop appropriate responses for control and prevention of harm. Thus, even though the substantive definition of each and every crime may vary, there can be great similarity in the modalities developed to control them. However, one should not be misled by the similarity in modalities for controlling "organized crime" and "terrorism" to mistakenly

³ See Bassiouni, *Terrorism: Law Enforcement and the Mass Media: Perspectives, Problems, Prospects*, 72 J. CRIM. L. & CRIMINOLOGY 1 (1981); see also A. SCHMID and J. DE GRAAF, *VIOLENCE AS COMMUNICATION: INSURGENT TERRORISM AND THE WESTERN MEDIA* (1982).

⁴ For a philosophical and political perspective, see Franck and Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L. L. 195 (1987). For a philosophical, legal policy and criminal justice perspective, see M.C. BASSIOUNI, *THE LAW OF DISSENT AND RIOTS* (1973); M.C. BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* (1971).

Annex 72

William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37 (2002)

***Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia**

William A. Schabas*

Mens Rea is derived from a maxim of legal Latin used to refer to the mental (or moral or psychological) element of crime: *actus non facit reum nisi mens sit rea*. Literally, it is said to mean “guilty mind.” In one of the leading common law cases, Lord Goddard said that “the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”¹ The requirement for a *mens rea* element of crimes is probably a general principle of law, as this term is understood in article 38 of the Statute of the International Court of Justice. Criminal law does not, as a general rule, address accidental behaviour, nor is it interested in vicarious forms of liability, matters that generally fall within regimes of civil liability or tort. Those who offend the criminal law are expected to intend the consequences of their acts. Most legal systems have treated the concept of *mens rea* as a presumption,² by which proof of guilty intent or knowledge is an element of any criminal offences, although like all presumptions it is subject to exceptions. Absent an indication to the contrary, law requires that a person who physically commits a crime do so intentionally. But “absolute liability” offences, where a person may be convicted of a serious offence absent any proof of intent or *mens rea*, are certainly far from unknown to national justice systems.

A common example of such an absolute liability offence is the crime that is often called statutory rape, namely, having sexual relations with a girl who is under some specified age, perhaps sixteen, or fourteen, or thirteen. Upon proof that the victim was below the age of consent, the crime is committed, irrespective of whether the accused believed she was older. Many legal systems simply refuse to entertain a defence of mistake

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1. *Brend v. Wood*, 175 L.T.R. 306, 307 (1946); *see also* *Harding v. Price*, 1 All E.R. 283, 284 (1948).

2. *See Sherras v. de Rutzen*, 72 L.T.R. 839 (1895); *see also*, JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 251-53 (1995).

of fact in respect of such offences. Thus, an individual may commit what he believes to be the totally innocent act of having sexual relations with a consenting adult, but because of an honest mistake about her age he finds himself subject to punishment for a serious crime. Recently, the United Nations agreed to include such an "absolute liability" offence within the subject matter jurisdiction of its third *ad hoc* tribunal, the Special Court for Sierra Leone, which is supposedly designed to prosecute only "those who bear the greatest responsibility" for the atrocities committed during that country's civil war.³

The focus of international human rights law in the area of criminal justice is on procedural rather than substantive issues. This does not mean that international human rights law has nothing to contribute with respect to the issue of *mens rea*. For example, article 6(2) of the International Covenant on Civil and Political Rights limits the use of capital punishment in States where it has not been abolished to the "most serious crimes."⁴ The "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly, declare that the ambit of the term most serious crimes "should not go beyond intentional crimes, with lethal or other extremely grave consequences."⁵ In a recent finding, the United Nations Human Rights Committee said that mandatory imposition of the death penalty for crimes of murder was arbitrary, because it failed to take into account the individual circumstances of the offender.⁶

3. See Statute of the Special Court for Sierra Leone, art. 5(a). For information on the Special Court see generally, Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857 (2000); Robert Cryer, *A 'Special Court' for Sierra Leone?*, 50 INT'L & COMP. L. Q. 435 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185 (2001); Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. RED CROSS 121 (2002); Stewart Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT'L L. 635 (2001); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations' Special Court for Sierra Leone*, AUSTRALIAN INT'L L.J. 159 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002); Abdul Tejan Cole, *Legal Basis of the Special Court for Sierra Leone*, 14 INTERRIGHTS BULL. 37 (2002).

4. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 174.

5. *Safeguards Guaranteeing Protection of the Rights of Those Facing The Death Penalty*, ESC Res. 1984/50, Annex, para. 1 (1984); *Human Rights in the Administration of Justice*, U.N. GAOR, 39th Sess., GA Res. 39/118 (1984).

6. See *Thompson v. St. Vincent and the Grenadines* (Communication No. 806/1998), U.N. Doc. CCPR/C/70/D/806/1998, para. 8.2 (2000). These views were endorsed by the East Caribbean Court of Appeal in *Spence v. The Queen*, *Hughes v. The Queen*, Criminal Appeal Nos. 20 of 1998 and 14 of 1997, Judgement of 2 April 2001, available at

But it is certainly difficult to claim, as the law now stands and as it is interpreted by courts and treaty bodies, that international human rights standards dictate that *mens rea* be an essential element of all criminal prosecutions. In fact, some may argue that too demanding a standard can even stymie the enforcement of other norms in international human rights law, such as the obligation upon States to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.⁷

SOURCES OF THE PRESUMPTION AT THE ICTY

The *Statute of the International Criminal Tribunal for the former Yugoslavia* does not address the issue of *mens rea* directly, and the other relevant normative instrument, the *Rules of Procedure and Evidence*, does nothing to complete the picture.⁸ Perhaps a few hints can be gleaned from the Report of the Secretary-General which was prepared prior to the establishment of the Tribunal by the Security Council. For example, it rejects the concept of guilt by association, whereby a member of a criminal association or organisation, by the fact of mere membership, could be made subject to the jurisdiction of the Tribunal. “The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups,” said the Secretary General.⁹

The absence of any real guidance on the subject in the applicable law of the International Criminal Tribunal for the former Yugoslavia (ICTY) contrasts markedly with the law applicable to the International Criminal Court. The *Rome Statute of the International Criminal Court* declares, at article 30:

<http://www.ecsupremecourts.org.lc> (last visited Apr. 9, 2003).

7. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195, art. 4(a).

8. The Rules of Procedure and Evidence create their own offences to deal with contempt of court, obstruction of justice and perjury. The applicable texts require proof of *mens rea*, using words like “contumaciously” and “with the intention of.” Rule 77, U.N. Doc. IT/32/Rev.26. For application of the concept, see Prosecutor v. Aleksovski, Case No.: IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001.

9. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 22 Feb. 1993, U.N. Doc. S/25704, para. 56.

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.¹⁰

Nevertheless, from their very first decisions, the judges of the ICTY have simply assumed that *mens rea* is an essential element of the offences within their jurisdiction. The issue was central to the first conviction, that of Erdemovic, because the availability of the defence of duress had been raised. Erdemovic had confessed to killing a large number of defenceless prisoners at Srebrenica, but when asked to explain his actions he said he had been compelled to do so. This defence of duress amounts to a claim that the accused lacked a guilty mind, because the compulsion under which he acted amounted to something irresistible, leaving him no moral choice in the matter. When his guilty plea was accepted by the Trial Chamber, it examined the possible defence duress, noting that it "might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself".¹¹ All of the judges of the Appeals Chamber, in their 1997 ruling rejecting the admissibility of a defence of duress, approached the issue as one of the presence or absence of *mens rea*.¹²

However, the first guilty verdict by the Tribunal following a full-blown

10. *Rome Statute of the International Criminal Court*, 17 July 1998, art. 30, U.N. Doc. A/CONF.183/9 (entered into force 1 July 2002). See Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291 (2001); WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85-87 (2001).

11. Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, para. 14; 108 I.L.R. 180, 186.

12. See Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Sentencing Appeal, 7 Oct. 1997, para. 71; 111 I.L.R. 298, 362 (Separate and Dissenting Opinion of Judge Stephen); see also *id.* para. 27; 111 I.L.R. at 442 (Separate and Dissenting Opinion of Judge Cassese).

trial hardly addressed the issue. Only one paragraph in the *Tadic* judgement refers to this question, and it summarily considers existing case law on whether or not the perpetrator of crimes against humanity must have knowledge of the context within which the acts are committed.¹³ The *mens rea* of the offences was not considered, most likely because Dusko Tadic offered an alibi defence, which does not raise questions about intent, and simply denies that the accused was present or involved when the crime was committed.

Mens rea was given considerable attention in the *Celebici* judgement of November 1998. Because some of the accused were charged as accomplices and not as principals, the Trial Chamber was concerned with the mental element applicable to such secondary participation. In the case of a principal perpetrator, courts, including the ICTY, generally presume that absent evidence to the contrary a person is deemed to intend the consequences of his or her acts. But in the case of secondary offenders or accomplices, the acts of assistance are often quite ambiguous, and it is not as easy to simply presume the guilty mind from the physical act. According to the judgement of Trial Chamber II *quarter*,

[i]t is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have 'a direct and substantial effect on the commission of the illegal act.' The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be 'awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.'¹⁴

The issue of *mens rea* was explained in the *Tadic Appeal Decision* of July, 1999. According to the Appeals Chamber:

[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle

13. See Prosecutor v. Tadic, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 657; 112 I.L.R. 2, 222.

14. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited Mar. 19, 2003).

of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”¹⁵

In support, the Appeals Chamber referred to article 7(1) of the *Statute*, which recognises the principle of individual responsibility for criminal acts. Although perhaps only implied, it should be obvious that reference to “culpability” means that the crime must be committed by somebody with intent or knowledge, in other words, with *mens rea*.

MENS REA AND THE ELEMENTS OF THE CRIMES

Many of the crimes defined in Article 2 to 5 of the *Statute* include, either explicitly or implicitly, reference to specific mental elements. In other words, the judges are not merely applying a presumption in requiring proof of *mens rea* for a conviction, because *mens rea* is an integral component of the crime’s definition. For example, article 2 of the *Statute* gives the Tribunal subject-matter jurisdiction over an exhaustive list of “grave breaches of the Geneva Conventions.” According to the paragraphs in article 2, these include *wilful* killing, *wilfully* causing great suffering or serious injury to body or health and *wilfully* depriving a prisoner of war or a civilian of the rights of fair and regular trial, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and *wantonly*.

In the *Celibici case*, the Trial Chamber examined the scope of the term “wilful killing,” and its relationship to “murder,” which is the term used in many criminal justice systems to describe intentional homicide. If the term “killing” were to stand alone, without the adjective “wilful,” it might be argued that the crime might also include non-intentional forms of homicide. The ICTY Trial Chamber referred to the ordinary meaning of the term “wilful,” as defined in the Concise Oxford English Dictionary, which is “intentional, deliberate.”¹⁶

420. The first question which arises is whether there is a qualitative difference between ‘wilful killing’ and “murder” such as to render the elements constituting these offences materially different. The Trial Chamber notes that the term ‘wilful killing’ has been incorporated directly from the four Geneva Conventions, in particular articles 50, 51, 130 and 147 thereof, which set out those acts that constitute “grave breaches” of the Conventions. In the French text of the Conventions,

15. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 186, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (last visited Mar. 19, 2003).

16. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 433.

this terminology is translated as '*l'homicide intentionnel*'. On the other hand, "murder", prohibited by common article 3 of the Conventions, is translated literally in the French text of the Conventions as '*meurtre*'.

421. The Trial Chamber takes the view that it is the simple essence of these offences, derived from the ordinary meaning of their terms in the context of the Geneva Conventions, which must be outlined in the abstract before they are given concrete form and substance in relation to the facts alleged. With this in mind, there can be no line drawn between 'wilful killing' and 'murder' which affects their content.¹⁷

The Trial Chamber relied upon a teleological interpretation of the term "wilful," observing that the purpose of the grave breaches provision of the Geneva Conventions is proscribing "the *deliberate* taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions' protections."¹⁸ The Trial Chamber said that the *mens rea* of the grave breach of wilful killing was "an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."¹⁹ Another of the grave breaches, the crime of wilfully causing great suffering, has been interpreted as "an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven."²⁰

But what of those grave breaches which do not include, in their definition, the words "willful," "wilfully" or "wantonly?" The Tribunal has nevertheless held that these must also be committed with intent. Thus, the grave breach of inhuman treatment consists of "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity."²¹

The *chapeau* of article 2 requires that the grave breaches be committed against "protected persons." But must the offender *know* that the victim is a "protected person," as this term is meant by the *Geneva Conventions*. "Protected persons" are defined in article 4(1) of the fourth Geneva Convention as those "in the hands of a Party to the conflict or Occupying

17. *Id.*

18. *Id.* para. 431. *See also* Prosecutor v. Blaskic, Case No.: IT-95-14-A, Judgement, 3 Mar. 2000, para. 153; Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 229.

19. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 439.

20. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, at para. 245.

21. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 348.

Power of which they are not nationals.”²² Wilful killing of a combatant during an armed conflict is not a crime, indeed it is the very essence of warfare. It is one of the “lawful acts of war” to which reference is made in article 15(2) of the *European Convention of Human Rights*.²³ If *mens rea* is taken to mean intent and knowledge, the combatant who kills a “protected person” in error, believing that person to be a combatant and a lawful target, ought to have a defence of mistake of fact.²⁴

Article 3 of the ICTY *Statute* is the “umbrella rule”²⁵ encompassing a broad range of unenumerated serious violations of the “laws or customs of war” as recognised at customary international law, in addition to the brief list of punishable acts that actually appears in the text of the provision.²⁶ As is the case with grave breaches, some of the paragraphs in article 3 include words that indicate intent to be an element of the offense. Thus, it is a violation of the laws or customs of war to employ weapons “calculated to cause unnecessary suffering.” In addition, “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” is proscribed.

In the case of those offences not specifically listed as violations of the laws or customs of war, the Tribunal has also imposed a *mens rea* requirement, even where this is not part of the text of the infraction as defined by customary international law. For example, in *Aleksovski* it considered the mental element of the crime of “outrages upon personal dignity,” which is drawn from common article 3 of the four *Geneva Conventions*. The Trial Chamber required, as an element of the offence, that the accused intend to humiliate the victim.²⁷

In the case of genocide, the definition in article 4 of the *Statute* is drawn without significant change from article II of the 1948 *Genocide*

22. Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, (1950) 75 U.N.T.S. 135; *see also* Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. s. 163-71; Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Judgement, 24 Mar. 2000, para. 151.

23. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 (entered into force 3 Sept. 1953).

24. *See* Clark, *supra* note 10, art. 32 (discussing a codification of the defence) Whether or not the perpetrator must know that the victim is a protected person is discussed by Roger Clark. *See id* at 330-31.

25. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 133; Amended Statute of the International Tribunal, art. 3 [hereinafter ICTY Statute] available at <http://www.un.org/icty/legaldoc/index.htm> (last visited April 9, 2003).

26. Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 137.

27. Prosecutor v. Aleksovski, Case No.: IT-95-14/1-T, Judgement, 25 June 1999, para. 57. *But see* Prosecutor v. Kunarac et al., Case. No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, paras. 164-166.

Convention, and has specific mental elements set out explicitly in the text. Genocide involves commission of one of five acts, “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Furthermore, several of the five punishable acts have their own mental elements. In the *Jelusic* appeal, the Office of the Prosecutor argued that the concept of *dolus specialis*, which is a civil law term used to describe the *mens rea* of a crime, set too high a standard, and could not be equated with the common law concepts of “specific intent” or “special intent.”²⁸ The Appeals Chamber dealt with the matter rather laconically, saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant “specific intent.”²⁹ The Appeals Chamber referred to “specific intent” to describe “the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such” or, in other words, the normative requirement set out in the *chapeau* of the definition of genocide.³⁰ The *Sikirica* Trial Chamber criticised the Prosecutor for introducing a debate about theories of intent for the crime of genocide, noting that the matter should be resolved with reference to the text of the provision:

The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the *chapeau* to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent.³¹

The text of article 5, crimes against humanity, has little to say on the subject of the mental element, with the exception of paragraph (h), which requires the existence of a discriminatory motive.³² In *Kunarac*, the Trial Chamber held that the accused must have had the intent to commit the underlying offence or offences charged, and must have known “that there is

28. Prosecutor v. Jelusic, Case No.: IT-95-10-A, Prosecution’s Appeal Brief (Redacted Version), para. 4.22; see also Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 142.

29. Prosecutor v. Jelusic, Case No.: IT-95-10-A, Judgement, 5 July 2001, para. 51.

30. *Id.* para. 45.

31. Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 60.

32. See Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, paras. 211-12; Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, para. 195; Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, paras. 435-36; Prosecutor v. Vasiljevic, Case No.: IT-98-32-T, Judgement, 29 Nov. 2002, para. 228.

an attack on the civilian population and that his acts comprise part of that attack, or at least *that he took* the risk that his acts were part of the attack.”³³ But there is no requirement that the perpetrator have knowledge of the details of the attack.³⁴ In *Tadic*, the Appeals Chamber found that discriminatory intent is not, as a general rule, an element of crimes against humanity.³⁵ But as with the other three categories of crime, there has never been any doubt that intent or knowledge be a requirement for proof that an individual has committed crimes against humanity. With respect to the crime against humanity of rape, for example, it must be proven that the accused knew that the victim did not consent.³⁶

There have been debates, of course, about the nature of the intent or knowledge that is required for specific offences. In *Krnjelac*, a Trial Chamber held that the *mens rea* of torture must aim at obtaining information or a confession or at punishing, intimidating or coercing the victim or third person or at discriminating on any ground against the victim or third person. It said that “although other purposes may come to be regarded as prohibited under the torture provision in due course, they have not as yet reached customary status.”³⁷ This contrasted with the broader view taken in earlier judgements, holding that torture can also be carried out with the intent to “humiliate” the victim. In particular, it noted that “the purpose to ‘humiliate’ the victim” mentioned in the *Furundzija*³⁸ and *Kvočka*³⁹ judgements “is not expressly mentioned in any of the principal

33. Prosecutor v. Kunarac et al., Case No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, para. 434.

34. See *id.* para. 102.

35. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 305. See also Prosecutor v. Kordic & Cerkez, (Case No.: IT-95-14/2-T), Judgement, 26 Feb. 2001, at para. 186.

36. See Prosecutor v. Kunarac et al., Case No.: IT-96-23-T, Judgement, 22 Feb. 2001, paras. 147, 460-64; see also Prosecutor v. Kunarac et al., Case No.: IT-96-23/1-A), Judgement, 12 June 2002, para. 127. Note, however, the very first version of Rule 96(ii) of the Rules of Procedure and Evidence, IT/32, which bluntly stated that consent was not a defence to rape. The judges quickly fixed this faux pas with an amendment. See William A. Schabas, *Le règlement de preuve et de procédure du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991*, 10 REVUE QUÉBÉCOISE DU DROIT INTERNATIONAL 112 (1994).

37. Prosecutor v. Krnjelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

38. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 162.

39. Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, paras. 141, 152, 157.

international instruments prohibiting torture.”⁴⁰ The Trial Chamber also observed that “[n]or is there a clear jurisprudential disposition towards its recognition as an illegitimate purpose.”⁴¹ It acknowledged that “[t]here may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes” but reiterated that “the Trial Chamber must apply customary international humanitarian law as it finds it to have been *at the time when the crimes charged were alleged to have been committed*.”⁴²

Thus, although not required within the text of the *ICTY Statute*, in contrast with the *Rome Statute*, the judges of the ICTY have treated *mens rea* as an element of all of the offences within the Tribunal’s subject matter jurisdiction. Indeed, there are more or less systematic efforts by the judges to identify the specific mental element of each crime. Incidentally, this would suggest that article 30 of the *Rome Statute* is not only confusing and ambiguous, it is also superfluous, and that judges of the International Criminal Court, like their colleagues at the ICTY, would easily have understood the mental element of crimes without them having to be told.

SOME EXCEPTIONS TO THE PRINCIPLE IN THE CASE LAW OF THE TRIBUNALS

Although the Tribunal has presumed *mens rea* to be an element of the offences over which it has jurisdiction, it has also made exceptions to this principle. There are two types of situation in which a person may be convicted of a crime for which the offender lacked full knowledge or intent. The first is established in the *Statute* itself. Article 7(3) sets out the principle of superior responsibility, by which someone may be convicted of a crime committed by a subordinate when that person “knew or had reason to know that the subordinate was about to commit such acts.”⁴³ The second has been devised by the judges, and in effect adds a form of criminal participation or complicity to the list that appears in article 7(1) that has been baptised “joint criminal enterprise.”⁴⁴

Command or superior responsibility is a form of criminal participation by which a person in a hierarchically responsible position may be held liable for the acts of subordinates. It differs from ordinary complicity, which exists upon proof that the commander ordered the act or otherwise aided and abetted its performance. A commander who actually knows that

40. Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

41. *Id.*

42. *Id.*

43. ICTY Statute, art. 7(3).

44. *Id.* art. 7(1)

troops under his or her command are about to commit an atrocity or are in the course of committing one, and who fails to intervene, can be prosecuted as an ordinary accomplice. But as the *Celibici* Trial Chamber explained, in the citation reproduced earlier in this article, to be an accomplice there must be some proof that the accused had knowledge of what the principal was doing.⁴⁵ Command responsibility takes this a significant step further, implicating the commander as an accomplice in the acts perpetrated by subordinates but in the absence of proof of such knowledge. Under command responsibility, it is only required that the commander had "reason to know" of the crimes, not that he or she actually knew of them.⁴⁶ The Secretary-General of the United Nations, in the report submitted prior to adoption of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* by the Security Council, described superior responsibility as "imputed responsibility or criminal negligence."⁴⁷

Superior or command responsibility developed in a military context and was applied, at least historically, to war crimes committed in international armed conflict.⁴⁸ It was later codified with respect to grave breaches of the Geneva Conventions in *Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts*.⁴⁹ Command responsibility in the case of war crimes is closely related to issues of military discipline, and the fact that a commander had specific duties that he or she had failed to fulfil. In the leading post-Second World War case, a United States Military Commission

45. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited Mar. 19, 2003).

46. ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

47. Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 56 (1993); see also M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 345-74 (1996); EDWARD M. WISE, *GENERAL PRINCIPLES OF CRIMINAL LAW*, Part 3, 13ter *Nouvelles études pénales* 39, 46-47 (1998).

48. See L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 319, 320-27 (1995) (discussing early foundations of the principle of command responsibility); L.C. Green, *Superior Orders and Command Responsibility*, 27 *CAN. YRBOOK INT'L L.* 167 (1989); Hays Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1 (1973).

49. Art. 86(2), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979):

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

noted that General Yamashita “was an officer of long years of experience, broad in its scope, who has had extensive command and staff duty.”⁵⁰ Although acknowledging it would be absurd to condemn a commander merely because one of his or her soldiers committed a crime, the Commission held that “where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops. . . .”⁵¹ When Yamashita’s *habeas corpus* petition was heard by the United States Supreme Court, dissenting Justice Rutledge voted to quash the conviction, believing it was impossible to determine whether the crime was a “wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.”⁵² But the conviction stood and Yamashita was executed.

The *Statute* of the Tribunals allows conviction of a commander or superior who “had reason to know” of crimes being committed by subordinates, and these words clearly indicate the possibility that a commander can be found guilty who did not, as a matter of fact, have such knowledge.⁵³ This is not to say that the commander’s behaviour would be

50. The Trial of General Tomoyuki Yamashita, IV L.R.T.W.C. 1, 36-37, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945); *In re Yamashita*, 327 U.S. 1 (1945). On the Yamashita case, see A. FRANK REEL, *CASE OF GENERAL YAMASHITA* (1949), RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); LAWRENCE TAYLOR, *A TRIAL OF GENERALS: HOMMA, YAMASHITA, AND MACARTHUR* (1981); Ann-Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 289 (1992); Major Bruce D. Landrum, *The Yamashita War Crime Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995). The other major post-Second World War command responsibility case is *Canada v. Meyer*, 4 L.R.T.W.C. 98, Canadian Mil. Court 98 (1948). On the Meyer case, see PATRICK BRODE, *CASUAL SLAUGHTERS AND ACCIDENTAL JUDGMENTS: CANADIAN WAR CRIMES PROSECUTION, 1944-1948* (1997); HOWARD MARGOLIAN, *CONDUCT UNBECOMING: THE STORY OF THE MURDER OF CANADIAN PRISONERS OF WAR IN NORMANDY* (2000).

51. The Trial of General Tomoyuki Yamashita, IV L.R.T.W.C. 1, 35, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945).

52. *Id.*; see also the comments on the case, *In re Yamashita*, 327 U.S. 1, 52 (1946).

53. On superior or command responsibility as applied by the Tribunal, see Daryl Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, in *CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (Gideon Boas & William A. Schabas eds.) (forthcoming 2003); Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT’L L. 747 (2001); Kirsten M.F. Keith, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 LEIDEN J. INT’L L. 617 (2001).

entirely innocent. The whole concept of superior responsibility is built upon the premise that those who assume command positions must conduct themselves diligently and with proper respect for the dangerous weapons and life-threatened individuals over which they have control. Nevertheless, the culpable act of a commander under such a scenario may only amount to one of negligent or irresponsible command. But negligent or irresponsible command is not a crime within the jurisdiction of the Tribunal.

The Appeals Chamber examined the *mens rea* of command responsibility in the *Celebici* case. The judges dismissed an argument by the Prosecutor aimed at expanding the concept, noting that:

a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.⁵⁴

Thus, although a literal reading of article 7(3) suggests the possibility of a superior being convicted who had no knowledge of the crimes, the Appeals Chamber has required that there be evidence that the superior have some amount of actual knowledge. This knowledge cannot simply be presumed because of the commander's position. Obviously sensitive to the charges of abuse that could result from an overly large construction of article 7(3) of the *Statute*, the Appeals Chamber said it "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."⁵⁵ Several of the judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.⁵⁶

According to the Appeals Chamber, the information available to the superior:

does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having

54. Prosecutor v. Delalic, Case No.: IT-96-21-A), Judgement, 20 Feb. 2001, para. 241 (reference omitted); see also Prosecutor v. Galic, Case No.: IT-98-29-AR73.2, Appeals Judgement, 7 June 2002.

55. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 239.

56. See, for example, the opinion of Judge Bennouna, in Prosecutor v. Krajisnik, Case No.: IT-00-39, Separate Opinion of Judge Bennouna, 22 Sept. 2000. For a recent discussion of this point: Prosecutor v. Hadžihasanović et al., Case No.: IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.

the required knowledge.⁵⁷

This certainly falls short of the concept of “wilful blindness”, by which an offender in effect wishes to remain ignorant of the facts. In *Celibici*, Trial Chamber II said that it took as its starting point in an analysis of superior responsibility:

the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility.⁵⁸

In a contempt prosecution, the Appeals Chamber said:

[p]roof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist).⁵⁹

In the view of the Appeals Chamber, wilful blindness is “equally culpable” as actual knowledge.⁶⁰

But even “wilful blindness” should be treated with caution, as the great English criminal law specialist Glanville Williams has observed:

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable

57. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 238.

58. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 387.

59. Prosecutor v. Aleksovski (Case No.: IT-95-14/1-AR77), Judgement on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001, para 43.

60. *Id.*

from the civil doctrine of negligence in not obtaining knowledge.⁶¹

There is the very real possibility of a conflict between the superior responsibility provisions in article 7(3) and the subject matter jurisdiction provisions in articles 2 to 5. To the extent that certain definitions of crimes include specific reference to intent, it is impossible to reconcile this with the lower threshold established for superior responsibility in the *Statute* as interpreted by the Appeals Chamber in *Delalic*.⁶² For example, the reference to subordinates with “a violent or unstable character” recalls the notorious behaviour of Goran Jelusic, a racist concentration camp official who went by the sobriquet “the Serbian Adolf.” Describing him as “violent or unstable” is to understate the extent of his dysfunctional personality. The Appeals Chamber considered that it was, at least in theory, possible for Jelusic to have committed genocide acting alone and with no larger plan or policy or the involvement of others.⁶³ But is it conceivable that Jelusic’s superior could be convicted of a crime specifically requiring an “intent to destroy” an ethnic group if, in reality, the superior simply underestimated the perversity of a fanatic over whom he exercised command and control?⁶⁴

Superior responsibility is believed by many to offer the most effective way of convicting leaders when evidence is lacking that they have actually ordered the commission of atrocities. Recent judgements suggest that it may not be the panacea many had hoped, and that in its place is an even more effective mechanism that does not appear in the *Statute* at all, and that has been devised by judges. This is “joint criminal enterprise” complicity, a way of imputing guilt to a person who participates in a form of collective criminal activity. The accused can be convicted not only for the crimes that he or she actually committed, with intent, but for those committed by others that he or she did not specifically intend but that were a natural and foreseeable consequence of executing the crime that formed part of the

61. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 159 (2nd ed. 1961).

62. *See* Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 389.

63. *See id.*

64. Although there have now been several convictions by the International Criminal Tribunal for Rwanda for genocide committed on the basis of superior responsibility, none of them really confronts this difficulty. In each case, the Trial Chamber accepted evidence that the superior had actual knowledge of the behaviour of the subordinate rather than mere “reason to know.” Although the convictions rely upon the superior responsibility provision, in reality the crime looks more like one of complicity by omission. *See* Prosecutor v. Serushago, Case No.: ICTR-98-39-S, Sentence, 2 Feb. 1999; Prosecutor v. Kayishema & Ruzindana, Case No.: ICTR-95-1-T, Judgement, 21 May 1999, para. 473 (Kayishema only); Prosecutor v. Musema Case No.: ICTR-96-13-T, Judgement, 27 Jan. 2000, paras. 894, 899, 905, 914, 924.

collective or common purpose or enterprise.⁶⁵

The Appeals Chamber first developed the theory in *Tadic*, building upon a discussion of complicity in the *Furundzija Trial Judgement*.⁶⁶ The Appeals Chamber conceded that “common purpose” or “joint criminal enterprise” liability is not included within the enumeration of forms of participation in article 7(1), but said that a purposive approach to the *Statute* indicates that “it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution.”⁶⁷ It considered the case where perpetrators share a common design to pursue a criminal course of conduct, but where one of them commits an act that was outside the common design yet “a natural and foreseeable consequence of the effecting of that common purpose.” According to the Appeals Chamber:

[a]n example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.⁶⁸

The Appeals Chamber found support for this type of accomplice liability in some of the post-Second World War jurisprudence of British, United States and Italian courts and military tribunals. It concluded with respect to

65. Prosecutor v. *Tadic*, Case No.: IT-94-1-A, Judgement, 15 July 1999; *see also* Prosecutor v. *Krnjelac*, Case No.: IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000; Prosecutor v. *Brdjanin & Talic*, Case No.: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001; Prosecutor v. *Krnjelac*, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002.

66. Prosecutor v. *Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, paras. 199-226.

67. Prosecutor v. *Tadic*, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 190.

68. *Id.* para. 204.

such cases:

[I]t is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).⁶⁹

The Appeals Chamber referred to national practice as well, conceding, but only obliquely and in a footnote, that common purpose or joint criminal enterprise liability has in some countries been declared unconstitutional in the case of serious offences such as murder because conviction of a person for an offence that was not truly intended offends principles of fundamental justice.⁷⁰ Thus, as with superior responsibility, in the case of joint criminal enterprise the Tribunal recognises a form of liability or responsibility for acts where, as the Appeals Chamber says, “he did not intend to bring about” the result.

Since the theory of “joint criminal enterprise” was first mooted by the Tribunal, in *Tadic* in July 1999, it has become the magic bullet of the Office of the Prosecutor. For example, the May 1999 indictment of Slobodan Milosevic for crimes against humanity and war crimes committed in Kosovo was amended in 2001 so as to allege his participation in a joint criminal enterprise with Bosnian Serb military and civilian leaders.⁷¹ In August 2001, Bosnian Serb leader General Radovan Krstic was convicted

69. *Id.* para. 220; see also *id.* para 228.

70. *Id.* para. 224, fn. 288 (citing *R. v. Logan*, [1990] 2 S.C.R. 731, 735 and *R. v. Rodney*, [1990] 2 S.C.R. 687 .

71. Compare *Prosecutor v. Milosevic et al.*, Case No.: IT-99-37-I, Indictment, 24 May 1999 with *Prosecutor v. Milosevic et al.*, Case No.: IT-99-37-I, Amended Indictment, 29 June 2001 and *Prosecutor v. Milosevic et al.*, Case No.: IT-99-37-PT, Second Amended Indictment, 29 Oct. 2001.

as part of a “joint criminal enterprise” to commit genocide with respect to the Srebrenica massacre of July 1995. The Trial Chamber was not prepared to conclude that there was an operational genocidal plan until the days immediately preceding the killings, when it said that “ethnic cleansing” become transformed into a full-blown plan to destroy physically the Bosnian Serbs in Srebrenica. It found that “General Krstic could only *surmise* that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all.”⁷²

Both of these forms of criminal participation, superior responsibility and joint criminal enterprise, involve a presumption that the offenders behave as “reasonable” people. They establish an objective rather than a subjective standard for the assessment of *mens rea*. The Tribunal can remain uncertain about what the offender actually believed, intended and knew, as long as it is satisfied with how a reasonable person in the same circumstances would have judged the situation and reacted.

Command responsibility requires that the offender “had reason to know,” while joint criminal enterprise allows a conviction where acts are “natural and foreseeable.” The use of objective criteria to measure knowledge and intent is well-accepted in criminal justice systems in the case of negligence-based offences. A negligent person is someone who does not act in the manner of a “reasonable” one, and who does not appreciate what is “natural and foreseeable.” But negligence-type offences are not treated as the most serious crimes, and they do not attract the most serious penalties. It is a form of anti-social behaviour judged by a different yardstick than those who commit crimes with malice and premeditation.

Yet in the case of the International Criminal Tribunal for the former Yugoslavia, an offender may be convicted of the most serious crimes, and sentenced to lengthy terms in prison, on the basis of what can amount to a negligence-like standard of guilt. General Krstic was convicted of genocide, not manslaughter, and he was sentenced, as a man in his early fifties, to a term of forty-six years in prison, all on the basis of the joint criminal enterprise theory of criminal liability. The Trial Chamber never really concluded that he actually intended to commit genocide – a requirement of the chapeau to article 4(2) of the *Statute* – but only that genocide was a “natural and foreseeable” consequence of a criminal plan to ethnically cleanse Srebrenica, and that a reasonable person would have “surmised” such a development.

Dilution of the *mens rea* standard in the case of prosecutions that rely upon superior responsibility or joint criminal enterprise raises issues of a

72. Prosecutor v. Krstic, Case No.: IT-98-33-T, Judgement, 2 Aug. 2001, para. 622 (emphasis added).

policy nature. Granted, these two techniques facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy.

At present, a conviction that relies upon either superior responsibility or joint criminal enterprise appears to be a likely result of the trial of Slobodan Milosevic.⁷³ The three indictments as amended, dealing with crimes in Kosovo, Croatia and Bosnia and Herzegovina, all place reliance on these techniques. However, if it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit, we may well ask whether the Tribunal will have fulfilled its historic mission. It is just a bit like the famous prosecution of gangster Al Capone, who was sent to Alcatraz for tax evasion, with a wink and a nod, because federal prosecutors couldn't make proof of murder.

If it cannot be established that leaders such as Milosevic actually intended the atrocities with which they are charged, the door is left ajar for future generations to deny the truth. As special Rapporteur Louis Joinet has written,

The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember" on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved.⁷⁴

Holocaust denier David Irving has made a career out of claiming that Hitler never actually intended to destroy the Jews of Europe. He generally concedes the involvement of Hitler's associates in racist atrocities, but attempts to rehabilitate the *fuhrer*, to the acclaim of neo-Nazis around the world.⁷⁵ But can it be a serious and credible answer to Irving's revisionism

73. See MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 122-26 (2002) (discussing forms of criminal responsibility).

74. *The Administration of Justice and Human Rights of Detainees*, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 49th Sess., Agenda Item 9, at 4, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997) (proposed by Mr. Joinet pursuant to Sub-Commission decision 1996/119).

75. Irving's revisionist views that centre around a denial that Hitler knew of the planned extermination of the Jews are well-documented, and well-demolished. See RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 71-

to claim that even if Hitler did not really intend the Holocaust, he should be held accountable for the actions that he had “reason to know” his subordinates, like Heydrich and Eichmann, were committing, or that their acts were “natural and foreseeable” consequences of his plan to make Europe *judenfrei*? Is history served if we say, in effect, that we may not be able to prove that Hitler was personally involved in the final solution or even had knowledge of it, but that this doesn’t matter because he ought to have known about it, and he was derelict in his duty as a superior or commander?

In this respect it may be worth recalling a warning from Trial Chamber III (Judges May, Bennouna and Robinson), in the *Kordic* judgement of 26 February 2001:

The expansion of *mens rea* is an easy but dangerous approach. The Trial Chamber must keep in mind that the jurisdiction of this International Tribunal extends only to ‘natural persons’ and only the crimes of those individuals may be prosecuted. Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal.⁷⁶

In its first Annual Report, the Tribunal warned of the dangers of “guilt by association,” observing that suggestions of collective responsibility could frustrate its objectives.

Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, “collective responsibility” - a primitive and archaic concept - will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of “collective responsibility” easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.⁷⁷

103 (2001). See generally D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL (2001).

76. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 219 (reference omitted).

77. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. GAOR/SCOR, 49th Sess., UN Doc. A/49/342 - S/1994/1007, para. 16 (1994).

Ultimately, it is for this reason that the concept of *mens rea* is so central to all of the prosecutions of the International Criminal Tribunal for the former Yugoslavia. Deviation from adherence to strict principles may augment the chances of conviction but it can also threaten the Tribunal's ability to fulfil its solemn goals.

Annex 73

**Chiara Giorgetti, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL
COMMUNITY ACTIONS IN EMERGENCY SITUATIONS (2010)**

*Pursuant to Rules of the Court Article 50(2), this annex is
comprised of such extracts of the whole document as are
necessary for the purpose of the pleading. A copy of the
whole document has been deposited with the Registry.*

A Principled Approach to State Failure

International Community Actions in
Emergency Situations

By

Chiara Giorgetti

With a Foreword by

Professors Michael Reisman and Lea Brilmayer



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Chapter Four

What is State Failure? The Inadequacy of Existing Legal Techniques to Deal with Failed States

In the previous chapters, I demonstrated that the international community is ill-prepared to deal with the incapability of a State to perform the obligations owed to it and to other subjects. Though some tools exist, they are mostly *ad hoc* and cannot properly address the dilemmas of State failure. This is because State failure is a complex phenomenon, yet a phenomenon that is not recognized by international law.

As discussed in this study, State failure is best defined as the incapacity of a State to perform its obligations towards its citizens and towards the international community in general. Failed States are characterized by an implosion of States' structures, which results in the incapability of governmental authorities to perform their functions, including providing security, respecting the rule of law, exercising control, supplying education and health services, and maintaining economic and structural infrastructures. In fact, State failure can be seen as a *condition* in which the State is unable to provide political goods to its citizens and to the international community. These goods include security, border control, political structure, physical infrastructures, a judicial system, education and healthcare, and commercial and banking systems.

State failure is multifaceted and can be depicted as a continuum, as the State becomes progressively less capable of performing its functions and becomes more and more 'failed.' Complete State collapse is the ultimate, and rare, result, while different stages of State failure can be encountered along the continuum. State failure is not uncommon and examples exist in today's world. As discussed in the previous chapter, these include Somalia, which has been without a government for more than a decade, the Democratic Republic of Congo, which was shattered by internal rivalries and the presence of regional troops fighting for its mineral resources, and Sudan and Afghanistan, whose governments only control parts of their territory.

Curiously, however, a rigorous analysis of the legal implications, significance and consequences of State failure is missing. In fact, because definitions of what constitute a 'failed State' are, in general, informed by the analysts'

definition of the State and of their own view over the functions and role of the State, international law has not recognized and named the phenomenon of State failure. This is because international law focuses on the creation and dissolution of a State, but has not focused on the evolution, changes or temporary failures that may occur after a State is created.

State failure implies the possibility that a State cannot – rather than does not want to – perform its functions, even after its statehood is recognized. Moreover, State failure implies a gradation of sovereign capacity, while for international lawyers sovereignty either exists or it does not. If at all, international law views failed States as States with ineffective governments.¹ However, failed States are not just failed governments. Their failure is normally long-lasting and encompasses several to all the functions of the State, not solely their governmental functions. State failure includes not only an ineffective government, but affects the bases and entire structure of the State, including its population, territory and capacity to perform international and internal obligations.

Historically, State collapse is the product of several key events. Although it is not possible to single out one cause of State failure, several interlinked causes exist, both endogenous and exogenous to the State. Endogenous causes include corruption, structural weaknesses, and misadministration. Exogenous causes include macroeconomic and political policies, foreign interventions, either in support of those in power or opposition groups, the decline of foreign financial and political support, and generally the processes of modernization “which encourage[s] social and geographical mobility but [is] not counterbalanced by nation-building processes capable of placing the State on a firm foundation.”²

Three conditions are also generally associated with State failure: the end of the Cold War, ethnic unbalances and the heritage of the colonial regimes.³

¹ For example, Ralph Wilde affirms that failed States denote situations in which “the governmental infrastructure in a State has broken down to a considerable degree.” R. Wilde, *The Skewed Responsibility Narrative of the Failed States Concept*, 9 ILSA J. INT’L & COMP. L. 425, 426 (2003).

² D. Thürer, *The “Failed State” and International Law*, INT’L COMM. OF THE RED CROSS (31 Dec. 1999), available at: <http://www.globalpolicy.org/component/content/article/173/30464.html>.

³ See, *inter alia*, William Reno, *Shadow States and the Political Economy of Civil Wars*, GREED AND GRIEVANCE, ECONOMIC AGENDAS IN CIVIL WARS 43 (M. Berdal and D.M. Malone eds., 2000); W. RENO, *WARLORD POLITICS AND AFRICAN STATES* (1998); MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE (S. Chesterman, M. Ignatieff, and R. Thakur eds., 2005); R. Joseph, J. Herbst, *Correspondence: Responding to State failure in Africa*, 22 INT’L SECURITY 175, 175–184 (1997); C. Tilly, *Where Do Rights Come From?*, DEMOCRACY, REVOLUTION AND HISTORY 55–72 (Theda Skocpol ed., 1995);

First, State failure may be considered a typical post-Cold War phenomenon. In fact, the end of the cold war brought about a major change in the dynamics of international relations, which resulted in a shift of political alliances among States and regions. As a result of the end of the Cold War, super powers became less inclined to support weak regimes and declined their economical and military support to former allies in Africa and Asia. As financial assistance and political support given to politicians dried up, governments became too weak to maintain power. Historically, a wave of failed States coincided with the end of the Cold War. Somalia and the Congo, the main examples of State failure, were heavily supported both financially and politically by both super powers at different stages. Their regimes collapsed in the early 1990s, shortly after the end of the cold war.

However, although State failure is undoubtedly connected to the end of the Cold War, the seed that grew into State failure was planted before, when State's rulers began to personalize and pray on State's resources, while disenfranchising and isolating the majority of the population. Hence, the end of the Cold War exposed a flawed governance system that already existed. The end of the Cold War, therefore, only took away the economic and political resources that sustained a system that was already pathogenic.

The issue of ethnic differences is also often considered an important source of State weakness and, hence, failure. Ethnic tension is an important structural reason for internal conflict that weakens the institutions of governance and uses up valuable human and financial resources. However, empirical research shows that although the failure of States in the beginning of the 1990s coincided with an increase in the frequency of civil war, there is no direct link between civil war and ethnic tensions, and thus between ethnic differences and State collapse.⁴

J. HERBST, STATES AND POWER IN AFRICA, COMPARATIVE LESSONS IN AUTHORITY AND CONTROL (2000); Christopher Clapham, *Failed States and Non States in the International Order* (paper presented at the Conference on Failed States, 7 April 2000, Florence, Purdue University); I. William Zartman, *Introduction: Posing the Problem of State Collapse*, COLLAPSED STATES, THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (I.W. Zartman ed., 1995).

⁴ To reach this conclusion, Fearson and Laitin implement a three-step approach. They first showed that there was no direct connection between the end of the Cold War and the increase in civil wars. They analyzed 127 post-WWII internal conflicts and concluded that, contrary to common opinion, "the prevalence of civil war in the 1990s was *not* due to the end of the Cold War and associated changes in the international system. The current level of about one in six countries had already been reached prior to the breakup of the Soviet Union and resulted from a steady, gradual accumulation of civil conflicts that began immediately after World War II." They then demonstrated that it was not true that a greater degree of ethnic or religious diversity could, by itself, make a country more prone to civil

Colonialism is another historical element considered a root cause of State failure, as often State failure occurs in former colonized territories, mostly in Africa. Two main reasons are often given to explain this position: first, colonization often resulted in the imposition of governmental structures that were alien to the political systems that existed prior to colonization. Empirical evidence, however, provides limited support to this argument, as there are no common governmental characters in failed States.⁵ A second negative legacy of colonization was the creation of artificial inter-state boundaries, which was based upon colonial boundaries that did not respect ethnic alliances or geographical characters.⁶ Problematic boundaries have been a recurrent source of conflict in post colonial countries, and several failed States have unsettled borders, including Somalia and the DRC.

The narrative of State failure as colonial heritage has also been used in legal discourse. Ruth Gordon defines State failure as a 'neo-colonial' notion.⁷ Ralph Wilde affirms that the way the term is used "suggests exclusive responsibility on the part of the State and its people for the breakdown of gover-

war. Third, they demonstrated that the degree of grievances by ethnic minorities had no causal link to civil war. See James D. Fearon and David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 AM. POL. SCI. REV. 75, 75–90 (2003).

⁵ Zartman suggests that State collapse in independent Africa is not a postcolonial phenomenon, as "no common theme or characteristic runs through the cases of collapse that would indicate that collapse was the result either of the same 'Western-style' malfunction in the state or of particularly badly adapted Western institutions. While parliaments, parties, and bureaucracies in Africa seem to have difficulties in living up to Montesquieu's, Madison's, or Weber's standards, these shortcomings do not seem to be the key to collapse; nor do these institutions function any better in noncollapsing states in Africa. Nonetheless, it can be said that the poor performances of their functions – representation, interest articulation, output efficiency – are broad causes of state collapse, whether performed by the 'proper' institution (in Western terms) or by a surrogate more suited to African conditions." I. William Zartman, *Introduction: Posing the Problem of State Collapse*, COLLAPSED STATES, THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 6 (I. William Zartman ed., 1995). Post colonialism was an enabling factor because it recognized elites that dismissed western style democracy. Moreover, the colonial legacy created and empowered phony elites and destroyed the traditional forms of social structure of control, which existed before colonization, without creating new viable ones. Their governments are often deficient in the political will, institutional authority, and organized power to protect human rights or provide socioeconomic welfare. See, *inter alia*, WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* (1998), DAVID CAMPBELL, *NATIONAL DECONSTRUCTION, VIOLENCE, IDENTITY, AND JUSTICE IN BOSNIA* (1998), and ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990).

⁶ J. Herbst, *Responding to State Failure*, 21 INT'L SEC. 120, 120–144 (1996–1997).

⁷ Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 914 (1997).

nance.”⁸ Helman and Ratner talk about “saving failed States.”⁹ However, I argue that these descriptions are flawed because they confine themselves to describing how failed States are regarded (by the viewers themselves), rather than searching for the legal consequences of State failure and the role that the international legal community can play in making them viable again. It is incorrect to apply value judgments to State failure. It is much more useful to understand the phenomenon politically and legally and seek solutions.

In the following sections, I will assess this situation and will argue that failed States are characterized by their incapacity to fulfill their social contract and by their inability to be recognized as having a specific character in international law.

1. *State Failure as Unfulfilled Social Contract*

State failure has been defined in political theory as a State that is unable to fulfill its social contract.¹⁰ As briefly discussed above, in the introduction of this chapter, this is a most fitting definition.

In essence, the theory suggests that the existence of States is founded on a tacit, mutually beneficial ‘contract’ between the rulers and the ruled, based on rights and obligations that each party to the contract agreed to perform. Thus, while the ruled parties agreed to be ruled, pay taxes and obey the law, the rulers provide in exchange several political goods, including security, education and health care systems, and physical infrastructures.¹¹

⁸ R. Wilde, *The Skewed Responsibility Narrative of the Failed States Concept*, 9 ILSA J. INT’L & COMP. L. 425, 426 (2003).

⁹ Gerald B. Helman and Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL’Y 1, 3 (1992).

¹⁰ For the main proponents of the theory of the state as social contract see THOMAS HOBBS, *LEVIATHAN* (1851), JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (1690), JEAN-JACQUES ROUSSEAU, *LE CONTRAT SOCIAL* (1762).

¹¹ An alternative view describes the State as the legitimate holder of the monopoly of violence in a given territory. This view, however, is too limiting and cannot encompass the complexities highlighted by State failure. See MAX WEBER: *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (Talcott Parsons ed., 1947). Weber’s characterization of the State as the holder of the monopoly of violence has informed a specific understanding of failed states. In particular, Weber’s views are reflected in Ignatieff’s approach to State failure. Ignatieff affirms that failing States are characterized by “an inability to maintain a monopoly of the internal means of violence.” In application of this approach, Ignatieff states that State failure is first and foremost the result of the colonial legacy and of the mismanagements of the governments that took control in the post colonial era. Other enabling elements for state failure include outside interference, poverty, corruption, planning choices and ideological doctrines. The consequences of a State’s inability to secure and maintain order are not

fulfilling all or parts of their international obligations for nearly a decade, but they are still recognized as States by the international community and their status in the international community has not changed.

Thus, the element of the capability of entering into international relations, identified by the Montevideo Convention as a requirement for statehood, is – similarly to what was concluded for the previous three elements – useful to determine whether a new State can be recognized as such. However, it is not useful to assess the status or continuation of the existence of a failed or failing State.

It seems that changes in the constitutive elements of statehood do not affect States' standings in international law. This is because when analyzed, the definitions of the four elements concentrate solely on the initial existence of certain requirements and not on their continuation throughout the existence of the State. Further, the elements do not provide a clear indication of the consequences of changes in the elements that define the State.

To conclude, failed and failing States continue to be considered States even when they are incapable, for long periods of times, to fulfill their international obligations.

3. *Conclusion*

Failed States are characterized by the dispersion of State powers and the alteration and diffusion of the elements that constitute a State. However, the paragraphs above show that the loss of any or all of the elements that define a State does not result in the alteration or disappearance of statehood, or in the extinction of a State in international law. The instances of State extinction are well defined and do not include State failure. Moreover, definitions of the constitutive elements of statehood have developed so limitedly that they provide little help in understanding statehood.

Disguised under the premise of rigorousness, the definition of State in the Montevideo Convention is in fact lax and imprecise. It is limited to an indication of the elements necessary for a State to be created, but it is not helpful in assessing changes in the standing and responsibilities of the States once they are created.

Hence, although all States must possess the four Montevideo requirements when they are created, it is difficult in practice to transpose the analysis of the constitutive elements to verify any modification in a recognized State. In fact, although these requirements must exist for the creation of States, the consequences of the change of one of the elements in practice are not

clear, and in fact do not extinguish or alter the position of States within the international system.⁶⁷

⁶⁷ In addition to the Montevideo criteria, two further requirements are often considered essential elements of Statehood: recognition of the existence of the State by the international community, and the requirement of democratic governance. These requirements are briefly assessed here. This analysis aims at providing further appraisal of the characteristics of statehood, and whether they alter the definition of failed States as States in international law. Recognition of the State by fellow States is considered as a requisite for statehood, “effectively forming an additional category to those stipulated in the Montevideo Convention.” HIGGINS, *PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT* 42 (1994). However, an analysis of this additional element does not seem to provide any further assistance in the definition of State. Two main theories on the nature of recognition exist: the constitutive theory and the declaratory theory. First, the constitutive theory maintains that only states that are recognized by other States can effectively participate in the international community. This theory implies that only recognized States have legal capacity to act and thus have international obligations. This, however, is not manifestly the case. Second, the declaratory theory maintains that recognition is only a declaration by a State and does not have general legal consequences. An interpretation of recognition as a declaratory act, which merely acknowledges an existing situation, seems to be more appropriate. MALCOLM N SHAW, *INTERNATIONAL LAW* 367–408 (5th ed. 2003). See also J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 24 (1st ed. 1979) (stating that “the tentative conclusion is that the international status of a State ‘subject to international law’ is, in principle, independent of recognition, although the qualifications already suggest that the differences between declaratory and constitutive school are less in practice than might have been expected.”) In fact, State recognition is mostly due to political consideration. The Institute de Droit International expressly acknowledged that recognition has a declaratory effect and stated that “the existence of the new State with all the legal effects attached to that existence are not affected by the refusal of recognition by one or more States.” Resolution on Recognition of New States, adopted at the Brussels Session of the Institute de Droit International on 23 April 1936, Art. 1 (*available at*: http://www.idi-iil.org/idiF/resolutionsF/1936_brux_01_fr.pdf (translation from French by the author)). Moreover, although contemporary States’ policy is to recognize States and not governments, several scholars agree that it is the recognition of governments rather than the recognition of States that yield legal consequences. See S. TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW* 3–17 (1998); HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 131–166 (1963). In fact “although it is the State which is the person in international law, it is nevertheless the recognition of a government of the State which is the prerequisite for the actual flow of practical legal consequences from recognition. The recognition of a State without the recognition of some government of that State is purely an academic exercise; but the recognition of a *de facto* government without the recognition of any corresponding State has immediate legal consequences on an important order.” R. Y. JENNINGS, *GENERAL COURSE OF INTERNATIONAL LAW*, 121 *Recueil des Cours* 351 (1967–II). Recognition, thus, does not provide any useful assistance to the definition of Statehood, nor, as it stands, helps to better understand State failure. A second requirement of Statehood is that of democratic governance. Some scholars claim that recent developments in the practice of State recognition are contributing to the creation of a ‘democratic entitlement’. See generally DEMO-

In fact, even when one – or more than one – of the Montevideo's elements of statehood is weakened, the standing of a State in the international legal system has not been questioned. Professor Crawford concludes that

a State is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three.⁶⁸

Once statehood has been recognized, changes in the elements upon which such recognition was granted do not alter the status of the State.

Thus, based upon the overview of the constitutive elements of the State, failed States continue to be considered unaltered States in international law. In practice, this means that the status of failed States cannot be properly addressed.

This conclusion is both unsatisfactory and problematic.

It is unsatisfactory because it demonstrates that the defining elements of statehood, the pillar of international law, provide only a very limited elucidation of what constitutes a State. The definitions of a 'permanent population' and of a 'determined territory' are limited to the existence of a community living in a territory, even if the borders are not defined and population not fixed. Similarly, the requirement of a 'government' continues to exist even when the effectiveness of such government is disrupted by civil war. Finally,

CRATIC GOVERNANCE AND INTERNATIONAL LAW (G.H. Fox and B.R. Roth eds., 2000). This view is supported by the practice of states vis-à-vis the recognition of new states formally part of the Soviet Union. In 1991, when the Soviet Union began to dissolve, the European Council issued a declaration containing 'Guidelines on the recognition of New States in Eastern Europe and in the Soviet Union' requiring respect for democracy and human rights as a criteria for recognition. Danilo Türk, *Annex I: Declaration on the 'Guidelines on the Recognition of New States in Eastern European and in the Soviet Union'* 4 EU, J. INT'L. L. 72 (1993). A similar requirement was imposed on the former members of the Yugoslav Federal State by the Badinter Arbitration Commission, although the practice in this case is more complex. S.D. Murphy, *Democratic legitimacy and the recognition of States and governments*, DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123–154 (G.H. Fox and B.R. Roth eds., 2000). However, there is no evidence that States refuse to recognize the existence of another State only because it is not democratic, in fact, "notions of democratic legitimacy are certainly present in contemporary practice concerning recognition of States. However, the evidence of these notions is not uniform, and it derives exclusively from practice of States that are themselves democratic." *Id.* at 139. Besides, respect of democracy may be a requirement for recognition of the State, but it is not a requisite for the existence of the State. These two additional criteria, therefore, do not provide any additional clarification to the definition of State in international law. It follows that they are also not relevant to assess whether these criteria need to be found in failed and failing States.

⁶⁸ J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 417 (1st ed. 1979). Similarly Professor Crawford also states that the "presumption – in a practice a strong one – is in favour of the continuance, and against the extinction, of an established State. Extinction is, thus, within broad limits, not affected by more or less anarchy with the State." *Id.*

the requisite of ‘capability of engaging in international obligations’ has been useful only as a definition of independence. This conclusion is all the more surprising as the ‘State’ is the fundamental keystone over which international law is built. This anomaly derives from the fact that the Montevideo definition of State looks at the elements needed to create a State, rather than at the elements needed for the maintenance of statehood. Therefore, it does not provide effective guidance when the elements required for the establishment of statehood are changed or lost after statehood is recognized.

This conclusion is also problematic. At present, State failure is not acknowledged in the framework of international law. Failed States continue to be considered fully equal and capable States under international law, as international law does not react to the weakness and failure of the State as an organic structure. State failure often implies severe migration and population displacements. It infringes on the certitude of a State territory, as borders become porous, rebel groups control important sections of the territory and neighboring countries often secure their borders by patrolling foreign territory. Additionally, governments are not effective and the capacity to enter into relations with other States is lacking.

International law does not contemplate the case of a State that ceases to be able to deliver political goods, and has created no mechanisms for the recreation or substitution of State power when the State is no longer capable of performing its duties. There is no space for an even temporary power vacuum. In the most serious case of State failure, States continue to exist on the map – like in the case of Somalia – and maintain their former borders and population, but there is little more beyond that.

The phenomenon of failed States is broad and complex, as failed States are “the product of a collapse of the power structures providing political support for law and order.”⁶⁹ However, “the international community has not previously faced the total breakdown of a State unaccompanied by some other centralized entity claiming statehood”⁷⁰ and has been slow to appraise State failure.

Oddly, although States are the building blocks of international law, the definition of their constitutive elements remains general, and failed States continue to be required to behave like States and fulfill the many obligations

⁶⁹ D. Thürer, *The “Failed State” and International Law*, INT’L COMM. OF THE RED CROSS (31 Dec. 1999), available at: <http://www.globalpolicy.org/nations/sovereign/failed/2003/0725law.htm>.

⁷⁰ Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT’L L. J. 301, 338 (1995).

incumbent upon them. Obligations continue to exist, although no power can actually perform them.⁷¹

To remain significant, however, any juridical definition of State must confront reality and must be elaborated so as to respond to changes in international law and politics. It needs to evolve and take into consideration the reality of statehood, and namely fragile, failed and failing States.

Failed and failing States vary a great deal, and there is a lot of gradation in how capable they are of fulfilling their obligations and whether their incapacity is transitory or protracted. In any case, I propose that introducing a concept by which international obligations are – temporarily and for limited areas – performed by other actors in the international community would take this reality into consideration. This will ensure that the necessary obligations are indeed performed, while at the same time preserving failed States' sovereignty. Failed States remain independent, equal to other States and the sole sovereign of their territory. Once their ability to perform their obligations is restored, they will again be required to perform all obligations owed to other States or other subjects of the international community.

Failed and failing States must be assessed in light of the political and legal changes that resulted in State failure. Failed States have factually lost the ability to deliver the goods that they agreed to deliver. Thus, while it is necessary to recognize that a State does not cease to exist because certain characteristics that made its existence possible are no longer present,⁷² it is also important to acknowledge that these transformations have altered the ability of the State to perform its obligations.⁷³

⁷¹ Weiss and Chopra remark that while under international law, there is no degree of sovereignty, in the sense that it either exists or it does not, “[i]n contrast, political scientists and international relations theorists have formulated a concept of sovereignty, which they perceive in terms of degrees... For these scholars it is possible to be *more* sovereign or *less* sovereign. *Sovereignty* becomes an elastic term that refers to a category of social and political organization that is linked geographically to delimited territory.” T. Weiss and J. Chopra, *Sovereignty under Siege: from Intervention to Humanitarian Space*, BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTIONS 99–100 (G. Lyons and M. Mastanduno eds., 1995) (emphasis in original).

⁷² As Oppenheim concludes “once it is appreciated that it is not so much the possession of sovereignty which determined the possession of international personality but rather the possession of rights, duties and powers in international law, it is apparent that a State which possesses some, but not all, of those rights, duties and powers is nevertheless an international person.” OPPENHEIM’S INTERNATIONAL LAW 123 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1992).

⁷³ State inability or failure is not an accepted circumstance that precludes wrongfulness in international law. However, if there are no institutions that are authorized to act on behalf of the State, the State cannot be held responsible. Recently, however, the international community has more frequently intervened to restore the protection of fundamental

In the next three chapters, I will assess if and how particular obligations are performed in crises situations similar to State failure, and who has the authority to perform them. In particular, I will assess the performance of acts directed at addressing health emergencies, environmental crises and gross human rights violations that have international impacts. In fact, performance of these obligations is not only important for the failed State, but has become necessary to ensure the safety and survival of the entire international community.

human rights when a State has been unable or unwilling to do. Examples include Somalia and Kosovo. This has not been without controversy. See J. CRAWFORD, COMMENTARY TO THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-THIRD SESSION (Nov. 2001); D. Thürer, *The “Failed State” and International Law*, INT’L COMM. OF THE RED CROSS (31 Dec. 1999) (available at: <http://www.globalpolicy.org/nations/sovereign/failed/2003/0725law.htm>).

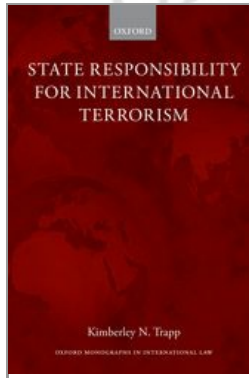
Annex 74

Kimberley N. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM (2011)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

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State Responsibility for International Terrorism

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The ICJ's jurisdiction over disputes relating to state responsibility for international terrorism

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[+] Abstract and Keywords

Chapter 4 explores the potential bases of the ICJ's jurisdiction in cases of State responsibility for international terrorism, beginning with optional clause declarations under Article 36(2) of the ICJ Statute. It then critically examines the *Bosnia Genocide Case* decision as a precedent for arguing that the international terrorism suppression conventions implicitly prohibit State terrorism through their obligation of prevention, and thereby provide a basis for the ICJ's jurisdiction in cases of responsibility for State terrorism. Chapter 4 further analyses the international terrorism suppression conventions' exclusion clauses and the interaction of the conventional regime and international humanitarian law, in order to define the potential scope of the ICJ's jurisdiction. Finally, Chapter 4 assesses the enforcement options available following a determination of State responsibility for international terrorism by the ICJ, in particular measures adopted by the Security Council pursuant to Article 94(2) or Chapter VII of

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the UN Charter.

Keywords: Terrorism, International Court of Justice, optional clause declarations, compromissory clauses, reservations, Bosnia Genocide Case, humanitarian law, Security Council enforcement

A breach of the primary rules of international law related to terrorism considered in Chapters 2 and 3 gives rise to a state's responsibility for an internationally wrongful act by operation of the law.¹ As a result of such responsibility, the wrongdoing state is under a secondary obligation to cease the wrongful conduct and to make full reparation for any injury caused thereby.² There has yet to be a case, however, in which a state has acknowledged its responsibility for international terrorism following protest of such responsibility by the injured state. If the injured state wishes to pursue its demands for cessation and reparation, it will have to rely on the mechanisms available under international law to implement the wrongdoing state's responsibility.

One possible mechanism for implementing responsibility, envisaged in Chapter VI of the UN Charter, is the peaceful judicial settlement of disputes.³ The presence of an authoritative mechanism to establish (with binding effect) that a primary obligation has been breached, and the legal consequences of that breach, does not, of itself, enforce the secondary obligations that flow from responsibility. Judicial settlement of disputes may impose further primary obligations on the wrongdoing state, for instance the primary obligation to abide by the decisions of the ICJ under the UN Charter,⁴ but the treaty obligation to abide by decisions of the Court is no more binding on a wrongdoing state than the primary obligation it has breached (which is the subject of judicial determination) and the secondary obligations that flow from its responsibility for that breach under customary international law. That said, a binding determination of responsibility both pressures and gives rise to additional possibilities for pressuring a wrongdoing state into complying with its secondary obligations. For instance, an objective determination of wrongfulness that is binding on the wrongdoing and injured states can eliminate the risks associated with the adoption of self-help countermeasures by the injured state, as discussed in Chapter 5. Equally, a determination of responsibility by the principal **(p.132)** judicial organ of the UN can trigger the Security Council's power to decide upon measures to give effect to the judgment as discussed in Section 4.5 below.

In order that the judicial settlement of disputes amount to a potential mechanism for implementing a state's responsibility for international terrorism, there must be an available forum for such settlement. Despite the proliferation of international courts and tribunals,⁵ the ICJ remains the only international court with a general jurisdiction that might cover disputes relating to a state's responsibility for international terrorism. The ICJ's jurisdiction, however, is not compulsory and is based on the consent of the applicant and respondent states. Consent can be expressed in an *ad hoc* fashion with reference to a particular dispute,⁶ pursuant to an optional clause declaration,⁷ or through compromissory clauses.⁸ Given the unlikelihood that a respondent state will accept the ICJ's jurisdiction on an *ad hoc* basis in cases of its responsibility for international terrorism, this chapter examines the latter two bases of jurisdiction.

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As examined in Chapter 2, the rule of international law prohibiting state terrorism is an instantiation of more general rules and principles of customary international law, in particular the prohibition of aggression, the prohibition of the use of force, and the principle of non-intervention. Equally, as examined in Chapter 3, the obligation to prevent international terrorism is both an obligation of customary international law, and a treaty obligation under the TSCs. Breach of the customary obligations can form the substantive basis of an invocation of responsibility before the ICJ in cases where the terrorist act is *not* covered by a TSC, or involved states are not party to a relevant TSC. Absent *ad hoc* consent, such breaches of customary international law will only fall within the ICJ's jurisdiction to the extent that the involved states have made applicable optional clause declarations under Article 36(2) of the ICJ Statute. Section 4.1 examines such declarations as a basis of the ICJ's jurisdiction in cases of internationally wrongful acts related to terrorism.

The TSCs each contain a compromissory clause conferring jurisdiction on the ICJ over disputes 'between two or more State Parties concerning the interpretation or application of the relevant TSC.'⁹ As a result, at least in reference to a dispute (**p.133**) over breach of the obligation to prevent acts of international terrorism, there will be more than one possible bases of jurisdiction (assuming the relevant act of terrorism falls within the scope of a TSC): an Article 36(2) declaration applicable to the customary obligation to prevent international terrorism generally; and the TSC compromissory clauses applicable to the parallel treaty obligation to prevent particular acts of terrorism covered by the TSCs.¹⁰

The TSC compromissory clauses will be very important in reference to disputes regarding the breach of an obligation to extradite or submit terrorist actors to prosecution. This is because the *aut dedere aut judicare* obligation is treaty-based and has not developed into customary international law.¹¹ The scope of exclusion clauses, discussed in reference to struggles for self-determination in Chapter 3, and in reference to state activity in Section 4.2.2 below, will be particularly important in this regard as the Geneva Conventions and Additional Protocols (the alternative treaty source of the substantive obligation to prosecute or hand over that might apply to relevant conduct) do not contain compromissory clauses conferring jurisdiction on the ICJ to settle disputes.

The TSC compromissory clauses might also be a relevant basis of jurisdiction for claims of state terrorism. In its judgment on the merits of the *Bosnia Genocide Case*, the ICJ held that a state's obligation to prevent genocide under the Genocide Convention necessarily implies a prohibition of the commission of genocide by the state itself. Like the Genocide Convention, the TSCs do not expressly prohibit state conduct, but require states to prevent and punish the terrorist offences defined therein. The *Bosnia Genocide Case* precedent suggests that an applicant state could successfully argue that the TSCs impliedly prohibit state terrorism through their obligation of prevention. Section 4.2 below examines the TSCs as a basis of the ICJ's jurisdiction in cases of state terrorism. There are, however, limits to the type of state conduct that might be covered by the TSCs, and Section 4.2.2 considers the extent to which military conduct is excluded from their scope.

The TSCs are subject to reservations and their compromissory clauses each set out pre-

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conditions for the seisin of the ICJ. Section 4.4 considers the impact of these conditions and reservations on the potential for judicial settlement of disputes regarding state responsibility for international terrorism. Finally, Section 4.5 explores the Security Council enforcement options available to a state that has successfully established another state's responsibility for international terrorism before the ICJ.

4.1 Optional clause declarations

As discussed in Sections 4.2 and 4.3 below, disputes relating to sponsorship of, support for, or a failure to prevent acts of international terrorism may fall within the **(p.134)** ICJ's jurisdiction pursuant to the compromissory clauses in the Terrorism Suppression Conventions. But the compromissory clauses will only serve as a basis of the Court's jurisdiction to the extent that the act of terrorism is one that meets the elements of the offences defined therein,¹² is not excluded from the scope of the TSC, and the states involved in the dispute are parties to that TSC (including its compromissory clause). In all other cases, and assuming a refusal to grant *ad hoc* consent, compulsory jurisdiction under Article 36(2) of the ICJ Statute will be the only basis of the Court's jurisdiction for disputes relating to state responsibility for international terrorism. The merits of such disputes will be decided on the basis of customary international law.

There are two factors that militate against the ICJ's having jurisdiction over international terrorism disputes pursuant to an optional clause declaration. The first results from the limited number of relevant declarations accepting the ICJ's compulsory jurisdiction under Article 36(2) of the ICJ Statute. Only approximately one-third of UN member states have accepted the ICJ's compulsory jurisdiction,¹³ and very few are states that are habitually charged with sponsorship of, support for, or failure to prevent international terrorism. With the exception of the Sudan,¹⁴ none of the current US designated 'State Sponsors of Terrorism' have filed optional clause declarations.¹⁵ Libya and North Korea have recently been removed from the US State Sponsors list, but were ever-present members of the list throughout the 1980s and 1990s.¹⁶ Neither has made an optional declaration accepting the ICJ's compulsory jurisdiction. Finally, a number of states with terrorist organizations operating from their territory, including Yemen, Algeria, Lebanon and Afghanistan, have not accepted the compulsory jurisdiction of the Court under Article 36(2) of the ICJ Statute.¹⁷ Of the remaining four states identified as terrorist safe **(p.135)** havens by the US Department of State that have made an optional clause declaration,¹⁸ one has done so subject to a reservation.¹⁹

This capacity to carve out certain disputes or disputants from acceptance of the ICJ's jurisdiction under Article 36(2) of the ICJ Statute further decreases the chances of the Court having jurisdiction over a dispute based on the breach of customary international law, including one relating to state responsibility for international terrorism.²⁰ Of the sixty-six states that have accepted the ICJ's compulsory jurisdiction under Article 36(2) of the ICJ Statute at the time of writing, more than one-third have reserved against the ICJ having jurisdiction over one or more of the following disputes: disputes related in some way to the use of armed force;²¹ disputes with particular groupings of states;²² disputes concerning the interpretation or application of a multilateral treaty unless all the

the existing TSCs do not.¹²⁹

(ii) Implied exclusion of state military activities?

With the exception of the Terrorist Bombing Convention, Nuclear Terrorism Convention, 2005 Protocol to the SUA Convention,¹³⁰ and to a lesser extent the **(p.159)** Hostages Convention and the Terrorism Financing Convention, the TSCs in force at the time of writing are silent on the 'state terrorism' issue. There is, however, some practice suggesting that the military activities of a state that meet the elements of offences defined in the remaining TSCs are not considered subject to those TSCs, and are rather considered subject to more directly applicable legal regimes—practice that might inform an interpretation of the scope of those TSCs. TSCs adopted under the auspices of the IMO in 2005 and the ICAO in 2010 confirm this implicit analysis by incorporating exclusion provisions identical to those in the Terrorist Bombing and Nuclear Terrorism Conventions, as discussed further below.

Internationally Protected Persons Convention

The Internationally Protected Persons Convention does not expressly exclude any state activities from its scope, but states do not tend to invoke the Internationally Protected Persons Convention to condemn state activities unless attempting to establish the ICJ's jurisdiction over a dispute.¹³¹ Instead, state force against diplomatically protected persons is, to the extent possible, dealt with as a matter regulated by the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations, and not as a question of state responsibility under the Internationally Protected Persons Convention.

For instance, states protesting action taken by Iraqi soldiers against foreign consulates, embassies and their ambassadors or attachés in Kuwait after Iraq's invasion in 1990 did not invoke the Internationally Protected Persons Convention.¹³² Similarly, in a letter to the Secretary-General regarding an attack by Ecuadorian military personnel on the Peruvian Vice-Consul, Peru invoked both the Vienna Convention in Diplomatic Relations and the Vienna Convention on Consular Relations, not the Internationally Protected Persons Convention.¹³³ Finally, the Sudan informed the Secretary-General of an assault on its Ambassador to Egypt by Egyptian security forces, characterizing the assaults as 'flagrant violation[s] of the Charter of the United Nations, the Vienna Convention on Diplomatic Relations of 18 April 1961 and the resolutions of the General Assembly', but not of the Internationally Protected Persons Convention.¹³⁴

This practice suggests an application of the regime interaction principles discussed above in reference to the Terrorist Bombing and Nuclear Terrorism Conventions—treating the Internationally Protected Persons Convention as supplementary to existing bodies of international law, without overlap. In its *Tehran Hostages* decision, the Court showed an appreciation for these regime interaction principles, relying on more directly applicable rules to decide the case. **(p.160)** In particular, the Court did not consider it necessary to decide the question of responsibility under the Internationally Protected Persons Convention given that the Vienna Conventions applied to the facts before the Court and

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both Iran and the US were state parties to the Vienna Conventions and their accompanying Optional Protocols concerning the compulsory settlement of disputes.¹³⁵ But this will not always be the case. While the Vienna Conventions on Diplomatic and Consular Relations are (marginally) more widely ratified than the Internationally Protected Persons Convention,¹³⁶ only one-third of state parties to the Vienna Conventions have ratified their accompanying Optional Protocols conferring jurisdiction on the ICJ,¹³⁷ compared with 136 state parties to the Internationally Protected Persons Convention that have accepted the compulsory jurisdiction of the ICJ under the Convention's compromissory clause.¹³⁸ As a result, the issue of the applicability of the Internationally Protected Persons Convention to state conduct (whether the Vienna Conventions are more directly applicable to the conduct or not) may well arise in the context of disputes before the ICJ. In cases where relevant states have not ratified the Optional Protocols to the Vienna Conventions, the Court could well abandon the principled approach it took in *Tehran Hostages* (in which it relied on the more directly applicable Conventions), in favour of a position that supports its jurisdiction to hear a dispute.

There is also a broad spectrum of potential state conduct that falls outside the scope of the Vienna Conventions on Diplomatic and Consular Relations, to which the Internationally Protected Persons Convention would apply. For instance, the Vienna Conventions impose obligations on states as receiving states—and therefore the obligations resulting from the inviolability of diplomatic representatives of the sending state are limited to territory within the receiving state's jurisdiction or control. In addition, the Vienna Conventions on Diplomatic and Consular Relations are more limited in scope than the Internationally Protected Persons Convention in so far as the former only apply to persons connected with the diplomatic and consular relations between a sending and receiving state. The Internationally Protected Persons Convention applies more broadly to heads of state and other internationally protected persons (including diplomatic agents), as defined under general international law.¹³⁹ As a result, there are gaps in coverage in the Vienna **(p.161)** Conventions that might be filled by the Internationally Protected Persons Convention. Employing a *Bosnia Genocide Case* analysis, the Internationally Protected Persons Convention could impose obligations on states directly to refrain from uses of force against protected persons that would not otherwise be unlawful under the Vienna Convention regime.¹⁴⁰ For instance, a state's conduct against internationally protected persons, when perpetrated outside of its territory or territory it controls, or against an internationally protected person who is not protected pursuant to the Vienna Conventions, has been treated as falling within the scope of the Internationally Protected Persons Convention. In a letter to the Security Council, in which South Korea accused North Korea of having sent captains of its army to Rangoon in Burma to attack the South Korean President with explosives, South Korea characterized North Korea's conduct as 'criminal acts of terrorism' that amounted to a violation of the UN Charter *and* the Internationally Protected Persons Convention.¹⁴¹

IMO TSCs

At the SUA Conference in 1988, Saudi Arabia,¹⁴² Libya¹⁴³ and Nicaragua¹⁴⁴ proposed

Annex 75

Marko Milanovic, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW,
PRINCIPLES, AND POLICY (2011)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

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Extraterritorial Application of Human Rights Treaties

Law, Principles, and Policy

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sliver at a time, in cases in which it would be morally difficult not to do so, and yet not too inconvenient politically. Do they have some other choice, other than running headlong into utopia? Is there a better way?

4. A Third Model: Territorial Jurisdiction and the Distinction Between Positive and Negative Obligations

A. Universality unbound

The driving force behind the personal model is easy to spot—how could it be justified against the normative baseline of universality that a state which is in full control of its own agents is dispensed from respecting the human rights of persons whose lives its agents affect, merely on account of their location? Yet it is precisely this same driving force which ultimately leads to the collapse of the personal model of jurisdiction. Why then not simply say that states have to comply with their negative obligation to respect human rights in all circumstances, regardless of whether they exercise jurisdiction over a particular territory or area?

There is truly a fundamental distinction between a state's obligation to respect human rights, which requires it only to *refrain* from infringing upon an individual's rights without adequate justification, and its duty to *secure* or *ensure* human rights to the inhabitants of a certain territory, which, in certain circumstances, compels the state to prevent the violations of human rights even by private parties.²⁶⁵ According to the Human Rights Committee,

The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.²⁶⁶

²⁶⁵ See, e.g., T. Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981), at 72–91. P. van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, 4th edn, 2006), at 13; Nowak, above note 170, at 37–41. In the context of socio-economic rights, Eide has in particular developed a more detailed typology of rights, separating the broader obligation to ensure into the obligations to protect and fulfil—see generally 'The Right to Adequate Food as a Human Right', Final Report submitted by Asbjørn Eide, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1987/23 (1987). I do not believe that such a disaggregated typology would be of direct relevance for the issue of extraterritorial application, so I will not address it any further.

²⁶⁶ Human Rights Committee, General Comment No. 31, para. 8.

The positive obligation of a state to ensure the human rights of persons within its jurisdiction from violations by private parties is not absolute, as states are neither omniscient nor omnipotent. What they must do is to exercise due diligence, i.e. to take all measures reasonably within their power in order to prevent violations of human rights. As held by the Inter-American Court,

... in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.²⁶⁷

In order to be realistically complied with, the obligation to respect human rights requires the state to have nothing more than control over the conduct of its own agents. It is the positive obligation to secure or ensure human rights which requires a far greater degree of control over the area in question, control which allows the state to create institutions and mechanisms of government, to impose its laws, and punish violations thereof accordingly.

This is then what my proposed third model would amount to: the notion of jurisdiction in human rights treaties would be conceived of only territorially, as *de facto* effective overall control of areas and places. Having now looked at the text of the relevant treaties and the treaty practice of states generally, as well as at the case law, this is indeed the most natural way of interpreting the term 'jurisdiction'. This threshold would, however, apply only to the state's obligation to secure or ensure human rights, but *not* to its obligation to respect human rights, which would be territorially unbound.²⁶⁸

I should not be taken as arguing that the state is in exactly the same position with respect to its negative obligations when it acts inside its territory in conditions of normalcy, as when it acts outside it, particularly in wartime or other extraordinary situations. What I *am* arguing is that the best way to address these difficulties, and to fully take into account all considerations of effectiveness, is *not* in artificially imposing a threshold for the state's negative obligations, but in applying the *substance* of these obligations to the facts at hand with a greater degree of flexibility.²⁶⁹ As Lord Justice Sedley aptly put it in *Al-Skeini*:

²⁶⁷ *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 172.

²⁶⁸ Similarly, see E. Roxstrom, M. Gibney, and T. Einarsen, 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection', (2005) 23 *B.U. Int'l L.J.* 55, at 72 *et seq.*; J. Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context', (2007) 40 *Israel L Rev* 72, at 122–3.

²⁶⁹ See above, Chapter III, Section 10.

[I]t is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing. The question is whether our armed forces' effectiveness on the streets [of Basra] in 2003–4 was so exiguous that despite their assumption of power as an occupying force they lacked any real control of what happened from hour to hour in the Basra region. My own answer would be that the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force. Whether they were justified in using it in the situations they encountered, of which at least four of the cases before us are examples, is precisely the subject of the inquiry which the appellants seek. It is in such an inquiry that the low ratio of troops to civilians, the widespread availability of weapons and the prevalence of insurgency would fall to be evaluated.²⁷⁰

He did not, however, think that this approach was open to him under existing Strasbourg jurisprudence. And he was right—it is not. Adopting the third model would require a radical rethink of Strasbourg's approach, and to a lesser extent also that of other human rights bodies. I am well aware that this makes the third model less attractive. But having now extensively examined the European Court's convoluted case law on extraterritoriality, would it really be such a bad thing to put it on some sensible, principled foundation? I think not. It bears emphasizing, however, that even in regular peacetime conditions the European Court has been prepared to approach positive obligations flexibly.²⁷¹ Thus, in the context of the right to life it remarked that

[f]or the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way *which does not impose an impossible or disproportionate burden on the authorities*. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. . . . In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they *failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*.²⁷²

Let me now make my argument in more detail. I will first try to establish whether the text of the relevant treaties could accommodate the third model. While I am not saying that my argument is free of all difficulties, I believe that such difficulties can be overcome, particularly if the negative obligation to respect human rights is read into some of the treaties implicitly. Further, as I will explain, I am not advocating a crude distinction between negative and *all* positive obligations.

²⁷⁰ *Al-Skeini CA*, para. 197 (per Sedley LJ).

²⁷¹ See Lawson, above note 172, at 106.

²⁷² *Osman v. United Kingdom [GC]*, App. No. 23452/94, Judgment, 28 October 1998, para. 116 (emphasis added).

Rather, some positive obligations are procedural or prophylactic in nature, tied solely to the state's compliance with its negative obligation to respect human rights. In my view, it is only the wide-ranging obligation to *secure* or *ensure* human rights, particularly from acts of third parties, that requires a jurisdictional threshold. Finally, I will try to prove that, when compared to its rivals, this third model actually provides the best balance between universality and effectiveness, if at a cost.

B. Textual interpretation and implicit negative obligations

Is the third model even possible under the text of the relevant human rights treaties? Let us again look at what they say. Article 1 ECHR thus provides that '[t]he High Contracting Parties shall *secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention' (emphasis added). All this article says, as I read it, is that the positive obligation to *secure* human rights is contingent on state jurisdiction—something that I certainly do not dispute. Except in the descriptive heading of the article, it says nothing about the negative obligation to *respect* human rights, which does not mean that this obligation does not exist. Indeed, many human rights treaties with jurisdiction clauses explicitly refer only to the positive obligations of the states parties.

For example, all of the nine jurisdiction clauses in the CAT denote the scope of a positive obligation. Article 2(1) provides that '[e]ach State Party shall take effective legislative, administrative, judicial or other measures *to prevent* acts of torture in any territory under its jurisdiction' (emphasis added); Articles 5(1)(a), 5(2), and 7(1) require states to criminalize and prosecute torture on the basis of the territoriality and universality principles; Articles 11, 12, and 13 require states to review interrogation rules for the purpose of preventing torture, ensure an effective investigation, and provide remedies to individuals; while Article 16 requires states to prevent cruel, inhuman, and degrading treatment, all in 'any territory under its jurisdiction'. Notably, these provisions do not *expressly* say that the state as such has the negative obligation not to torture individuals or treat them inhumanely, probably because it was obvious that such an obligation existed, yet it would have been somewhat impolitic to spell it out. Similarly, Article 3 CERD provides that 'States Parties particularly condemn racial segregation and apartheid and undertake *to prevent, prohibit and eradicate* all practices of this nature in territories under their jurisdiction' (emphasis added).

The treaties which do explicitly mention the obligation to respect are those whose jurisdiction clauses are to a greater or lesser extent based on Article 2(1) ICCPR, which provides that '[e]ach State Party to the present Covenant undertakes *to respect and to ensure* to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant'. The grammatically more natural interpretation of this wording would be to say that the jurisdiction threshold applies to both the obligation to respect and to the obligation to ensure. This interpretation is however not the only plausible one—Article 2(1) could also be read as limiting the jurisdiction threshold only to the obligation to ensure, which

would be consistent with its object and purpose.²⁷³ Article 2(1) CRC and Article 7 of the Migrant Workers Convention are similar in this respect. Notably, however, Article 1(1) ACHR stipulates that the 'States Parties to this Convention undertake to respect the rights and freedoms recognized herein *and* to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' (emphasis added). This formulation could quite comfortably be seen as imposing a jurisdictional threshold for the obligation to ensure alone.

Coming back to the treaties which do not mention the obligation to respect explicitly, most importantly the ECHR, that particular obligation is either spelled out in provisions which guarantee specific rights, or can if necessary be *implied* into the content of the treaty in question. Crucially, if the negative obligation to respect human rights generally, or for example the obligation not to torture specifically, is implicitly read into the treaties, there is no reason why it should depend on the same jurisdictional threshold of application as the positive obligation to secure or ensure.

The best authority for these points is the ICJ's merits judgment in the *Bosnian Genocide* case.²⁷⁴ Just like the CAT, which does not say in so many words that states will be responsible if their organs or agents commit torture, so the Genocide Convention does not explicitly provide for state responsibility for the commission of genocide. Thus, Article I of the Convention obliges states to prevent and punish genocide, while other provisions elaborate on these requirements. Both at the preliminary objections and at the merits stage of the case the FRY/Serbia disputed the existence of a separate state obligation under the Convention not to commit genocide, asserting that the Convention was a classical international criminal law treaty, dealing with crimes committed by individuals, not states. All the Convention did, in Serbia's view, was to require states parties to criminalize in their domestic law the crimes that it defines, and then prosecute the perpetrators of these crimes. Article IX of the Convention, which does mention the responsibility of states for genocide, was, in Serbia's argument, merely a compromissory clause which did not impose any additional substantive obligations upon states parties.

The Court first reasoned that Article I of the Convention is not merely hortatory or purposive, and that 'in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles [of the Convention]' so that the 'the Contracting Parties have a direct obligation to prevent genocide'.²⁷⁵ It then held as follows:

The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant

²⁷³ See, e.g., Cerone, above note 268, at 124; R. Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans and Kamminga 201, at 227-99.

²⁷⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 27 February 2007 (hereinafter *Bosnian Genocide* merits judgment).

²⁷⁵ *Ibid.*, paras 162, 165.

has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes 'including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'. Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed.

The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III.

It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.²⁷⁶

The Court thus concluded that the 'Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them'.²⁷⁷ It then extended the same reasoning to crimes ancillary to genocide defined by Article III of the Convention, that is conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit genocide, and complicity in genocide.²⁷⁸

Turning back to human rights treaties, to my mind the Article 2(1) CAT obligation of the state 'to prevent acts of torture in any territory under its jurisdiction' necessarily implies the state's obligation to itself refrain from torture, just as with the Genocide Convention. More generally, the Article 1 ECHR obligation to secure human rights implies the obligation to respect them. That implication does not, however, necessarily require the same threshold for its existence, that of state jurisdiction over territory.

Thus, for example, in the *Bosnian Genocide* case the ICJ thought that the obligation not to commit genocide had no territorial limitation. States were *implicitly* prohibited from committing genocide anywhere in the world. The Court had the same view with regard to the positive obligation to prevent, an

²⁷⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 27 February 2007 (hereinafter *Bosnian Genocide* merits judgment), para. 166 (paragraph breaks added).

²⁷⁷ *Ibid.*, para. 167.

²⁷⁸ *Ibid.*

obligation of states to exercise due diligence and 'employ all means reasonably available to them, so as to prevent genocide so far as possible',²⁷⁹ saying that '[t]he substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.'²⁸⁰

However, in his separate opinion Judge Tomka forcefully argued that the positive obligation to prevent should be limited territorially. According to him,

[U]nder Article I of the Genocide Convention the State does have an obligation to prevent genocide outside its territory to the extent that it *exercises jurisdiction outside its territory*, or exercises control over certain persons in their activities abroad. This obligation exists in addition to the unequivocal duty to prevent the commission of genocide within its territory.²⁸¹

In essence, Judge Tomka argued for the imposition of a threshold criterion on the obligation to prevent—state jurisdiction over a territory—the same threshold as in human rights treaties. Under his approach, a state would have to exercise effective overall control of an area in which there is a serious risk of genocide being committed by some other actor in order for its obligation to prevent genocide to arise. His argument was in essence one of policy—that a state should be expected to prevent genocide only when it had territorial jurisdiction, because that obligation was much more onerous than the simple obligation to refrain from committing genocide.²⁸²

My point is simply this—there is no inherent contradiction in implying, where necessary, the negative obligation to respect human rights into the relevant treaties and that obligation having a *broader*, territorially unlimited scope of application than the positive duty to secure or ensure human rights, or prevent violations thereof. Thus, under the CAT for example, we could say that the state has the duty to prevent torture only in territories under its jurisdiction, but that it has the obligation to itself refrain from torturing in all circumstances. Likewise, under the ECHR, the state's obligation to secure human rights would be limited to areas under the state's effective overall control, but its duty to respect human rights would apply everywhere, without any territorial limitation. For example, the ECHR would apply to the taking of property by the UK within the UK of a person residing in Monaco, whether in law or merely in fact.

C. Prophylactic and procedural positive obligations

Let me again emphasize that I am not advocating a strict separation between negative and positive obligations. Rather, I am arguing for a separation between those positive obligations which require control over territory in order to be effective, such as the obligation to prevent inhuman treatment or secure human rights generally even from

²⁷⁹ *Ibid.*, para. 430. ²⁸⁰ *Bosnian Genocide* merits judgment, para. 183.

²⁸¹ *Bosnian Genocide* merits judgment, Separate Opinion of Judge Tomka, para. 67.

²⁸² For more on the territorial scope of application of the Genocide Convention, see M. Milanovic, 'Territorial Application of the Convention and State Succession', in P. Gaeta, ed., *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009), 473.

third parties, and those obligations whose effectiveness depends only on the state's control over its own agents. The practice of the European Court and other human rights bodies has long recognized that some positive obligations are of a procedural or prophylactic nature.²⁸³ Thus, for example, in the context of the right to life, the state has the negative obligation not to take life unjustifiably, but also the positive obligation to conduct an independent and effective investigation into a possible taking of life by its own agents, e.g. the police or the armed forces. As explained by the House of Lords,

The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated *and it appears that agents of the state are, or may be, in some way implicated*.²⁸⁴

In Lord Bingham's view, '[t]his procedural duty does not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice'.²⁸⁵ This procedural obligation is, however, *not* the same as the other positive aspect of Article 2, which flows from the state's obligation to *secure* human rights, namely 'to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life'.²⁸⁶ That obligation is much more far-reaching, as it requires the state to prevent and investigate even acts of purely *private* violence, in which the agents of the state are not implicated at all.

Therefore, in my view, the first category of positive obligations, which exist solely to make the state's *negative* obligations truly effective, should apply co-extensively with the negative obligations themselves. On the other hand, those positive obligations which flow from the state's duty to secure or ensure human rights or prevent violations thereof—say prevent private violence or discrimination—require a threshold that sets out the limits of realistic compliance. And that threshold is precisely state jurisdiction, i.e. control over territory.

On the other hand, the *intensity* of these obligations also differs; a state has an absolute duty to investigate violations of human rights committed by its own agents, or committed against persons in its custody.²⁸⁷ It also has to provide persons whom it deprives of liberty with food, clothing, or health care, even though it might not have such obligations towards the general population.²⁸⁸ However,

²⁸³ See generally Mowbray, above note 124.

²⁸⁴ *R. (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, para. 3 (citing Strasbourg case law).

²⁸⁵ *Gentle*, para. 5 (per Lord Bingham).

²⁸⁶ *Middleton*, para. 2 (citing Strasbourg case law).

²⁸⁷ See, e.g., *Selmouni v. France* [GC], App. No. 25803/94, Judgment, 28 July 1999.

²⁸⁸ Even a system which has an extremely limited acceptance of positive obligations generally, such as the one in the United States—see e.g. *DeSheaney v. Winnebago*, 489 U.S. 189 (1989)—recognizes that the state may accrue positive obligations towards an individual if it acts beforehand so as to restrict or affect the rights or liberty of the individual concerned, for example by incarceration. In the words of the US Supreme Court, 'elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration' as 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for

when it comes to its positive obligations with regard to purely private conduct, they are indeed more far-reaching in scope but are also more flexible in content. In the words of the European Court in *Osman*, they must not 'impose an impossible or disproportionate burden on the authorities'.²⁸⁹

We can thus distinguish between several kinds of positive obligations under human rights treaties, and this distinction should have a bearing on their extraterritorial application. To make this discussion somewhat less abstract, let us go back to *Al-Skeini* and the five applicants killed by British troops on patrol. Assume, for the sake of the argument, that even though the killings took place in British-occupied Basra, because of the strength of the insurgency Basra could not be qualified as an area under the UK's effective overall control,²⁹⁰ and was hence outside its jurisdiction. Even so, in my view, the UK would still have not only the negative obligation to refrain from depriving the five applicants of life unjustifiably, but would also have the positive procedural obligation to conduct an effective investigation into their killing. Its existence depends solely on the UK's own involvement in the killing, and in order to comply with it the UK need not do anything more than investigate the conduct of its own troops, which it is in principle perfectly able to do. However, were the killings actually done by third parties, be they insurgents or indeed the soldiers of an allied country, the UK would have had no obligation to investigate or prevent the deaths, since they took place in an area outside its jurisdiction, and it would in fact be exceedingly difficult, if not impossible, for the UK to conduct an effective investigation without actually having control over the territory.²⁹¹

Or, take again the example of the assassination of Alexander Litvinenko in London, ostensibly with Russian involvement. The killing clearly took place outside Russia's jurisdiction, if jurisdiction is conceived of territorially. Nonetheless, Russia would still have the obligation to investigate it, to the extent that a credible case can be made that its own agents were involved in Litvinenko's death, for example by providing the killers with polonium, the radioactive substance with which Litvinenko was poisoned. If, however, such a credible case could not be made, and on the evidence available there was no reasonable suspicion that Litvinenko's death was anything other than a purely private act, then it would

himself. *Estelle v. Gamble*, 429 U.S. 97, 102-4 (1976). See also *Farmer v. Brennan*, 511 U.S. 825 (1994).

²⁸⁹ *Osman*, para. 116 (emphasis added).

²⁹⁰ See above, Section 2.C.3.

²⁹¹ I am not denying that the UK might be faced with serious evidentiary and forensic difficulties even when investigating the conduct of its own troops in a territory outside its control, e.g. because it does not have access to the crime scene. In such a situation the prophylactic positive obligation to investigate should again be interpreted flexibly, so that the UK is obliged to do only what it can in fact do. Above all, however, the UK would be expected to put in place reasonable safeguards and procedures before it mounts a military operation that would allow it to investigate allegations of misconduct by its own troops.

only be the UK which would have the obligation to investigate the murder since it took place within its jurisdiction.²⁹²

Similarly, on the facts of *Bankovic*, the respondent states should have been asked by the Court to justify on the merits their killing of individuals who were not within their jurisdiction territorially conceived, as the killing implicates the states' negative obligation to which some positive obligations may attach. In doing so, the Court should have taken into account the relevant rules of international humanitarian law and the extraordinary circumstances of armed conflict, and adopted a more flexible approach to Article 2 than in a situation of normalcy. As I have argued above, however, there would be limits to that flexibility, motivated by the need to preserve the integrity of the ECHR regime.²⁹³ The Court would also have encountered serious evidentiary difficulties on the merits, but it has managed to deal with such difficulties in the past, as with Chechnya, for example by equitably distributing the burden of proof between the parties. Thus, though in my view the correct result in *Bankovic* would probably have been that the killings were unlawful, it is far from obvious that this should have been the case. The respondent states would have a case to answer, but they would also have something to answer the case with.

Or, if we take the example of the pending *Aerial Herbicide Spraying* case before the ICJ while taking the facts alleged by Ecuador as proven,²⁹⁴ Colombia would be responsible for violating the rights of Ecuadorian residents adversely affected by its spraying operation, as the operation was conducted by its own agents or on its own behalf. Colombia would not, however, have the same obligation under human rights treaties with regard to pollution or herbicides used by purely private actors operating within its territory and having effects in Ecuador. Similarly, if we consider

²⁹² See, in that regard, *W v. United Kingdom* (dec.), App. No. 9348/81, (1983) 32 DR 190, a Commission admissibility decision. The applicant's husband was killed in the Republic of Ireland, while her brother was killed in Northern Ireland. She complained that the United Kingdom had failed to secure her husband's and brother's right to life. With respect to the husband, who was killed in the Republic of Ireland, the Commission declared the application to be incompatible *ratione loci* (at 199):

The Commission further considers that, in determining its competence *ratione loci* in relation to the jurisdiction of the United Kingdom, regard must be had to the position, at the relevant time, of the direct victim (i.e. the applicant's husband) and not of the indirect victim (the applicant herself) of the alleged violation of the Convention. It finds that, at the time of his death at G. Sales Yard, in the Republic of Ireland, the applicant's husband was not 'within the jurisdiction' of the United Kingdom in the sense of Article 1 of the Convention. The Commission has also considered whether any active measures by United Kingdom authorities could have contributed to the murder of the applicant's husband in the Republic of Ireland. However, it notes that even the applicant has not alleged any such action by these authorities.

Note how the Commission applied a spatial model of jurisdiction—the victim was not within UK's jurisdiction because the killing took place in Ireland, and therefore the UK had no obligation to investigate it. However, the Commission did entertain the possibility that the result could have been different if the applicant had shown that UK authorities were involved in the murder.

²⁹³ A further problem is that even though Article 15(2) ECHR permits derogations from Article 2 'in respect of deaths resulting from lawful acts of war', which could serve to add more flexibility to an Article 2 analysis in times of armed conflict, no such derogation was made by ECHR states parties engaging in the bombing of Serbia. See also Chapter V below.

²⁹⁴ See Section 1.F above.

the scenarios of extraterritorial complicity that we examined above, with say a UK intelligence officer feeding questions and data to a Pakistani torturer interrogating a terrorist suspect in Pakistan,²⁹⁵ the UK would in my view have a territorially unlimited negative obligation under Article 3 ECHR not to be complicit in the torture of any person anywhere in the world. Accordingly, it would also have the positive obligation to investigate complicity in torture by its own agents wherever it might occur. It would not, however, have such an obligation with regard to an extraterritorial human rights violation in which its own agents did not participate at all, unless the act was committed in a territory under its effective overall control.

D. Reconciling universality and effectiveness

To my mind, this third model provides us with the best balance between universality and effectiveness with regard to the extraterritorial application of human rights treaties. Instead of being artificially limited, universality is brought to its logical (and moral) conclusion. States would have the same obligation to respect human rights both within and outside their territories. Whether they use drones for the targeted killings of suspected terrorists, use force in more conventional military operations, abduct or detain combatants or civilians or put them on trial, poison the crops of innocent farmers, or enforce their laws, states would still have to abide by the restrictions that human rights law places on the arbitrary exercise of their power, and do so regardless of territorial boundaries. When, however, states are expected to do more than just refrain from adversely affecting the lives of others, when they need to take positive steps, from preventing domestic violence²⁹⁶ and safeguarding private property to protecting lawful public assemblies²⁹⁷ and the free exercise of religion,²⁹⁸ they cannot fulfil such obligations effectively without having the tools to do so. Such obligations should, therefore, be territorially limited to areas and places under the state's jurisdiction.

This model would, in principle, be able to accommodate all of the effectiveness concerns that generally militate against the extraterritorial application of human rights instruments, which I have examined above in some detail: flexibility, impact, regime integrity, clarity, and predictability.²⁹⁹ Flexibility is beyond doubt the most important, and can only be achieved on the merits and substance of each concrete instance of extraterritorial application to a specific set of facts. In the transition from threshold to substantive issues lies both the appeal of this model, and its greatest risk. It would be unreasonable to contend that most human rights obligations can be applied in exactly the same way in peacetime in the state's own territory, and during a military occupation or in an active battlefield abroad. Full account must be

²⁹⁵ See Section 1.D above.

²⁹⁶ See, e.g., *Opuz v. Turkey*, App. No. 33401/02, Judgment, 9 June 2009.

²⁹⁷ See, e.g., *Plattform 'Ärzte für das Leben' v. Austria*, Judgment, 21 June 1988, Ser. A, No. 139, (1991) 13 EHRR 204.

²⁹⁸ See, e.g., *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, App. No. 71156/01, Judgment, 3 May 2007.

²⁹⁹ See above, Chapter III, Section 10.

taken of the extraordinary circumstances in which the treaty is being applied extraterritorially, and substantive adjustments need to be made in order for extraterritorial application to truly become realistic and effective—for example, through the greater use of international humanitarian law in interpreting the norms of human rights law.

But, as I have said, though a price must be paid if universality is not to descend into utopia, that price must not be too steep. There still must be a point to extraterritorial application—it must have an actual *impact*—and the integrity of the human rights regime as a whole must not be compromised by its being watered down too much. Again, both of these concerns can only be addressed by examining the numerous substantive issues arising with extraterritorial application, such as targeted killings or preventive detention, which are as such beyond the scope of this study. My only point here is that such concerns *can* be addressed effectively, and that the extraterritorial application of human rights treaties can be both realistic and worthwhile. Obviously, the extension of the negative obligation to respect human rights that I propose can by itself have an enormous impact, as it would at the very least require some sort of justification by states for their acts outside their territory which violate the rights of countless people.

The third model also sufficiently addresses the *Bankovic* concern that human rights treaties would be compromised if state obligations were divided and tailored to match each specific extraterritorial action. The most onerous obligation by far, that to secure or ensure human rights, is strictly confined to areas over which states have effective control. The treaties are not chopped up and divided. Rather, they require states to *respect* human rights when they are in the position to do so.

Likewise, by allowing us to have those substantive disputes which are truly important, on matters like targeted killings or security detention, and by detaching these disputes from the preliminary threshold question of extraterritorial application, the third model would lead to a great simplification of the case law on extraterritorial application, its grounding in principle, and a rejection of casuistry. In other words, we would be able to tell with some clarity when human rights treaties actually apply extraterritorially—something that we are in all honesty incapable of doing with the present state of the jurisprudence, at least when it comes to the ECHR. That the current lack of certainty makes the lives of judges and academics more difficult is the least of its problems; it directly undermines the authority of the Court, and makes other participants in the system—above all states—unable to adequately factor the applicability of human rights treaties extraterritorially into their own policy-making.³⁰⁰

³⁰⁰ See also Miller, above note 192 at 1230, arguing that

[t]his uncertainty creates the twin risks that states will either under-estimate the jurisdictional scope of the Convention and violate human rights which might otherwise be protected, or that they will over-estimate the Convention's reach and refrain from actions which are strategically essential. Either way, the Court's doctrinal ambivalence prevents signatory states from accurately weighing the legal liabilities associated with particular extraterritorial actions, to the detriment of both human rights protection and security.

I should also say that I am aware that it is impossible to conclusively test whether my proposed model strikes the best balance between universality and effectiveness without actually trying it out. From the perspective of the European human rights system, whose strength derives precisely from the fact that it is the *European* human rights system, the risk of a flood of litigation doing it irreparable damage may be seen by some—particularly judges—as being too great. That risk, it needs to be said, is a realistic one.³⁰¹ I maintain, however, that the European Convention is sufficiently flexible, and that the tools given to the European Court are sufficiently powerful, to minimize that risk to a great extent. The floodgates will not open, and the European system will not be overwhelmed—at least not any more than it already is—just because the Court would no longer be able to use the preliminary question of extraterritorial application to avoid a number of vexing and controversial substantive issues. Nothing would prevent the Court, for example, from declaring inadmissible those cases which it considers manifestly ill-founded, after conducting even a deferential substantive analysis. And though the risk may be real, it is one worth taking, if universality of human rights is to have any meaning. Whether this will actually happen will depend on those who sit on the European Court of Human Rights, and on whether it is, in their view, the ‘European’ or the ‘Human Rights’ bit of their Court and Convention that matters most.

Finally, to the extent that my textual argument in favour of the third model is not considered to be persuasive, or that its adoption would require too radical a departure from existing jurisprudence, I would (purely as a pragmatic matter) not be opposed to the adoption as a substitute of the personal model of jurisdiction as state authority and control over individuals jointly with the spatial model. If the personal model is considered to be textually necessary, then it should apply to the negative obligation to respect, while the spatial model would apply to the positive obligation to secure or ensure human rights.³⁰² Indeed, if we took another look at the various cases applying the personal model, we would see that they generally deal only with negative obligations of states, or with procedural or prophylactic positive obligations. So long as the personal model is not in any way limited, its application would lead to the same result as my third model, just with the added pretence of applying a jurisdictional threshold to negative obligations when no such threshold in fact exists. This would be an adequate solution for interpreting the jurisdiction clauses in some treaties, such as in the First Optional Protocol to the ICCPR, which limit the right to individual petition only to those persons subject to the state’s jurisdiction. This would also be an adequate answer to Lord Brown’s challenge in *Al-Skeini* that the spatial model would become redundant if the personal one were to be adopted, since each would apply to different types of state obligations.

³⁰¹ See, in that regard, Miller, above note 192, at 1235.

³⁰² For a similar contextual approach, see Lawson, above note 172, at 120, as well as R. Lawson, ‘Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR’, in A. Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Intersentia, 2010), 57; Lubell, above note 50, at 227 *et seq.*; S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006), at 66 *et seq.*, 206.

Having thus outlined the model of extraterritorial application that I would prefer, I again do not wish to be taken as arguing that this model is free of all weaknesses. In some cases at least, the distinction between positive and negative obligations is not as clear-cut as I have made it seem. The same goes for the distinction between positive obligations arising from the duty to secure or ensure human rights, which I would subject to a threshold of territorial jurisdiction, and those which are prophylactic or procedural in nature and thus appurtenant to negative obligations, which I would not. As with most things, there would be grey areas in which my model would not provide a clear answer. And there probably would be areas in which my model would give answers that would run counter to our legal or moral intuitions regarding the territorial scope of human rights treaties. Even so, in my view it provides a principled foundation that allows us to move from the question of *when* human rights treaties apply extraterritorially to the far more important and difficult question of *how* they should do so.

5. The Special Problem of the ICCPR

Having discussed the available models of extraterritorial application, I will briefly turn back to an issue that I have mentioned but until now have more or less studiously avoided—the proper interpretation of Article 2(1) ICCPR, providing that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. As we have seen, this clause presents two interpretative difficulties: first, whether the obligation to respect human rights is modified and limited by the remainder of the clause, or whether it is only the obligation to ensure which is subject to limitation; and secondly, whether that limitation is conjunctive or disjunctive, i.e. whether individuals have to be *both* within a state's territory *and* subject to its jurisdiction to have ICCPR rights, or is it rather that states have to guarantee these rights to all individuals within their territories *and* to those subject to their jurisdiction? As for the former issue, I have just explained why there is in my view no bar to reading Article 2(1) as imposing no limitation on the obligation to respect, similarly to Article 1 ACHR. As for the latter, I have indicated several times how the Human Rights Committee has now espoused the more expansive disjunctive interpretation of Article 2(1),³⁰³ and it will come as no surprise to the reader that this is an interpretation I agree with in principle—but let me now offer my reasons for doing so, other than that this is simply the result that I prefer as a matter of policy.

First, I think it fair to say that the conjunctive reading of Article 2(1) is textually or grammatically more natural, and interpretation under Article 31 VCLT does of course start from the text. This does *not* mean, however, that this is the *only*

³⁰³ See Buergethal, above note 265; Human Rights Committee, General Comment No. 31, para. 10: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.'

Annex 76

Michael Milde, ESSENTIAL AIR AND SPACE LAW: INTERNATIONAL AIR LAW AND ICAO (2d ed., 2012)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

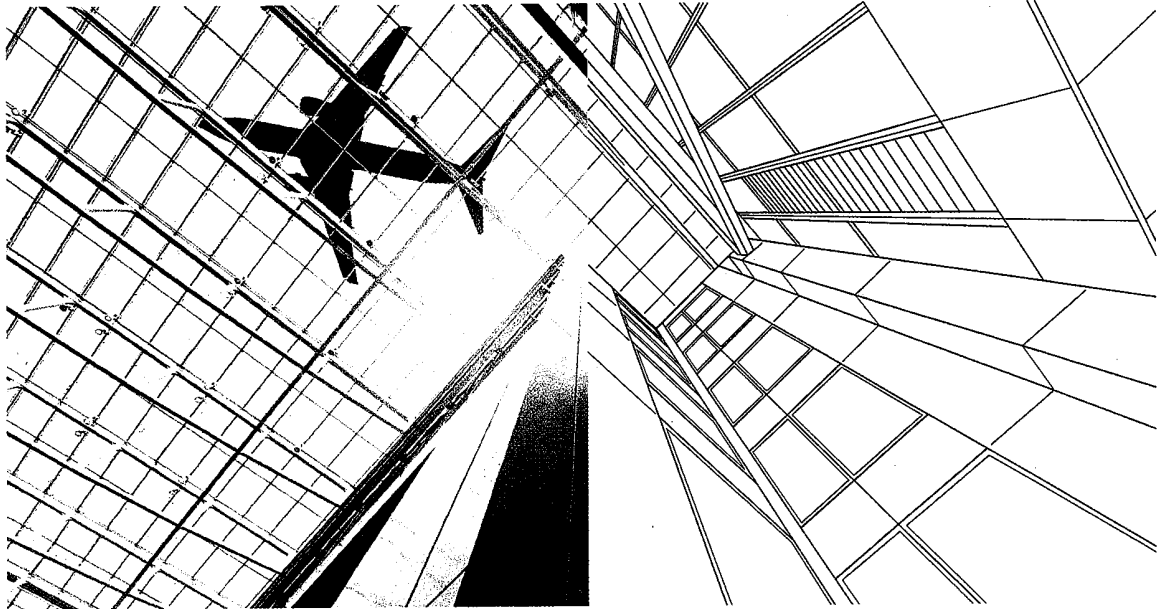
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10 September 2010 the scope of The Hague Convention of 1970 was expanded by a Protocol purporting to update it in the light of “new” dangers (see below).

8.4 MONTREAL CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION, SIGNED ON 23 SEPTEMBER 1971²⁷

While an unlawful seizure of aircraft creates a serious danger for the flight and all persons on board, a far greater danger could be created by acts of sabotage of the aircraft or of the essential air navigation facilities. A typical example of an act of sabotage of an aircraft is causing an explosive charge (bomb) to detonate on board the aircraft in flight – such an act would in most cases lead to a complete destruction of the aircraft, death of all on board and possibly loss of life and material damage on the surface.

Incidents of this type also have a long history. The first recorded case appears to be the crash of Imperial Airways Argosy plane at Dixmude (or Diksmuide), Belgium on 28 March 1933 caused by fire started by a passenger on board.²⁸ On 10 October 1933 United Airlines B-247 crashed with 7 fatalities at Chesterton, Indiana after a nitroglycerin charge exploded on board.²⁹ Also the explosion of LZ Hindenburg Zeppelin on 6 May 1937 at Lakehurst, New Jersey was sometimes attributed to an act of sabotage.

A clearly criminal act was committed on 7 May 1949 against Philippine Airlines DC-3 on board of which 13 persons perished – a bomb was placed on board by two ex-convicts in a contract killing of the husband of a woman involved with another man.

A very similar act was committed on 9 September 1949 at Sault-au-Cochon, Quebec, Canada on board a Canadian Pacific Airlines DC-3 when a bomb placed in the baggage compartment caused the death of 23 persons; the main accused planned to murder his wife after insuring her life for USD 10,000 while his mistress helped to place a time bomb on board; her brother – a watchmaker – construed the timing mechanism; all three were sentenced to death and executed; Margaret Pitre was hanged on 9 January 1953 – the last woman ever to be hanged in Canada.³⁰

Serious political implications were involved in the explosion and crash, on 11 April 1955, of Air India “Princess of Kashmir” Lockheed Constellation flight from Hong Kong to Jakarta in the context of the Bandung Conference of non-aligned nations; the planned target of the bomb placed in the wheel well were apparently some senior Chinese politicians but they changed their travel plans and the victims were mostly journalists.

²⁷ Doc. 8966; the Minutes and Documents of the Conference are in Doc. 9081.

²⁸ <www.planecrashinfo.com/cause.htm>, accessed on 15 September 2007.

²⁹ <www.wikipedia.org/wiki/United_Airlines_Chesterton_crash>, accessed on 15 September 2007.

³⁰ <www.planecrashinfo.com/unusual.htm> and <mysteriesofcanada.com/Quebec/mass_murder.htm>, accessed on 15 September 2007.

On 21 February 1970 Swissair Convair CV-990 on a flight from Zurich to Tel Aviv experienced an explosion on board shortly after take-off and the valiant effort of the captain to execute emergency landing was thwarted when acrid smoke filled the cockpit and electrical systems failed; all nine crew members and 38 passengers were killed.³¹

Among other major instances of sabotage of aircraft with extensive loss of life was the explosion on Air India B-747 on 23 June 1985 in the Irish Sea, sabotage of the Korean Air plane in the Andaman Sea on 29 November 1985, explosion on PANAM B-747 on flight 103 on 21 December 1988 over Lockerbie, Scotland, UTA plane on 19 September 1989 in Niger, etc.

The task of the ICAO Legal Committee in the preparation of a new instrument dealing, *inter alia*, with sabotage of aircraft in conformity with Assembly resolution A17-20 was greatly facilitated by the consensus reached in The Hague Convention on issues of unlawful seizure of aircraft. The task was to formulate a sufficiently exhaustive and precise definition of an unlawful act against the safety of civil aviation to be designated as an "offence", stipulate a severe penalty for such offence, determine the jurisdiction of States to prosecute the alleged offender or offenders as widely as possible to achieve practically universal jurisdiction and to agree on conditions of extradition and related provisions.

The Diplomatic Conference held in Montreal in August-September 1971 was more "relaxed" than the previous Conference at The Hague in December 1970. The most contentious problems of extradition have been solved by an acceptable compromise at The Hague and the new resulting Montreal Convention is now (August 2011) accepted by 188 States – an absolute record among Conventions for the unification of law!

The most difficult problem in discussions proved to be the definition of the "offence". While many delegations wished to make the definition as wide and all-encompassing as possible, others cautioned that the convention should not go beyond incidents with a distinct "international element" and that the incidents to be covered by the definition of the "offence" had to be directly related to the safety of civil aviation.

The cautious drafting of the definition of the "offence" is reflected in Article 1 as follows:

Article 1

1. Any person commits an offence if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
 - (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
- or

31 <www.planecrashinfo.com/1970/1970-21.htm>, accessed on 15 September 2007.

- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
 - (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
 - (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he:
- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
 - (b) is an accomplice of a person who commits or attempts to commit any such offence.

Some elements of this definition require more detailed interpretation based on the true intentions of the drafters. In the first place, the act must be “unlawful”, *i.e.*, must be contrary to a general duty imposed by law. The act must be “intentional” – this specific offence under the Montreal Convention cannot be committed by negligence; the Conference did not discuss whether the intention must be “direct” (*i.e.*, true intent to cause the harmful result) or whether an “indirect” or “eventual” interest would suffice (the offender did not intend to cause the harmful result but was aware that such result may occur and that did not stop him from acting) – that would be left to interpretation by the Courts of law.

Not every act of violence against a person on board an aircraft in flight would constitute an “offence” under the Convention – it would qualify as an “offence” only “if that act is likely to endanger the safety of that flight” – and that would be a matter of evidence in each particular case for consideration by a Court of law. A physical attack by a passenger against another passenger would be relevant under the Tokyo Convention for the establishment of jurisdiction or powers of the aircraft commander (restraint, disembarkation, delivery ...) but in itself would not be an “offence” under the Montreal Convention unless the act is likely to endanger the safety of that aircraft.

Much thought was given during the drafting process to the act of destruction of an aircraft on the ground (as occurred in 1970 at the Dawson Field or elsewhere when a stationary aircraft was attacked by a bomb, hand grenade or anti-tank missile). Many delegations believed that an aircraft on the ground was just another piece of property and would not merit international legal protection against an attack unless there is a distinct danger to the safety of that aircraft in flight. The Conference finally decided to give international protection only to “aircraft in service” in case of its destruction or damage which would render it incapable of flight or which is likely to endanger its safety in flight. The term “in service” was defined in Article 2, paragraph (b) as follows:

(b) an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article.

This definition aimed at making sure that the aircraft is not just an object but that it is close to actual operation that could be endangered. The definition is not very fortunately formulated – in particular the twenty-four hours period after any landing is highly improbable for any airline because the commercial airlines cannot afford to keep the aircraft idle for such a long period of time – the typical aircraft would be “in service” practically all the time except for periods of extensive maintenance or repairs.

The very act of placing or causing to be placed on board an aircraft in service a “device or substance” (explosive or corrosive material ...) which is likely to destroy or damage the aircraft is an offence, regardless of any actual resulting damage; even an attempt to do so or complicity in the act or attempt would be qualified as an offence.

The destruction of or damage to air navigation facilities or interference with their operation is an offence only if it is likely to endanger the safety of aircraft in flight. There was an extensive debate about this provision since some delegations believed that the air navigation facilities (e.g., radio transmission towers, radar stations) were localized in a particular State and did not possess an appropriate “foreign element” justifying inclusion into an international instrument. A provision limiting the applicability of subparagraph (d) of paragraph 1 of Article 1 was then included in Article 4, paragraph 5 as follows:

5. In the cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities are used in international air navigation.

This is not a very good and precise drafting – all system of electronic air navigation facilities, such as the HF, VHF, DME, VOR and radar or GNSS facilities are generally available to aircraft at a very great distance from the originating transmitters and serve both domestic and international flights; the lawyers should have taken better advice from the technical experts.

Communication of a knowingly false message (“hoax”) could endanger the safety of aircraft in flight. A malicious warning that there is a bomb on board the aircraft which is timed to explode at a determined moment cannot be disregarded and may force the pilot to seek fastest possible landing, possibly without proper maps, instrumentation or at an unsuitable airport. The pilot-in-command may also order emergency evacuation of the aircraft and in such actions the safety may be seriously jeopardized.

As in The Hague Convention the concept “in flight” is defined in Article 2 (a) as a “closed universe”, *i.e.*, when the external doors are closed to separate the aircraft from the possibility of an intervention by any external authority:

- a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;

Article 3 expresses the undertaking of each contracting State to make the offences punishable by “severe penalties”. The Conference accepted the compromise reached in The Hague Convention and there was no extensive discussion on what the term “severe” is to mean.

Article 4, paragraph 1 repeats the now standard provision that the Convention shall not apply to aircraft used in military, customs or police services. The rest of Article 4 deals with additional aspects of the scope of applicability of the Convention and the somewhat convoluted text proves how anxious the authors of the Convention were to make sure that only situations with a distinct ‘foreign element’ would be governed by the new international instrument:

2. In the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall apply, irrespective of whether the aircraft is engaged in an international or domestic flight, only if:
 - (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
 - (b) the offence is committed in the territory of a State other than the State of registration of the aircraft.
3. Notwithstanding paragraph 2 of this Article, in the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall also apply if the offender or the alleged offender is found in the territory of a State other than the State of registration of the aircraft.
4. With respect to the States mentioned in Article 9 and in the cases mentioned in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall not apply if the places referred to in subparagraph (a) of paragraph 2 of this Article are situated within the territory of the same State where that State is one of those referred to in Article 9, unless the offence is committed or the offender or alleged offender is found in the territory of a State other than that State.

5. In cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities are used in international air navigation.
6. The provisions of paragraphs 2, 3, 4 and 5 of this Article shall also apply in the cases contemplated in paragraph 2 of Article 1.

The "foreign element" triggering the applicability of the Convention is, even in the case of a domestic flight, the place of take-off or landing (actual or intended) in a State other than the State of registration or the offence is committed in a State other than the State of registration; in any case, the Convention applies if the offender (or alleged offender) is found in a State other than the State of registration. The strict reference to the State of registration is gradually becoming less relevant in practice since aircraft are often registered in a State other than the State of the operator.

The provisions relating to jurisdiction of States fall short of universal jurisdiction with respect to some acts defined in Article 1. Universal jurisdiction would have been established if every State where the offender may be found would have to establish its jurisdiction. However, as will be seen in Article 5, paragraph 2 of the Convention, such universal jurisdiction is foreseen only with respect to acts defined in subparagraphs (a), (b) and (c) of paragraph 1 of Article 1 and not for the acts defined in subparagraphs (d) and (e) (which refer to damage to air navigation facilities and to communication of false information):

Article 5

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
 - (a) when the offence is committed in the territory of that State;
 - (b) when the offence is committed against or on board an aircraft registered in that State;
 - (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
 - (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

The procedural steps to be taken by the State having jurisdiction are described in Article 6:

Article 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary enquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.
4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

The possibly controversial and divisive issue of extradition was solved in the Montreal Convention without any substantive discussion and the model adopted in The Hague Convention was accepted – *aut dedere aut prosequi* without establishing any mutual priority between extradition or assumption of jurisdiction:

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

The format is the same as in The Hague Convention: the State concerned is only obliged to present the case to the appropriate authorities for the purpose of prosecution and the offence is to be addressed as an "ordinary" (*i.e.*, non-political) offence of a serious nature and there is no obligation to extradite the alleged offender.

This seemingly clear provision became strongly contested after the Lockerbie disaster of PANAM flight 103 on 21 December 1988 in which 270 people were killed after the explosion of a SEMTEX bomb on board. The United Kingdom and the United States after their investigation claimed that the bomb was planted on board by security agents of the Libyan Arab Jamahiriya and requested extradition of the alleged offenders.

The Libyan authorities refused extradition with reference to Article 7 of the Montreal Convention of 1971 and professed willingness to prosecute the alleged offenders if the US and UK authorities provide the relevant evidence.

The matter was presented to the UN Security Council as a subject of "international terrorism" endangering international peace and security. The Security Council adopted a resolution on 21 January 1992³² requesting Libya to cooperate in the suppression of international terrorism; when Libya failed to comply, the Security Council adopted another resolution shortly thereafter – on 31 March 1992³³ – in which it determined that the failure by the Libyan Government "to demonstrate, by concrete actions its renunciation of terrorism ... constitute a threat to international peace and security" and declared as of 15 April 1992 sanctions against Libya under Chapter VII of the UN Charter.

The sanctions included denial by States of "permission to any aircraft to take off from, land in or overfly their territory if it is destined to land or has taken off from the territory of Libya", prohibition to supply any aircraft or aircraft components to Libya, etc. An even stricter measure was imposed on Libya by Security Council resolution of 11 November 1993³⁴ that called for the freezing of all Libyan funds abroad. Libya brought the case to the International Court of Justice.³⁵ The case became to a large degree moot after the Security Council adopted, on 12 September 2003, a resolution lifting the sanctions.³⁶

However, the case raised a fundamental question whether the decisions of the Security Council under Chapter VII of the UN Charter are subject to a review by another body of the UN. The ICJ is not positioned above the Security Council!

According to Article 103 of the UN Charter "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present

32 UN S/RES 731 (1992).

33 UN S/RES 748 (1992).

34 UN S/RES/883 (1983).

35 Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya v. United States of America*, Judgment of 27 February 1998).

36 UN S/RES/1506 (2003).

Charter shall prevail". The Lockerbie case went beyond the scope of the Montreal Convention once it was qualified by the Security Council – a body with “primary responsibility for the maintenance of international peace and security” – as a threat to international peace and security and once the Security Council invoked measures under Chapter VII of the Charter.³⁷

Like The Hague Convention of 1970 the Montreal Convention has three depositories – Soviet Union, United Kingdom and the United States.

Like The Hague Convention of 1970 the Montreal Convention was also revisited in the ICAO legal work program in the “post 911” efforts to address all acts and offences of concern to the international aviation community. The intended expansion of the scope of offences to be covered by an international instruments did not make it feasible to solve the task by a protocol to the Montreal Convention of 1971; the ICAO-sponsored Diplomatic Conference in Beijing adopted and opened for signature, on 10 September 2010, a new Convention that would – as among the parties to this new Convention – replace the Montreal Convention of 1971 (see below). The venerable Convention of 1971 remains untouched for its 188 current parties and it is to be seen whether the new 2010 instrument ever achieves such a wide acceptance.

8.5 PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION, SUPPLEMENTARY TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION, DONE AT MONTREAL ON 23 SEPTEMBER 1971, SIGNED AT MONTREAL, ON 24 FEBRUARY 1988³⁸

At the 26th session of the ICAO Assembly in 1986 Canada, supported by several other delegations, proposed³⁹ that a new instrument should be elaborated dealing with the unlawful acts of violence at airports serving international civil aviation. Particular attention was given to the bomb explosion at Narita airport in June 1985 and the armed attacks at the Rome and Vienna airports in December 1985.

During 1973-1985 there were twenty-five armed attacks committed at different airports. While none of them took place in Canada, the authorities of Canada were anxious to come up with a new initiative in the field of aviation security due to some implicit international criticism of the allegedly ineffective screening of passengers and baggage in Canada that

³⁷ The title of that Chapter is “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. The resolutions of the Security Council in this case were based on Article 41 of the Charter that deals with “measures not involving the use of armed force”.

³⁸ Doc. 9518; generally referred to as “Montreal Protocol 1988”.

³⁹ A26-WP/41, EX/9, 14/7/86.

Annex 77

Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, International and Comparative Law Quarterly, Vol. 61 (2012)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

MENTAL ELEMENTS UNDER ARTICLE 30 OF THE ROME
STATUTE OF THE INTERNATIONAL CRIMINAL COURT:
A COMPARATIVE ANALYSIS

SARAH FINNIN*

Abstract The Rome Statute of the International Criminal Court is the first international instrument that includes a general provision on the mental element required before criminal responsibility for an international crime attaches (Article 30). This article analyses that provision from a comparative perspective, drawing on common law and civil law understandings of intent. It analyses the jurisprudence and commentary concerning Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it.

I. INTRODUCTION

Prior to the Rome Statute of the International Criminal Court (Rome Statute),¹ no international statute, code or charter included a general provision on the mental element required before criminal responsibility for an international crime would attach. The Nuremberg and Tokyo Charters,² which governed the trials of the major German and Japanese war criminals following the Second World War, contained no such provision. Nor did Control Council Law No 10,³ which governed the subsequent trials of war criminals in post-war occupied Germany. The Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR)⁴ did not contain such a provision, nor did the various Draft Codes of Crimes against the Peace

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¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

² Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter); Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, 4 Bevans 20 (Tokyo Charter).

³ Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (adopted 20 December 1945) in Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, 50–5 (Control Council Law No 10).

⁴ Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, annexed to UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY Statute); Statute of

and Security of Mankind prepared by the United Nations International Law Commission.⁵ This omission was not repeated with the Rome Statute, which includes a specific provision (Article 30) on the mental element required for crimes within the jurisdiction of the International Criminal Court (ICC). This makes Article 30 the first of its kind.

Article 30 of the Rome Statute provides that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Thus, Article 30 represents an ambitious attempt at codification of the rules relating to the mental element in international criminal law. As Pisani states, it is 'designed to bring some consistency into this area of the law'.⁶ First, it aims to set a default rule that applies, in principle, to all crimes included in the Rome Statute. It therefore requires that, unless otherwise provided, the material elements of a crime be committed with 'intent and knowledge'. Second, it seeks to provide a comprehensive definition of these concepts of 'intent' and 'knowledge' in the two subsequent paragraphs.

While the mere presence of Article 30 in the Rome Statute is a step forward compared to previous international statutes, codes and charters that did not include any such provision, the article has been subject to criticism from all corners of academia. Cassese describes it as 'confusing and ambiguous',⁷ while Werle and Jessberger state that it 'raises more questions than answers'.⁸ Satzger describes it as 'an extremely complex rule' that is 'quite clearly a

the International Criminal Tribunal for Rwanda, adopted 8 November 1994, annexed to UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute).

⁵ See, eg, International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-eighth Session' (6 May–26 July 1996) UN Doc A/51/10.

⁶ N Pisani, 'The Mental Element in International Crime' in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (II Sirente 2004) 125.

⁷ A Cassese, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 *New England LR* 1015, 1025.

⁸ G Werle and F Jessberger, "'Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 *J Int'l Crim Justice* 35, 37.

compromise between continental and Anglo-American criminal law'.⁹ Eser, on the other hand, while recognizing that Article 30 'can certainly not be called a masterpiece of legal architecture', considers that 'it provides sufficient building blocks for a meaningful construction of "intention"'.¹⁰

This article analyses Article 30 of the Rome Statute from a comparative perspective, by drawing on the different approaches taken by two broad groupings of States: the common law grouping, and the civil law grouping. The primary systems drawn on as examples of the common law grouping are the United States, the United Kingdom and Australia,¹¹ while that drawn on as an example of the civil law grouping is Germany.¹² The article begins with a general introduction to the concept of intent, as it is understood in both civil law and common law domestic legal systems. This is necessary in order to understand the approach taken at Rome because, as Kelt and von Hebel explain, Article 30 'necessarily consisted of compromises between different concepts or norms from various legal systems'.¹³ Part III examines the provisions of Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it. Part IV discusses the exceptions to Article 30, and the article concludes with some opinions on the appropriate direction of future jurisprudence and a possible amendment to the Rome Statute.

⁹ H Satzger, 'German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 Int'l Crim LR 261, 269.

¹⁰ A Eser, 'Mental Elements: Mistake of Fact and Mistake of Law' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 907.

¹¹ Despite the US not being a State Party to the Rome Statute, it has nevertheless had a great influence on the drafting of the statute, and on the development of international criminal law more generally. The US made a significant contribution to the early development of international criminal law through its influence on the Nuremberg and Tokyo Trials, and the trials before the US Nuremberg Military Tribunals. With respect to the Rome Statute specifically, the Model Penal Code prepared by the American Law Institute had considerable impact on the drafting of Article 30 of the Rome Statute and on the 'purposive' element of aiding and abetting under Article 25(3)(c). This article also draws on domestic criminal law principles derived from the United Kingdom and Australia, as the text of Article 30 bears striking resemblance to the equivalent provisions of the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code.

¹² Like US law, German law has had a great influence on the development of international criminal law, with a number of German criminal law professors establishing themselves in the field, and acting as judges of international courts or tribunals (for example, Albin Eser and Hans-Peter Kaul). More importantly, German criminal law theory 'enjoys widespread influence in the civil law world': M Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Amer J Comp L 679, 679. Dubber notes, however, that criminal law in common law countries has, until fairly recently, developed largely independently of German influence (ibid). German law therefore provides a good example against which to compare general principles of law that are recognized across common law systems.

¹³ M Kelt and H von Hebel, 'General Principles of Criminal Law and the Elements of Crimes' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 22.

II. THE CONCEPT OF INTENT IN COMMON LAW AND CIVIL LAW

A. *Gradations of Intent*

In all domestic criminal law systems, the general rule (although it is not without exceptions) is that conduct must be committed with ‘intent’ in order for it to constitute a crime.¹⁴ Conduct that is unintentional, or that is committed negligently, will constitute a crime only in limited circumstances (usually, but not always, where specifically provided for by statute). While all systems require ‘intent’, the definition of intent varies widely depending on the particular domestic system in question. Furthermore, it is rare for a single definition of intent to be applied to every crime. Rather, domestic criminal law systems recognize different *gradations* or *degrees* of intent. The same goes for international criminal law. Each gradation or degree has two components: a cognitive component (the element of awareness) and a volitional component (the element of desire).¹⁵ What sets each gradation or degree of intent apart is the relative level of each component.

Generally speaking, common law systems recognize three gradations of intent: direct intent, oblique intent and recklessness. In addition, certain crimes can be committed negligently, or even unintentionally (eg strict or absolute liability offences). Civil law countries similarly recognize three gradations of intent: *dolus directus* in the first degree, *dolus directus* in the second degree and conditional intent (generally referred to as *dolus eventualis*). In addition, civil law countries recognize two forms of negligence (advertent and inadvertent). Furthermore, both common law and civil law systems recognize some form of special (or additional) intent for particular crimes.¹⁶

Table 1 represents my attempt to provide a visual comparison of the different gradations of intent recognized in the domestic criminal justice systems of common law and civil law countries, in descending order of culpability.¹⁷ Inevitably, it only gives a broad outline of these gradations, as there is no one ‘common law’ or ‘civil law’ approach to intent. In fact, approaches differ considerably among civil law countries (and, to a lesser extent, between common

¹⁴ The term ‘intent’ is used here in the broad sense, to refer to any mental state that is higher than negligence. Negligence is excluded from the concept of ‘intent’ in this context, because it is characterized by the absence of any volitional or cognitive component (see Table 1 below). On this point, see G Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 31. See also GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 508–10.

¹⁵ See, eg, *Prosecutor v Bemba Gombo* (Confirmation Decision) ICC-01/05-01/08, PT Ch II (15 June 2009) para 357 (Bemba Confirmation). See also Eser (n 10) 905; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 475.

¹⁶ The concept of special or additional intent is discussed below in Part IV.

¹⁷ I have not been able to find any similar visual representation of the differences between the gradations recognized in common law and civil law countries. The hope is that a visual representation will assist the reader in understanding how the different gradations in these two systems roughly compare.

Table 1. Gradations of intent under common law and civil law

Common law	Civil law
Special (additional) intent	Special (additional) intent (<i>besondere Absicht</i> or <i>dolus specialis</i>)
Direct intent	Direct intent in the first degree (<i>Absicht</i> or <i>dolus directus</i> in the first degree)
V=Very High C=Low	V=Very High C=Low
Oblique intent	Direct intent in the second degree (<i>direkter Vorsatz</i> or <i>dolus directus</i> in the second degree)
V=Low C=High	V=Low C=Very High
	Conditional intent (<i>bedingter Vorsatz</i> or <i>dolus eventualis</i>)
Recklessness	V=Low C=Moderate
V=Low C=Low/Moderate	Advertent (conscious) negligence (<i>bewusste Fahrlässigkeit</i>)
	V=Low C=Low
(Inadvertent/unconscious) negligence	Inadvertent (unconscious) negligence
V=None C=None	V=None C=None

law countries).¹⁸ While some countries recognize every gradation listed, others do not recognize them all.¹⁹ Similarly, while some countries define certain gradations in a particular way, other countries adopt very different definitions.²⁰ Therefore, the borders between each gradation should not be viewed as clear

¹⁸ As Clark has put it, 'the civil law is not a monolith; the common law is not a monolith': RS Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Crim L Forum 291, 294.

¹⁹ For example, according to van Sliedregt, France does not recognize *dolus eventualis* as a form of intent: E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press 2003) 46. See also ME Badar, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 New Crim LR 433, 455–6; C Elliott, 'France' in K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 218.

²⁰ This is particularly the case for *dolus eventualis*, where even scholars *within* some countries hotly debate the definition of this gradation of intent (eg in Germany).

lines, but rather as boundaries that move, depending on the particular domestic legal system one is examining and the time at which it is examined.

In the same way, there is no one view on how the various gradations of intent recognized by common law and civil law systems line up when compared directly. Commentators disagree, for example, on whether recklessness (in common law) and *dolus eventualis* (in civil law) are really different, and in what way. Thus, the placement of certain common law gradations next to (or above or below) certain civil law gradations should not be viewed as definitive, but rather as a starting point for the following discussion. In fact, it is questionable whether it is even possible to compare the different gradations directly, as the concepts are so different. Instead of comparing *concepts*, it may therefore be more accurate to view the following table as comparing the likely *outcomes*; in other words, comparing whether an individual in a particular case would be considered to fulfil the definition of the relevant gradation if that same individual was to come before each domestic criminal justice system.

Before examining Table 1, a few more explanations are required. First, in addition to the English terms for each of the civil law gradations of intent, I have provided both the German and Latin terms, which are more commonly used by commentators and courts. Second, beneath the name of each gradation, an indication has been given of the relative level of the volitional (V) and cognitive (C) components required for each. As will be seen, both the volitional and cognitive components are present for all gradations, except for (inadvertent) negligence.

B. Direct Intent (in the First Degree)

Putting aside the question of special or additional intent, the highest gradation or level of intent for both civil law and common law systems is characterized by the perpetrator's *purposeful will* to bring about the prohibited result. This gradation is captured by the following example:

P (the perpetrator) is a sniper who wishes to kill *V* (the victim). *V* is standing inside a building a significant distance away. *P* shoots in the direction of *V* when *V* passes in front of the window of the building. The bullet shatters the window, and hits *V*. *V* dies as a result of the gunshot wound.

In this example, *P* has a strong desire to kill *V*; thus, the volitional component is very high. He is not sure whether, by his conduct, he will succeed in killing *V* (that is, whether he can hit his target at such a distance), but this does not matter, as this gradation of intent is still satisfied even where the cognitive component is low.

This gradation is generally known in civil law systems as direct intent (or *dolus directus*) in the first degree. In German law, direct intent in the first degree (*Absicht*) requires that the perpetrator 'have the completion of the

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Use of force against non-state actors and the circumstance precluding wrongfulness of self-defence

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Subject: International law

Keywords: International law; Non-state actors; Right to self-defence; Third countries; Use of force

Legislation:

United Nations Charter 1945art.2, art.51

***93** The right of self-defence against non-state actors is increasingly invoked and accepted in the practice of states. However, the recognition of this right must overcome a fundamental obstacle: that of explaining why the rights of the host state, in particular its right of territorial sovereignty, is not infringed by the self-defensive force used within its territory. In practice, states invoking self-defence against non-state actors rely on the involvement of the host state with those actors to justify the use of force in that state's territory. It is not clear, from a legal standpoint, how to rationalize the fact of involvement as a form of legal justification. For some, involvement amounts to attribution. For others, involvement is a form of complicity. For others still, involvement may entail a breach of the host state's due diligence obligation to protect the rights of other states in its territory. All of these solutions are deficient in some way, and have failed to receive general endorsement. This article considers whether there may be a different, as yet neglected, solution: self-defence as a circumstance precluding wrongfulness. The article shows that this is not a perfect solution either, since positive law remains uncertain on this point. Nevertheless, it is a solution that may provide a better normative framework for the development of the law of self-defence against non-state actors.

armed attack; circumstances precluding wrongfulness; non-state actors; self-defence; use of force

1. INTRODUCTION

The use of force by non-state actors is an unfortunate but recurring phenomenon in international affairs. It is, to be sure, not a new phenomenon. One of the most famous episodes in the history of international law, the *Caroline* incident between the US and Great Britain in 1837, involved the use of cross-border force by insurgents.¹ In contemporary conditions, the threat posed by non-state actors' uses of force is, however, greater than it has ever been. Technological and military advancements, as well as their availability to private actors, has exponentially increased non-state ***94** actors' capacity for destruction.² It is only necessary to read the daily news to realize just how devastating the actions of these irregular groups can be. How to deal with this phenomenon (in all its aspects) is one of the most pressing issues in and one of the most important challenges for contemporary international law.

One of the central questions in this regard is that of the availability of a right of self-defence against non-state actors on the part of states that are victims of military attacks by these groups.³ Since 1945 at least, international law has envisaged a right of self-defence applicable in inter-state relations only: by a victim state against the aggressor state.⁴ In this framework, uses of force by armed bands and the like had to be attributed to a state to trigger the right of self-defence, which would then become the author of the attack and the target of self-defensive force.⁵ But since the attacks on the World Trade Center on 9/11, states have increasingly called into question this understanding of the right of self-defence by invoking the right to respond to non-state actors' uses of force.⁶ To cite two well-known examples, it was widely recognized that the US acted in self-defence against al-Qaida in Afghanistan in 2001,⁷ and Iraq, and its allies, including France, the UK and the US, have asserted a right of self-defence (be it individual or collective) against Islamic State of Iraq and Syria (ISIS) in Syria.⁸ Whether this practice is sufficient (and sufficiently *95 uniform)⁹ to evidence a change in the traditional understanding of self-defence is still a contentious issue.¹⁰ The most charitable view in this regard is that the use of force in self-defence against non-state actors is "not unambiguously illegal";¹¹ but even then, it is unclear that this view is generally accepted.

In no small part, the difficulty with recognizing a right of self-defence against non-state actors is that of explaining why the state in whose territory those actors operate (the "host state") is liable to the use of force within its territory. The "dilemma", as Tom Ruys and Sten Verhoeven put it, is "clear":

On the one hand, it can not be accepted that states must simply undergo private attacks without having the right to defend themselves by using force against the home bases of these groups and their accomplices. On the other hand, state sovereignty is and remains one of the basic pillars of international law and order and should not lightly be violated.¹²

Why must the host state tolerate the infringement of its territorial sovereignty, or a (forcible) intervention in its affairs, or the impairment of, say, legally protected trade and other commercial relations by the victim's use of force? In considering this question, Kimberley Trapp has (rightly) observed that self-defence must "in some way excuse the violation of" these rights of the host state if it is to be an effective mechanism.¹³ It may be added that the legal justification of the impairment of host state rights is necessary to avoid triggering the host state's right of self-defence against the victim state; to uphold, in short, the principle that there is no self-defence against self-defence.¹⁴ Indeed, if the victim's use of force is, from the standpoint of the host state, a forcible violation of its sovereignty, then why can the host state not react in self-defence against it?¹⁵ Farfetched as this may sound, a right of self-defence *96 in these circumstances was invoked by Syria in the wake of indications by the US and other European powers that they intended to attack ISIS targets within Syria's territory as an exercise of collective self-defence of Iraq.¹⁶

There are many disagreements as to the conditions and the legal ground of justification for the impairment of host state's rights by self-defensive action - if one exists at all. At a bare minimum, states and scholars agree that any such justification must be grounded, in some measure, on the involvement of the host state with the non-state actors mounting the attack. This is evidenced by the references to, for example, the "harbouring" by Afghanistan of al-Qaida¹⁷ and, most recently, by the claim of Iraq and the US that Syria was unwilling or unable to deal with ISIS in its territory.¹⁸ To be sure, host state involvement with the non-state actors warrants differential treatment depending on the kind and degree of the relationship between the two.¹⁹ Where involvement is enough for attribution of the private conduct to the state, self-defence can be exercised in an inter-state manner.²⁰ Where attribution is not possible, two questions arise: first, what kind and degree of involvement is necessary; and, second, how to rationalize the fact of host state involvement into a ground of legal justification. As to the kind and degree of involvement, agreement seems to be coalescing around a standard of "unwillingness and inability" of the host state to deal with the non-state actors.²¹ But host state involvement is

a factual question,²² and does not, on its own, constitute a legal ground of justification. It is thus necessary to rationalize this fact into one such legal ground. The latter point is still controversial; many solutions have been proposed in the literature, but none of these has received general endorsement.²³

The majority of the debates on self-defence against non-state actors have centred on Article 51 of the Charter,²⁴ either to demonstrate that the restrictive inter-state *97 understanding is not supported by the language of the provision or intended by the drafters,²⁵ or to identify a different standard of attribution of the non-state actors' attack to the host state.²⁶ These works constitute a crucial step for the development of the law of self-defence, if this body of law is to adequately address the threat posed by non-state actors. Nevertheless, this focus has also produced the 'dilemma' that Ruys and Verhoeven mention: Article 51 (may) authorize the use of force *against* the non-state actors, but it fails to address the relations between victim state and host state. In contrast with this approach, this study queries whether Article 21 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARS)²⁷ may provide an answer to the 'dilemma'.²⁸ Pursuant to Article 21: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

Curiously, the vast literature on self-defence against non-state actors has thus far overlooked Article 21. In fairness, this provision is mostly neglected in the scholarship on the use of force,²⁹ and when actually addressed it has been largely misunderstood.³⁰ Can Article 21 provide the legal justification for the impairment of host state rights by self-defensive force used within its territory?

The study answers this question in three steps. First, in Section 2, it will begin by explaining the intended role and scope of Article 21 of the ARS. The section will describe the context and historical developments which rendered this provision necessary, and will show how, even though unacknowledged in practice, self-defence operates to preclude the wrongfulness of the infringement of *other* rights of the target state by lawful measures of self-defence. Second, in Section 3, the study then considers the possible application of Article 21 in the context of self-defence against non-state actors within the host state. Finally, Section 4 will provide some concluding remarks.

*98 Before entering into the substance of this study, some methodological and terminological observations are necessary. As to the methodology, this study is limited to the theoretical question of *how* to justify the encroachment of host state rights by the use self-defensive force in its territory. In accordance with the trend in state practice, this article will assume that host state involvement with the non-state actors launching the attack is necessary. In particular, given its recent momentum, this article will assume that the kind and degree of host state involvement necessary amounts to 'unwillingness or inability'. The study will not, therefore, seek to prove or disprove this test by reference to state practice; equally, it will not elaborate on the precise content of the standard.³¹ As to terminology, in order to avoid confusion between the two provisions in Article 51 of the Charter and Article 21 ARS, the rule in Article 51 will be referred throughout as the 'right of self-defence' or the 'primary rule of self-defence', whereas the rule in Article 21 will be referred to as the 'circumstance precluding wrongfulness', 'justification' or 'secondary rule' of self-defence. This use of terminology should not suggest, however, that these are two different norms. As Section 2 will clarify, the customary law recognizes a right of self-defence, and its functions and effects in the international legal order are codified in two provisions: Article 51 excepting self-defence from the prohibition of force, and Article 21 providing a justification for the collateral impairment of rights of the target state by self-defensive force.

2. SELF-DEFENCE AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Until 1945, the institution of the state of war (also known as 'formal' or 'technical' war) governed all of the legal relations existing between belligerent states.³² The state of war wholly excluded the law of peace, and replaced it with the law

of war in the relations between belligerents.³³ Moreover, (peace-time) treaties were terminated or, at the very least, suspended in the relations between the parties.³⁴ As a result, the military measures adopted by either party to the conflict could not violate or even impair the rights and obligations which governed their relations during peace.

The state of war is now an institution of pure historical interest. Whether it is compatible with the Charter's collective security system remains debatable,³⁵ but it is certainly the case that states no longer claim to be in a "state of war" when they are ***99** engaged in armed conflict.³⁶ In contemporary conditions, states engaged in armed conflict remain "formally at "peace",³⁷ which means that all their legal relations remain in force throughout the period of hostilities.³⁸ In these conditions, the use of force can impair a multiplicity of obligations existing between the two states engaged in conflict. For example, when the use of force occurs in the target state's territory, that force will constitute a breach of the prohibition of force, and it will also, among others, be an impairment of the target's territorial sovereignty³⁹ and of its right to be free from intervention.⁴⁰

Ordinarily, these impairments constitute breaches of international law. But what if a state resorts to force in self-defence? Customary international law recognizes the *right* of states to use force in self-defence when they are the victims of an armed attack. This is a unanimously accepted entitlement,⁴¹ codified in Article 51 of the UN Charter and regularly described as an "exception" to the prohibition of force.⁴² Resort to force in self-defence, being excepted from the prohibition of force, does not therefore constitute an infringement of that prohibition. That use of force is lawful by reference to the prohibition of force itself. But what about the other legal relations just mentioned; is defensive force lawful *also* by reference to these legal relations? As will be seen, Article 21 of the ARS is intended to justify the impairment caused by lawful force on these other legal relations.

The next two sections unpack Article 21 in an effort to elucidate its role in the international legal order. The analysis will be performed in two steps. First, the legal relations between the victim and the aggressor state will be considered. For analytical purposes, the legal relations between these two states will be divided into three categories and the interaction between self-defence and each of these categories will ***100** be considered. Second, this section will consider the question of third-party rights and whether self-defence can provide a justification for the forcible interference with the rights of third states. As will be seen later, this is an issue of special relevance where self-defence is exercised *against* a non-state actor *within* the territory of the host state.

2.1. Effects of self-defence on victim-aggressor state relations

The first step in understanding the function and scope of Article 21 is to separate the legal relations existing between the states involved in an armed conflict into three categories. First is the relation governed by the prohibition of force and its exception, the right of self-defence. Second are all the other legal relations (conventional or customary) existing between those states. These comprise an "infinite variety"⁴³ and include the rights of territorial sovereignty and non-intervention, trade and commercial rights, treaties for the exchange of technology, and so on. Third is the category of legal relations which impose "obligations of total restraint",⁴⁴ including (some) rules of international humanitarian law and human rights law. As will be explained in what follows, the customary right of self-defence provides a legal ground of justification for the breach of the first and second sets of legal relations. These effects are codified in separate provisions: the legality of force under the first legal relation is addressed by Article 51, and the legality of the impairment by (defensive) force of the second set of legal relations is addressed by Article 21.⁴⁵ The third set of legal relations *cannot* lawfully be impaired *even* when acting in self-defence.

2.1.1. First legal relation: Legality of resort to force

States are bound, under international law, by an obligation not to use force against one another. The prohibition, codified in Article 2(4) of the UN Charter, is widely regarded as one of the *jus cogens* norms.⁴⁶ This obligation not to use force possesses (at least) one exception in the form of a right of self-defence.⁴⁷ What this means, essentially, is that states are bound to respect their obligation not to use force unless they are the victims of an armed attack, in which case they are authorized to respond to force with (defensive) force.

***101** The structural relation between the prohibition of force and the right of self-defence is very complex, and it has been conceptualized in many different ways. The International Law Commission (ILC) construed the prohibition of force and its exception of self-defence as a single norm.⁴⁸ The prohibition of force and the right of self-defence, in other words, are two segments of an over-arching norm which can be restated, in simplified but relevant part, as follows: "the use of force is prohibited except in self-defence against an armed attack". In conceptualizing the norm in this way, the ILC was accommodating the opinions of states according to which the use of force in self-defence is not inconsistent with the prohibition of force and that it is, rather, lawful *ab initio*.⁴⁹ In this understanding, the exception of self-defence constitutes a limit on the material scope of the prohibition. Thus, the prohibition of force would be applicable only if there were a non-defensive use of force and defensive force would fall wholly outside of the prohibition's scope of application.⁵⁰

The ILC's approach is, to be sure, not uncontested and has been criticized for its artificiality.⁵¹ Indeed, the relation between the two could be construed differently, in a way that upholds the autonomy of the right of self-defence from the prohibition of force. In this construction there would be two rules, the prohibition *and* the right, both applicable to the same set of facts: the use of defensive force would be banned under the prohibition of force and permitted by the right of self-defence. The two rules would, therefore, be in a normative conflict. To conclude in favour of the legality of self-defence, the right of self-defence must be able to set aside the application of the prohibition. This construction of the relationship between the prohibition and the right runs into an obvious obstacle: the prohibition's peremptory status. As a *jus cogens* rule, the prohibition cannot be set aside,⁵² and the conflict would be resolved by the *lex superior* principle; the prohibition would prevail over the right, with the result that defensive force is unlawful. This is a paradoxical conclusion, in utter contradiction with the practice of states. The paradox can be overcome in one of two ways. First, by "elevating", so to speak, the right of self-defence to a peremptory rule. In this case, the conflict would arise between two peremptory rules and could potentially be resolved by application of the *lex specialis* principle.⁵³ Since self-defence is the most factually specific of the two rules, it would set aside the ***102** prohibition of force in the circumstances. Alternatively, it could be argued that only the prohibition of aggression possesses peremptory status. The resulting conflict between self-defence and the prohibition of force would be a conflict between "ordinary" rules, in which self-defence would again prevail as the factually most specific rule. Both solutions, however, lack grounding in positive law: states do not accept the *jus cogens* status of the right of self-defence,⁵⁴ and they do uphold the *jus cogens* status of the prohibition as a whole.⁵⁵ The ILC's solution, artificial as it may be, appears to be the most descriptively accurate understanding of this relation.⁵⁶

In whatever way the relation is construed, the point is that the right of self-defence constitutes an authorization to use force where force would otherwise be banned. To put it in symbolic terms, Article 51 of the Charter authorizes conduct otherwise prohibited by Article 2(4). When a state resorts to force in self-defence, Article 51 in a sense "takes care" of the inconsistency existing between that force and Article 2(4), either by limiting the prohibition's scope or by setting aside its application in the circumstances. Crucially, however, the right of self-defence is not an authorization to impair all other rights of the aggressor state.⁵⁷

2.1.2. Second set of legal relations: "Other" rights of the aggressor state

The victim and aggressor states are also bound by an "infinite variety" of other rights and obligations, be they customary or conventional. All of these other rights can potentially be impaired by military measures. The case-law of the ICJ and other international tribunals shows the great variety of rules of international law potentially impaired by the use of force, including: commercial obligations under bilateral treaties,⁵⁸ aviation agreements,⁵⁹ the obligation to settle disputes peacefully,⁶⁰ and so on. Indeed, as the ICJ made clear in the *Oil Platforms* case, international obligations may be breached by whatever means, including: by the decision of a court, by an Act of Parliament, or by the use of force.⁶¹

***103** The question thus emerges whether the impairment of these obligations through defensive force is unlawful, or whether these impairments may be justified if the military force was resorted to in self-defence. Of course, it is perfectly plausible that these interferences are unlawful even if the state using force was acting in self-defence. As the ICJ stated in *Croatia v. Serbia*, "[t]here can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another".⁶² Thus, self-defence may be lawful in relation to the prohibition of force and be unlawful in relation to, for example, the right of territorial sovereignty. Namely, a use of force may be compatible with the first legal relation mentioned above, but incompatible with the second set of legal relations. International law, however, opts for the opposite conclusion: the use of force in self-defence is lawful by reference to both the first and second sets of legal relations.

Article 21 is concerned precisely with the effects of self-defensive force on the second set of legal relations. That is, it is concerned with the collateral effects, so to speak, of self-defensive force on other rights of the aggressor state comprised in the second set mentioned above. The provision reflects a recurrent, if not directly acknowledged, phenomenon in practice.⁶³ The ICJ, for example, has never directly acknowledged that self-defence may justify these collateral violations, though this effect can be deduced from its decisions in *Nicaragua and DRC v. Uganda (Nicaragua)*. In *Nicaragua*, the Court found that the violation of Nicaragua's territorial sovereignty and non-intervention by US military operations was not justified by self-defence because, on the facts of the case, the US did not have a right of (collective) self-defence.⁶⁴ The same reasoning can be found in *DRC v. Uganda*, where the Court found that, since Uganda did not have a right of self-defence, its actions breached the DRC's rights of territorial sovereignty and non-intervention.⁶⁵ *A contrario*, it may be inferred that if the US and Uganda had a right of self-defence against Nicaragua and the DRC respectively, then there would have been no breach of those rights either. In state practice, the parties' pleadings in *Oil Platforms* are especially instructive in this regard. On the question whether self-defence could justify the breach of the Iran-US 1955 Amity Treaty,⁶⁶ the US, directly invoking Article 21, maintained that "[a]ny actions of the US deemed incompatible with Article X of the Treaty would not be wrongful by the operation of this principle [self-defence] of customary international law".⁶⁷ Iran also accepted this proposition, and said that:

***104** [A]ction otherwise lawfully taken in self-defence could constitute a circumstance precluding wrongfulness in relation to Article X, paragraph 1, of the Treaty. In other words, it accepts the proposition contained in Article 21 of the ILC Articles on the Responsibility of states.⁶⁸

Iran later added that if made out, self-defence would "exonerate the United States entirely; it would provide a complete justification for their conduct, in accordance with Article 21 of the ILC's Articles".⁶⁹

At customary law, then, it appears that self-defence can also justify the collateral impairment of these obligations by means of force. Article 21 simply reflects this additional function of the right of self-defence in the international legal order. It is worth pointing out that this is not an additional norm in the legal order, capable of going beyond the right of self-defence. Simply put, Article 51 and Article 21 codify different effects of the exercise of the customary right of

self-defence in the legal order. Article 51 concerns its effect on the prohibition of force, and Article 21 the effects of that exercise on the second set of legal relations.

2.1.3. Third set of legal relations: Obligations of "total restraint"

Self-defence, however, cannot justify the collateral impairment brought about through force of all obligations of the victim state (or rights of the aggressor state). The Commentary to Article 21 expressly excludes from the scope of this provision what it termed, following the ICJ's advisory opinion in *Nuclear Weapons*,⁷⁰ the "obligations of total restraint".⁷¹ By these are meant those obligations "expressed or intended to apply as a definitive constraint even to states in armed conflict", including non-derogable human rights, the "intransgressible"⁷² principles of international humanitarian law and other obligations designed to place a limit on the conduct of hostilities.⁷³ This exclusion was accepted by Iran in *Oil Platforms*,⁷⁴ and by Uganda in *DRC v. Uganda*, whose memorial explicitly stated that self-defence may in no circumstances justify breaches of human rights and humanitarian law.⁷⁵ Since the impairment of these obligations may not be justified by self-defence, no more will be said about them in this study.

2.2. The effect of (defensive) force on third states?

The Commentary to Article 21 specifies that the "essential effect" of this provision "is to preclude the wrongfulness of conduct of a state acting in self-defence *vis-à-vis* an attacking state".⁷⁶ And yet, the use of force in international relations may, in addition, *105 affect the rights of third (neutral) states. Can self-defence justify the impairment of these states' rights?

During the first reading of the ARS, the Commission had entirely foreclosed the possibility that self-defence may justify the impairment of third states' rights. The commentary to draft Article 34, the predecessor to Article 21, was clear in this regard:

The Commission [wished] to point out that the provision in article 34 is not intended to preclude the wrongfulness of, so to speak, indirect injury that might be suffered by a third state in connection with a measure of self-defence taken against a state which has committed an armed attack.⁷⁷

The interests of third parties were, therefore, "fully protected".⁷⁸ But during the second reading of the ARS, the Commission changed its position. Prompted by Special Rapporteur Crawford,⁷⁹ the ILC observed in 1999 that "a state acting in self-defence might be entitled to take action against a third state" and that "there was no need to make an explicit reference to that circumstance" in the text of, or in the Commentary to, Article 21 since the issue "was adequately covered by the relevant primary rules".⁸⁰ To reflect this, the Commentary to Article 21 currently indicates that this provision "leaves open all issues of the effect of action in self-defence *vis-à-vis* third states".⁸¹

2.3. Interim conclusions

A brief summary of the discussion so far may be useful before turning to the application of Article 21 to the exercise of self-defence against non-state actors. When a state resorts to force in self-defence, it does so against the background of the complex web of legal relations which bind it to the aggressor state (and third states). For analytical clarity, these legal relations were divided into three sets since the effect of the right of self-defence on each of them is codified in different provisions. First is the prohibition of force. When force is resorted to in self-defence it does not constitute a breach of the prohibition since self-defensive force is excluded from the scope of the prohibition. In conventional law, the legality

of the use of force is grounded in Article 51 of the UN Charter. Second is the category of 'other' obligations of the victim state (or 'other' rights of the aggressor) which may be impaired by forcible measures. These include the rights of territorial sovereignty, non-intervention, commercial or other trade rights, and so on. The impairment of these rights is also justified by self-defence if the force that encroached upon them, in other words, constitutes a lawful exercise of the right of self-defence in international relations.⁸² This justifying effect of self-defence, a sort of *incidental* effect of self-defence, is codified in Article 21 of the ARS. Third, is the category of legal relations which impose absolute restraints *106 on states in times of armed conflict, even if the state is acting in self-defence. These include non-derogable human rights and 'intransgressible' humanitarian law rules. The impairment of these obligations *may not* be justified, even by reference to the right of self-defence. Finally, Article 21 and its Commentary leave open the question of whether the impairment of third state rights by self-defensive force may be justified.

3. THE CIRCUMSTANCE PRECLUDING WRONGFULNESS OF SELF-DEFENCE AND THE USE OF FORCE AGAINST NON-STATE ACTORS

The ILC's work on Article 21 assumed the exercise of self-defence in an inter-state context.⁸³ So long as self-defence is exercised as between two states - including when the armed attack is private but attributable to that state⁸⁴ - and the resort to force complies with the requirements of the *jus ad bellum*, then self-defence will also produce the incidental effect of justifying collateral violations of the aggressor state's rights belonging to the second set of legal relations described above. Could this provision be applied to situations involving unattributable armed attacks by non-state actors; namely, to situations where self-defence is exercised against a non-state actor *within* the territory of the host state, so as to justify the impairment of host state rights by the defensive force?⁸⁵

There is a crucial distinction between the 'essential' case covered by Article 21 and the present scenario in that in the present scenario there is an additional party: the non-state actor. This additional party intrudes at the level of the first legal relation. The prohibition of force is, of course, owed as between the two states, the victim and the host state. Nevertheless, the exception of self-defence accommodates (or can accommodate) a third party: the non-state actor. The victim state is under an obligation not to resort to force *unless* it is the victim of an attack, which could include attacks by a private party.⁸⁶ In positive terms, a state would be authorized to resort to force in international relations whenever it is the victim of an armed attack - regardless of its source. This authorization is codified in Article 51 of the Charter which, in colloquial terms, takes care of Article 2(4) whenever force is used in self-defence. Article 51 ensures that defensive force is not incompatible with the prohibition in Article 2(4), even if the defensive force is directed *against* a *107 non-state actor. But this additional party is not accommodated by the second set of legal relations; these exist as between the victim state and the host state only. It is precisely for this reason that the 'dilemma' arises to begin with; while the victim may have a right of self-defence against the non-state actors, the defensive force encroaches upon the rights of a different entity, the host state.

Scholars have articulated different ways to resolve this dilemma. As noted in the Introduction, all these solutions have at their basis the (factual) premise of host state involvement with the private groups mounting the armed attack. The type and degree of involvement seems to be coalescing around a standard of 'unwillingness or inability', a standard which remains vague and has been abused. Be that as it may, of interest here is how the fact of state involvement (whatever the standard may be) has been and can be rationalized into a legal ground of justification that may explain why the host state's rights are not impaired by the use of defensive force against non-state actors within its territory. Section 3.1 will provide an overview and critique of the three main approaches offered by the scholarly literature to answer this question. Section 3.2 then considers whether Article 21 ARS may have a role to play in this regard.

3.1. Insufficiency of the mainstream approaches

Legal scholarship has appraised the fact of host state involvement with non-state actors in this context in at least three different ways: as an element of the requirement of necessity of self-defence; as a breach of international law by the host state through complicity with the non-state actors; and as a breach of a due diligence obligation to protect the rights of other states within its territory.⁸⁷ None of these approaches has received general support in either state practice or the scholarly literature arguably because, as will be explained in what follows, each of these approaches is unsatisfactory in some way and this diminishes their explanatory power.⁸⁸

According to some scholars, host state involvement with the non-state actors is relevant to the (customary) requirement of necessity of self-defence.⁸⁹ Pursuant to this view, the right of self-defence of the victim state is triggered by the armed attack of the non-state actors and its exercise is limited by the conditions of necessity and proportionality. The host state's involvement with the non-state actor, so this view goes, would fall to be analyzed under the requirement of necessity. Thus if the host state were willing and able to deal with the threat, then the use of force in self-defence would not be necessary. Contrariwise, if the host state is unwilling and/or unable to do so, then the necessity condition would be met and the victim state could lawfully resort to force against the non-state actors in the host state's territory.

***108** This is a rather simple way to account for the host state's involvement with the non-state actors in situations of self-defence, but crucially it fails to explain why the impairment of host state rights caused by defensive force is justified. This can be elucidated by reference to the first two sets of legal relations described in Section 2. The requirement of necessity belongs to the first legal relation - the exceptional entitlement to use force in self-defence, codified in Article 51 of the Charter. The condition of necessity must be met to establish the legality of the resort to defensive force. When host state involvement is accounted for under the condition of necessity, it only serves to show that in the circumstances the victim state resorted to force against the source of the threat (the non-state actors) lawfully by reference to the norm prohibiting force in international relations. But the conclusion about the legality of the resort to force as such says nothing about the legality of the impairment of rules in the second set of legal relations (those between the victim and host state) affected by the exercise of self-defence - so precisely the ones the impairment of which is in need of legal justification. In addition, this solution distorts the 'original purpose', in Christine Gray's words, of the requirement of necessity insofar as it treats necessity as an enabler of, rather than as a limitation on, the use of force.⁹⁰

Other scholars have rationalized host state involvement under the notion of complicity. In this view, since the host state is complicit in the armed attack of the non-state actor then it becomes liable to the use of defensive force against the non-state actor within its territory.⁹¹ This is not an argument about attribution - it is not the case, under this approach, that the complicity with the non-state actor determines the attribution of that armed attack to the host state. Rather, the position is that the host state's breach of its obligation not to aid or assist in the commission of a wrongful act by another renders it liable to the use of defensive force in its territory. This is a questionable conclusion. Under the law of state responsibility, complicity in the act of another state entails the responsibility of the accomplice. Crucially, the accomplice is responsible for its *own* conduct, for its *own* aid and assistance in the commission of a wrongful act by another state.⁹² In the current scenario, a host state would be responsible for assisting and aiding the non-state actors to engage in an armed attack. The host state's own wrongdoing (the aid and assistance) would entail its responsibility, in the form of cessation (if the act were continuing) and reparation towards the victim state.⁹³ But the accomplice is not responsible for the wrongful act of the principal actor. The host state is thus not responsible for the ***109** private armed attack as such.⁹⁴ This being the case, the host state is not liable, by the mere fact of its complicity with the non-state actors, to the use of force in its territory. To be successful, this approach must explain *why* complicity in this context entails a consequence not normally entailed under the general law of responsibility. As it currently stands, however, the approach simply assumes this consequence to be the case; the argument, that is, assumes the conclusion it seeks to prove.

The same criticism can be levelled at the third and final approach mentioned. Several scholars have attempted to ground the justification of the impairment of host state rights by defensive force by reference to the host state's infringement

of its due diligence obligations. It is well-established that states have an obligation to protect the rights of other states within their own territory.⁹⁵ When non-state actors operating in a state's territory successfully mount an armed attack against the victim state, the host state could be found to have breached its due diligence obligation.⁹⁶ The infringement of this obligation, the argument goes, 'opens up' the state to force being used within its territory.⁹⁷ As a result, the impairment of host state rights is lawful. But this too is an unconvincing argument.⁹⁸ Just as with the argument based on complicity, the due-diligence approach assumes the conclusion. A violation of due diligence obligations entails responsibility, involving the obligations of cessation and reparation, but this violation does not render the state liable to the use of force within its territory any more than the violation of any other rule (other than the prohibition of force) entails this consequence.⁹⁹ The argument fails to explain *why* a breach of due diligence in the circumstances would generate this consequence. As it is, it too simply assumes this to be the case.

Both of the last two approaches, based on the notion of complicity and due diligence obligations, are underpinned to some extent by countermeasures-like reasoning. In essence, both approaches posit that one violation of international law (the complicity in another's wrongful act, or the breach of due diligence duties) *110 justifies another violation of international law (the encroachment of host state rights). But countermeasures may not themselves involve the use of force,¹⁰⁰ so it is not clear why the breach of obligations in these circumstances would attract a forcible response.

3.2. Self-defence as a circumstance precluding wrongfulness: An alternative solution?

None of the mainstream approaches provide a satisfactory explanation to the 'dilemma' of impairment of host state rights by the use of defensive force against non-state actors within that state's territory. Could Article 21 provide an alternative solution?

The scenario where a state exercises self-defence against a non-state actor in another state's territory is not the 'essential' situation falling within the ambit of Article 21 - that of inter-state self-defence - as noted earlier. Rather, the situation of the host state is better assimilated to one involving a third party affected by the exercise of self-defence. The action in self-defence exists as between the victim state and the non-state actor, and the host state is an (affected) third state. As was mentioned in Section 2.2, the ILC does not answer the question whether Article 21 can justify the impairment of third states' rights by an action in self-defence. The matter, it says, is left 'open'. In this way, the ILC does not foreclose the possibility that Article 21 may extend to the justification of the impairment of third party rights. Insofar as Article 21 codifies an effect of the right of self-defence at customary law,¹⁰¹ the question then is whether as a matter of customary law the exercise of self-defence permits these intrusions on third parties' rights.

There are two bodies of law relevant to this question. First, the law of neutrality which protects the rights of and imposes duties on third parties during armed conflict. A third party may, by its involvement with one of the parties in conflict, forfeit its neutral protection and render itself liable to attack by the opposing party. Where this is the case, there is no role for Article 21 to play; the law of neutrality would itself resolve the 'dilemma' of host state rights. Second is the right of self-defence itself. In certain circumstances - whether or not a third state is involved in any way in the conflict - a self-defending state may *lawfully* impair (some of) the third states' rights. Does this extend to the impairment of *any* of its rights? If so, such an effect could be rationalized under Article 21 of the ARS.

3.2.1. What role for the law of neutrality?

Under the law of neutrality, neutral states have a right not to be affected by the conflict and they have duties of non-participation and impartiality.¹⁰² A neutral state which renders assistance to one of the parties to an armed conflict thereby violates its neutral duties, and becomes liable to reprisals by the affected belligerent. *111 Nevertheless, this

is not a liability to forcible reprisals. Since international law prohibits armed reprisals,¹⁰³ the affected belligerent may not use force against the neutral state on this ground. According to Michael Bothe, the only circumstances in which the neutral state may be liable to forcible attack by the affected belligerent is when its violation of neutral duties amounts to an armed attack; "a reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack".¹⁰⁴ The standard is high; not all support for an aggressor is equivalent to an armed attack.¹⁰⁵ Bothe notes that the non-neutral services rendered by the US, Saudi Arabia and Kuwait to Iraq, for example, "did not entitle Iran to adopt measures against those states involving the use of military force".¹⁰⁶ Applying this to the present context,¹⁰⁷ the use of force would be permissible within the host state's territory whenever its assistance to the non-state actors amounts to an armed attack.

The difficulty is, of course, that of determining when assistance amounts to an armed attack-is attribution necessary, or will an indirect attack suffice? By requiring a degree of state involvement with the non-state actors (or any other state in conflict) amounting to "an armed attack" against the other party, the law of neutrality reaches the same stalemate as any arguments based on Article 51; failing attribution of the non-state actors' conduct to the host state, there will be no entitlement for the victim to use force against, or even within, the host state. A plausible avenue for development could be the lowering of the threshold of host state involvement with the non-state actors, such that, for example, unwillingness and inability to deal with the private groups might suffice. But there are two weaknesses in this argument. First, it is difficult to see how unwillingness and, especially, inability might constitute an involvement equivalent to an armed attack. Second, it would probably be simpler to redefine the notion as a matter of the right of self-defence itself. At any rate, given the reluctance to redefine the notion of armed attack in the context of the right of self-defence, it is highly unlikely that the law of neutrality might develop in this direction.

3.2.2. Self-defence and third parties

The other possibility is that the right of self-defence itself may allow a state to use force against third parties or, more likely, that it permits the impairment of third party rights by self-defensive force. Certain impairment of third-state rights during hostilities have been justified on the grounds of a state's exercise of self-defence. *112 This is the case, for example, of the institution of war-zones or maritime exclusion zones on the high seas, where they affect the freedom of navigation of all states.¹⁰⁸ While in the past these would have been grounded on the exercise of belligerent rights, in recent decades recourse to self-defence as a legal basis of justification for these interferences is increasing.¹⁰⁹

States having justified interferences with neutral shipping on the basis of self-defence include France, during the Algerian emergency of the mid 1950s, and Pakistan, during the Indo-Pakistani conflict of 1965.¹¹⁰ The UK justified the institution of a 200 nautical miles exclusion zone around the Falklands/Malvinas and the institution of "security bubbles" around its warships traveling through the Atlantic Ocean, on the right of self-defence.¹¹¹ These zones were initially applied only against Argentine warships, though they were later extended to "any other ship, whether naval or merchant vessel, which is operating in support of Argentina".¹¹² During the Iran-Iraq war, at least two states, the UK¹¹³ and the US,¹¹⁴ accepted the principle that self-defence could justify interference with neutral shipping when there was reasonable suspicion of non-neutral service.¹¹⁵ In particular, the UK held that:

a State which is actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there are reasonable grounds for suspecting that the ship is taking arms to the other side for use in the conflict.¹¹⁶

On the whole, the Iraqi and Iranian war-zones were widely criticized by other states and by the Security Council. But as emphasized by Ross Leckow, these critiques responded to the "little respect shown by either side for [the] principle of

restraint' in their enforcement of these areas. It was "because of this complete disregard for "reasonableness" that attacks on neutral merchant vessels on both sides must be condemned as violations of international law'. Most recently, after the 9/11 attacks, the US engaged in the boarding of neutral vessels suspected of transporting terrorists. While the explicit legal basis for this was never articulated, the US generally justified its action in this regard on the right of self-defence.¹¹⁷

The legal basis of interference with neutral shipping, to be sure, remains a matter of some debate; some uphold a wider right of interference as a matter of belligerent rights, and therefore available to both victim and aggressor state, whereas others - *113 like the examples just mentioned - opt for a narrower right based on a state's exercise of self-defence.¹¹⁸ As observed by Natalie Klein, the invocations of self-defence are of special significance given their context. In her view, "[t]his recent practice should be seen against previous practice where there was far less acceptance of reliance on the right of self-defence to justify intrusions against the freedom of navigation on the high seas'.¹¹⁹ This practice, at the very least, shows states' willingness to accept the impairment of the rights of third states in the exercise of self-defence in certain, if limited, circumstances.

The reasoning underpinning the legal justification of these interferences with third party rights could be extended, by analogy, to the 'dilemma' of host state rights as well. The analogy could be built on the UK's position on self-defence-based interferences with neutral shipping, quoted earlier, as this is the clearest articulation of a justification for impairment of third state rights in the circumstances. Under the UK position, a state acting in self-defence may impair the rights of third states to freedom of navigation only where there is suspicion of involvement between the third state and the aggressor. Involvement, in this regard, amounts to assistance in the form of arms-provision - so a far lower standard than what is necessary for that assistance to itself constitute an armed attack. Applying this same reasoning to the non-state actor scenario, the victim state exercises its right of self-defence against the non-state actor and, in so doing, it impairs the rights of a third party, the host state. Such interference may be justified under self-defence so long as there exists some measure of host state involvement with the non-state actor, an involvement which need not amount to an armed attack and could, if accepted, be as limited as unwillingness and inability. Nevertheless, given the different extent to which third state rights are impaired in the two scenarios (in one case, the right of freedom of navigation, in the other, the rights to territorial sovereignty, non-intervention, and so on), it may be necessary to qualify the UK position above if it is to apply in respect of host-states. So, instead of requiring a reasonable suspicion of host state involvement, the justification would only be afforded where host state involvement actually existed and there was evidence to prove it.

To put this approach in terms of Articles 51 of the Charter and 21 of the ARS, the resort to force in self-defence against the aggressor (the non-state actor) would be grounded on Article 51 of the Charter - which, it may be recalled, is applicable only to the question of the legality of the use of force by reference to the general prohibition - whereas the interference with third state rights may be grounded on Article 21 ARS.¹²⁰ Such an approach, which relies on Article 21 in addition to Article 51, overcomes the explanatory difficulties of the mainstream theories reviewed earlier. To begin with, it relies on the concept of 'circumstances precluding wrongfulness', a category of circumstances in the law of responsibility whose function is precisely that of justifying the infringement of legal rules. Most importantly, the relevant *114 circumstance precluding wrongfulness, Article 21, can justify the breach of obligations brought about through the use of force, which no other circumstance precluding wrongfulness, or any of the mainstream approaches reviewed earlier, are capable of achieving.¹²¹

4. CONCLUSION

The use of force against non-state actors presents, for international law, a clear dilemma: it is not possible to expect the victim of non-state actors' assaults to tolerate that conduct, but by the same token the rights of the host state must be upheld. State practice, albeit far from the generality, uniformity and consistency necessary for the modification of customary law, shows an increased acceptance of a right of self-defence against non-state actors - but the recognition

of this right must overcome an important practical obstacle: how, legally, to justify the interference with the rights of the host state by the use of force in its territory?

Scholars working in this field have proposed different explanations for the justification of interferences with host states' rights. Building from the practice of states, they all rely, in some form or another, on the involvement of the host state with the non-state actors. Nevertheless, they disagree as to the rationalization of the fact of involvement into a ground of legal justification. Thus, some scholars view host state involvement as relevant to the condition of necessity of self-defence, others as a form of complicity, and others still as a breach of the host state's due diligence obligation to protect the rights of the victim state in its territory. But none of these approaches is sufficient; at the crucial point, that of explaining why the host state is liable to the use of force within its territory, they all contain leaps in the reasoning.

This study has proposed an alternative answer to this question, one based on Article 21 of the ARS, namely on self-defence in its role as a circumstance precluding wrongfulness. This provision, albeit much misunderstood in the literature, has an important role to play in inter-state invocations of self-defence. It is Article 21 which explains why force that is lawful under Article 51 of the Charter does not constitute an infringement of other rights of the target state, most importantly of its right of territorial sovereignty. While Article 21 assumes an inter-state use of force, in which there is identity of the parties to the relevant legal relations (self-defence, territorial sovereignty, and so on), its Commentary shows that Article 21 may extend to the justification of the interference with the rights of third states, namely situations in which there is a mismatch between the parties to the affected legal relations. Indeed, the right of self-defence may, in certain circumstances, impair the rights of third parties. Thus, states have justified the institution of maritime exclusion zones, affecting third party rights of free navigation, on the basis of self-defence. Perhaps host state involvement with the non-state actors may be reconceptualized as one of the situations in which the right of self-defence permits interference with a third party, the host state. This way, the legal relation between the victim state and the *115 non-state actor would be governed by Article 51, and the legal relations between the victim state and the host state would be governed, and thereby justified, by Article 21.

To be sure, a solution based on Article 21 is still far from being entirely satisfactory. This is not so much as a result of the approach itself, but of the difficulties inherent in the claim that force can be lawfully used in self-defence against non-state actors. These difficulties are both legal and practical. Legally, any theory about the use of self-defence against non-state actors must overcome an important hurdle - that of grounding the illegality of the armed attack. An armed attack, to trigger the right of self-defence, must not be merely a "factual" armed attack¹²² - it is necessary that it also be unlawful. If this were not the case, then the continued validity of the principle "no self-defence against self-defence"¹²³ would be undercut. For if all that is necessary is a factual armed attack, regardless of its legal qualification, then a use of force in self-defence can, too, be a factual armed attack (if it attains the required gravity threshold) triggering the aggressor's own right of self-defence. The result is a logical spiral of violence, where self-defence can be invoked against self-defence. Yet, there is no identifiable ban on the use of force by non-state actors.¹²⁴ Practically, the desirability of this development remains questionable, as recently shown by Christine Gray, who has argued that the use of force against non-state actors is far from an effective instrument.¹²⁵

Article 21 can provide a sound framework to address the "dilemma" of host state rights. Of course, this solution would still require the acceptance of states to become binding at positive law (possibly through their practice and *opinio juris*). While a conceptually more satisfying solution can be found to the "dilemma", the availability of a right of self-defence against non-state actors still faces many theoretical and practical hurdles.

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Footnotes

- 1 On which see, generally, R. Jennings, 'The *Caroline* and McLeod Cases', (1938) 32 AJIL 82.
- 2 T. Ruys, 'Armed Attack' and Article 51 of the UN Charter (2010), at 488.
- 3 The discussion assumes that non-state actors operate in a cross-border fashion, from the territory of a different state. States are not prohibited by international law to use force within their own borders to tackle these threats, within limits imposed by human rights law and, if and to the extent applicable, humanitarian law.
- 4 See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136 (*Palestinian Wall*), at 194, para. 139.
- 5 As asserted by the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14 (*Nicaragua*), at 103, para. 195.
- 6 For a review of practice, see Ruys, *supra* note 2, at 447-72; R. Van Steenberghe, *La légitimité de l'usage de la force en droit international public* (2012), at 292-325; O. Corten, *Le droit contre la guerre* (2014), at 743-53.
- 7 UN Security Council, Resolution 1368 (2001), UN Doc. S/RES/1368 (2001). The literature on the US's exercise of self-defence in Afghanistan is vast. For a review of the facts and the main scholarly approaches, see T. Becker, *Terrorism and the state: Rethinking the Rules of State Responsibility* (2006), Ch. 6.
- 8 See summary record of the SC meeting of 20 November 2015, UN Security Council, 7565 th Meeting, UN Doc. S/PV.7565, at 2 (France), 4 (US), 9 (UK). See also the following letters to the Security Council: *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/695 (US); *Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2014/851 (UK); *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/745 (France). For scholarly analyses of the situation in Syria, see: L. Arimatsu and M. Schmitt, 'Attacking "Islamic state" and the Khorasan Group: Surveying the International Law Landscape', (2014) 53 *Columbia Journal of Transnational Law Bulletin* 1; M. Hakimi, 'Defensive Force against Non-State Actors: The state of Play', (2015) 91 *International Legal Studies* 1 (Defensive Force). The matter has also been addressed in numerous blog posts, e.g., J.D. Ohlin, 'The Unwilling or Unable Doctrine Comes to Life', *Opinio Juris*, 23 September 2014, available at www.opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/; M. Hakimi, 'Assessing (Again) the Defensive Operations in Syria', *Just Security*, 22 January 2015, available at www.justsecurity.org/19313/assessing-again-defensive-operations-syria/; C. Kreß, 'The Fine Line Between Collective Self-Defence and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria', *Just Security*, 17 February 2015, available at www.justsecurity.org/20118/claus-kreb-force-isil-syria/; R. Van Steenberghe, 'From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition', *EJIL: Talk!*, 23 October 2015, available at www.ejiltalk.org/13758-2/.
- 9 There are some methodological debates as to whether the practice should prove a modification of the rule or the existence of a new rule, on which see Corten, *supra* note 6, at 35-63; R. Van Steenberghe, 'State Practice and the Evolution of the Law of Self-Defence: Clarifying the Methodological Debate', (2015) 2 JUFIL 81.
- 10 Ruys, *supra* note 2, at 487-9, 531.
- 11 *Ibid.*, at 531. The expression is taken from a paper of the UK Foreign and Commonwealth Office, titled 'Is intervention ever justified', Foreign Policy Document no 148, 1986, reprinted in 'UK Materials in International Law', (1986) 57 BYIL 614. For a similar position, see C. Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', (2008) 55 NILR 159.
- 12 T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', (2005) 10 *Journal of Conflict & Security Law* 289, at 310.
- 13 K. Trapp, 'The Use of Force against Terrorists: A Reply to Christian J Tams', (2009) 20 EJIL 1049, at 1050.

- 14 *United States v. von Weizsaecker et al. (Ministries trial)* (1949) 14 NMT 314, at 329. For an earlier statement of this principle, see *The Maria* (1799) 1 C Rob 340, at 361 ('it is a wild conceit, that wherever force is used, it may be lawfully resisted. A lawful force cannot be lawfully resisted'). See also N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), at 41; Y. Dinstein, *War, Aggression and Self-Defence* (2012), at 190.
- 15 For this reason, the encroachment upon the host state's rights must be justified (namely, rendered lawful) and not just excused. Excuse defences exclude the consequences of unlawfulness (e.g., cessation and reparation), without having an effect on the illegality of the relevant conduct. If the infringement of host state rights were merely 'excused', this would mean that the victim state may not owe reparations to the host state, but it would not be enough to prevent the host state's right of self-defence from being triggered; the use of force in its territory would remain unlawful and, if it reaches the required gravity, it could constitute an armed attack. On the distinction between justification and excuse in international law, see: V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses?', (1999) 10 EJIL 405; T. Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?', in O. Corten et al. (eds.), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007), 223; G. Scalese, *La rilevanza delle scusanti nella teoria dell'illecito internazionale* (2008); F. Paddeu, *General Defences in International Law: Justification and Excuse in the Law of State Responsibility* (2013), Ch. 3, Unpublished Doctoral Dissertation, University of Cambridge.
- 16 See T. Ruys and N. Verlinden, 'Digest of State Practice: 1 July-31 December 2014', (2015) 2 JUFIL 119, at 135. According to the Syrian Minister of National Reconciliation Affairs, '[a]ny action of any type without the approval of the Syrian government is aggression against Syria', *ibid.*
- 17 See, e.g., the letters sent to the UN Security Council by: Canada: *Letter dated 24 October 2001 from the Charge d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/1005; the European Union: *Letter dated 8 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General*, UN Doc. S/2001/967; Germany: *Letter dated 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/1127; and New Zealand: *Letter dated 17 December 2001 from the Permanent Representative of New Zealand to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/1193.
- 18 See the references in *supra* note 7.
- 19 For an example of this differential treatment, see A. Becker Lorca, 'Rules for the "Global War on Terror": Implying Consent and Presuming Conditions for Intervention', (2012) 45 *NYU Journal of International Law and Politics* 1.
- 20 Even in this case, the interference with the target state's rights of territorial sovereignty and non-intervention, among others, require legal justification, as will be explained in Section 2.
- 21 On which see, generally, A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', (2012) 52 *Virginia Journal of International Law* 483. See also T. Reinold, 'State Weakness, Irregular Warfare, and the Right of Self-Defense Post-9/11', (2011) 105 *AJIL* 244.
- 22 T. Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah', (2007) 43 *Stanford Journal of International Law* 265, 283 (noting that state involvement with non-state actors "is not easy to assess [and] ultimately boils down to a factual and contextual assessment').
- 23 See *infra* Section 3.2.2.
- 24 Pursuant to Art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security", 1945 Charter of the United Nations, 1 UNTS 16.
- 25 See, e.g., S. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 *Harvard International Law Journal* 42; R. Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent Practice: A Step Forward?', (2010) 23 *LJIL* 183; S. Ratner, 'Self-Defence Against Terrorists: The Meaning of Armed Attack', in L. van

- den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order - Meeting the Challenges* (2013), 334.
- 26 Van Steenberghe usefully reviews the arguments made under several of the ARS rules on attribution in Van Steenberghe, *supra* note 6, at 311-23.
- 27 Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ARS and Commentary) Annexed to UN Doc. A/RES/56/83 (2002).
- 28 On this provision see, generally, J.M. Thouvenin, 'Self-Defence', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), 455; J. Crawford, *State Responsibility: The General Part* (2013); F. Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility', (2015) 86 BYIL 90.
- 29 As an example, the recent *Oxford Handbook on the Use of Force in International Law*, edited by Marc Weller, and containing over 50 chapters, does not contain a chapter on Article 21.
- 30 See, e.g., T. Christakis and K. Bannelier, 'La légitime défense en tant que "circonstance excluant l'illicéité"', in R. Kherad (ed.), *Les légitimes défenses* (2007) 233; T. Christakis and K. Bannelier, 'La légitime défense a-t-elle sa place dans un code sur la responsabilité internationale?', in A. Constantinides and N. Zaikos (eds.), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K Koufa* (2009), 519. These authors consider that Article 21 is 'useless' (they use the term '*inutile*' in French) insofar as the relations between the victim and aggressor states are concerned.
- 31 For this, see Deeks, *supra* note 21.
- 32 The state of war consisted of the situation, condition or status during which the extraordinary law of war substituted the law of peace in the regulation of the relations between the parties to the conflict, see Q. Wright, 'When does War Exist?', (1932) 26 AJIL 362, at 363.
- 33 S. Neff, *War and the Law of Nations* (2005), at 177.
- 34 See, e.g., *North Atlantic Coast Fisheries Case (Great Britain/US)* (1910) 11 RIAA 167, at 181 ('International law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it'). The doubts surrounding this question in the early twentieth century were described by C. Hurst, 'The Effect of War on Treaties', (1921) 2 BYIL 37.
- 35 For a summary of the scholarly debate see Neff, *supra* note 33, at 335-40.
- 36 See the exhaustive review of practice in M. Mancini, *Stato di guerra e conflitto armato nel diritto internazionale* (2009), Ch. 4. See also, for practice related to commercial and economic relations, S. Silingardi, *Gli effetti giuridici della guerra sui rapporti economici e commerciali* (2012).
- 37 ARS, *supra* note 27, Art. 21 Commentary, para. 2. See also J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498 and Add.1-4 (1999), at 75, para. 299.
- 38 Including treaties, at least as a matter of principle. See Art. 3 of the ILC's Articles on the Effects of Armed Conflict on Treaties, with Commentaries, Report of the ILC on the work of its sixty-third session, UN Doc. A/66/10 (2011).
- 39 *Nicaragua*, Memorial of Nicaragua, 30 April 1985, ICJ Pleadings, vol. IV, at 115; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ, Application instituting proceedings, 28 July 1986, at 5-7; *Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*, ICJ, Memorial of Nicaragua, 19 August 1987, at 109; *Armed Activities on the Territory of the Congo (DRC v. Burundi)*, ICJ, Application instituting proceedings, 23 June 1999, at 15-19; *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, ICJ, Application instituting proceedings, 23 June 1999, at 16-19; *Aerial Incident of 10 August 1999 (India v. Pakistan)*, ICJ, Application instituting proceedings, 21 September 1999, at sec. II; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ, Cameroon statement, CR 2002/7, at 36, para. 7; *Legality of the Use of Force (Federal Republic of Yugoslavia v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 283, para. 1; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ICJ, Application instituting proceedings, 18 November 2010, at 4.
- 40 *Nicaragua*, Memorial of Nicaragua, *supra* note 39, at 120; *Nicaragua v. Honduras*, Application instituting proceedings, *supra* note 39, 5-7; *Cameroon v. Nigeria*, CR 2002/7, *supra* note 39, at 36, para. 7; *DRC v. Burundi*, Application instituting proceedings, *supra* note 39, at 15-19; *DRC v. Rwanda*, Application instituting proceedings, *supra* note 39, at 16-19; *Certain Activities (Nicaragua v. Costa Rica)*, Memorial of Nicaragua, *supra* note 39, at 55ff.
- 41 Nevertheless, ambiguities and differences of opinion remain about the meaning and scope of the various conditions and requirements of the exercise of the right.

- 42 See, e.g., Murphy, *supra* note 25, at 44.
- 43 The expression is taken from: R. Baxter, "International Law in "Her Infinite Variety"", (1980) 29 ICLQ 549.
- 44 ARS, *supra* note 27, Art. 21 Commentary, para. 4. The expression is the ICJ's: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226 (*Nuclear Weapons*), at 242, para. 30.
- 45 It may be worthwhile to recall that, as clarified by the ICJ in *Nicaragua*, Art. 51 is not a complete statement of the law of self-defence as this exists in customary law. Customary law (to which a *renvoi* is made by the reference in Art. 51 to the "inherent right") complements the Charter provision. See *Nicaragua*, *supra* note 5, at 94, para. 176.
- 46 For a thorough review of the relevant practice, see Corten, *supra* note 6, 341-59. A significant number of judges and scholars support the preemptory status of the prohibition of force: *Nicaragua*, *supra* note 5, sep. op. President Singh, at 153; sep. op. Judge Sette-Camara, at 199; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, sep. op. Judge Kooijmans, at 260, para. 46; diss. Op. Judge Elaraby, at 291; sep. op. Judge Simma, at 327, para. 6; *Palestinian Wall*, *supra* note 4, sep. op. Judge Elaraby, at 254; Ruys, *supra* note 2, at 27; O. DoÏ#rr and A. Randelzhofer, "Article 2(4)", in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012) vol 1, 200, at 231; Van Steenberghe, *supra* note 6, at 137-40.
- 47 There are other exceptions too, see S. Helmersen, "The Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations", (2014) 61 NILR 167.
- 48 ARS, *supra* note 27, Art. 21 Commentary, para. 1. This reading was endorsed by Judge Tomka in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Rep. 168, Declaration Tomka, at 353-4.
- 49 See e.g., Ethiopia: UN Doc. A/C.6/35/SR.51, at 12, para. 46; Hungary: UN Doc. A/C.6/35/SR.55, at 12, para. 45; Mongolia: UN Doc. A/C.6/35/SR.53, at 8, paras. 29-30; Spain: UN Doc. A/C.6/35/SR.55, at 4, para. 11; Trinidad and Tobago: UN Doc. A/C.6/35/SR.56, at 6, para. 26; (then) USSR: UN Doc. A/C.6/35/SR.52, at 14, para. 63. On this point, see Crawford, *supra* note 37, at 74-5.
- 50 Kammerhofer describes this approach as a "gap" in the prohibition of force: J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), at 9.
- 51 E.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, at 52-3, para. 95; J. Green, "Questioning the Preemptory Status of the Prohibition of the Use of Force", (2011) 32 *Michigan Journal of International Law* 215; A. de Hoogh, "Jus Cogens and the Use of Armed Force", in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015), 1161, at 1172-5.
- 52 As confirmed by ARS, *supra* note 27, Art. 26: "The wrongfulness of any act of a State which is not in conformity with an obligation arising under a preemptory norm of general international law."
- 53 Assuming that conflicts between preemptory rules are resolved by reference to the principles of priority.
- 54 Van Steenberghe, *supra* note 6, at 118.
- 55 See references at *supra* note 47. It may be added that distinguishing "aggression" from "force" is not a simple task either in theory or in practice, on which see C. DiÏ#az Barrado, *El consentimiento, causa de exclusioÏ#n de la ilicitud del uso de la fuerza en derecho internacional* (1989), 74-5.
- 56 See further, Paddeu, *supra* note 28, at Section II.
- 57 From the standpoint of Charter law, it could be argued that the language of Art. 51 does indeed authorize the impairment of other Charter-rights of the aggressor state. Thus, Art. 51 states that "nothing in the present Charter shall impair â#". Nevertheless, Art. 51 cannot authorize the impairment of customary rights. Art. 103 of the Charter is not helpful in this regard. To begin with, it is limited to other conventional rights - though it seems logical that it may extend to customary rights as well. At any rate, Art. 103 gives priority to obligations arising under the Charter and not to *rights* arising thereunder.
- 58 See, e.g., Nicaragua's claims at: Memorial of Nicaragua, *Nicaragua*, ICJ Pleadings, vol IV, 110-11, and oral statement, ICJ Pleadings, vol V, 210-12. For Iran's claims, see *Oil Platforms*, *supra* note 46, at 166, para. 1; also at 176, para. 26.
- 59 See, e.g., Memorial of Iran, *Aerial Incident of 3 July 1988 (Iran v. USA)*, at 146 (breach of the Chicago Convention), 182 (breach of the Treaty of Amity), 238 (both).

- 60 See, e.g., *Guyana v. Suriname*, Award, 17 September 2007, UNCLOS Annex VII Tribunal, at 147, para. 445, and *dispositif* at 165, para. 2, on the obligation to solve disputes peacefully contained in Art. 279 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 397.
- 61 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection Judgment of 12 December 1996, [1996] ICJ Rep. 803, at 811-12, para. 21: "The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means."
- 62 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 474 (not yet reported).
- 63 For additional examples in practice, see Paddeu, *supra* note 28.
- 64 *Nicaragua*, *supra* note 5, at 126, paras. 247-9, on prohibition of intervention; at 128, para. 251, on territorial sovereignty.
- 65 *DRC v. Uganda*, *supra* note 48, at 227, para. 165, and at 280, para. 345.1. Note that the Court only refers to the principle of non-use of force and the principle of non-intervention in the *dispositif*, even though the DRC had claimed also a breach of its territorial sovereignty and the Court had addressed it in its reasoning. For the DRC's prayer for relief, see Memorial of the DRC, at 273.
- 66 1957 Iran-US Treaty of Amity, Economic Relations and Consular Rights, 284 UNTS 93.
- 67 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Rejoinder Submitted by the United States of America, 23 March 2001, at 141, para. 5.02. The US's argument on this point changed throughout the pleadings, for a brief summary (in what concerns the point of Art. 21), see Paddeu, *supra* note 28.
- 68 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Iran statement, CR 2003/5, at 41, para. 29 (references omitted).
- 69 *Oil Platforms*, Iran statement, CR 2003/7, at 51, para. 3.
- 70 *Nuclear Weapons*, *supra* note 44, at 242, para. 30.
- 71 ARS, *supra* note 27, Art. 21 Commentary, para. 4.
- 72 The term is, once again, taken from the ICJ's judgment in *Nuclear Weapons*, *supra* note 44, at 242, para. 30.
- 73 ARS, *supra* note 27, Art. 21 Commentary, para. 4.
- 74 *Oil Platforms*, Iran statement, CR 2003/5, at 41, para. 29. (references omitted).
- 75 *DRC v. Uganda*, Uganda Memorial, at 232-3, paras. 5.93-5.94.
- 76 ARS, *supra* note 27, Art. 21 Commentary, para. 5.
- 77 Commentary to Art. 34, ILC, Report of the Commission on the work of its thirty-second session, UN Doc. A/35/10 (1980), at 61, para. 28.
- 78 Ibid.
- 79 Crawford, *supra* note 37, at 76, para. 302.
- 80 ILC, Report of the Commission on the work of its fifty-first session, UN Doc. A/54/10 (1999), at 77, para. 321.
- 81 ARS, *supra* note 27, Art. 21 Commentary, para. 5.
- 82 Art. 21 requires compatibility both with the *jus ad bellum* and with the *jus in bello*, see Commentary, para. 6. The discussion in this article will only consider the issue from the standpoint of the *jus ad bellum*.
- 83 ARS, *supra* note 27, Art. 21 Commentary, para. 5.
- 84 Through whichever rule of attribution recognized in the ARS or, even, a lower standard of attribution recognized in the primary law, on which see Crawford, *General Part*, *supra* note 28, at 158. See also C. Tams, "The Use of Force against Terrorists", (2009) 20 EJIL 359, at 385-8; G. Nolte and A. Randelzhofer, "Article 51", in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012) vol. 2, 1397, at 1416; Corten, *supra* note 6, at 717-58. See also Van Steenberghe, *supra* note 6, 311-23, for a review of relevant arguments.
- 85 On the distinction between self-defence against a state or within the state, see K. Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against non-State Terrorist Actors", (2007) 56 ICLQ 141, at 142; Lubell, *supra* note 14, at 36. For a contrary view, see M.E. O'Connell, "Dangerous Departures", (2013) 107 AJIL 380, at 383.

- 86 This interpretation of Art. 51 and the right of self-defence is accepted here for the sake of argument. As noted in the introduction, however, it is important to recall that whether this is accepted as a matter of customary law is debatable.
- 87 Each of these approaches will be presented in its essential form, in a way which it is believed will be more or less acceptable to all scholars maintaining it. Of course, there may be variations in the details across the writings of various scholars, though these are immaterial to the point being made in this article.
- 88 Hakimi, *Defensive Force*, *supra* note 8, at 3-4.
- 89 Trapp, *supra* note 85, at 146-7; Van Steenberghe, *supra* note 25, at 199-202; Deeks, *supra* note 21, at 494-5; C. Tams and J. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence', (2012) 45 *Israel Law Review* 91, at 98-101; D. Akande and T. Liefeländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence', (2013) 107 *AJIL* 563, at 564-6.
- 90 C. Gray, 'The Limits of Force' (2016) 376 *RCADI* 93, at 111.
- 91 E.g., R. Wolfrum and C. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 594-5; R. Wolfrum, 'The Attacks of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', (2003) 7 *Max Planck Yearbook of United Nations Law* 1, at 37-8; Ruys and Verhoeven, *supra* note 12, at 315-17. For a summary and critique of this approach see K. Trapp, *State Responsibility for International Terrorism* (2011), 58-61.
- 92 ARS, *supra* note 27, Art. 16 Commentary, para. 10. In the literature, see B. Graefrath, 'Complicity in the Law of International Responsibility', (1996) 29 *RBDI* 370, at 371 (complicity "constitutes itself an internationally wrongful act of the State â#; [i]t does not create a kind of co-responsibility in another State's responsibility â#; [i]t has its own identity as a separate violation of international law').
- 93 See, generally, H. Aust, *Complicity and the Law of State Responsibility* (2011), at 269-86.
- 94 Becker, *supra* note 7, at 224-5.
- 95 *Corfu Channel (UK v. Albania)*, Compensation Assessment, Judgment of 15 December 1949, [1949] *ICJ Rep.* 4, at 22. See also, in the context of terrorism, General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (XXV) (24 October 1970). On this obligation see, generally, Trapp, *supra* note 91, at 64-82.
- 96 On due diligence obligations see R. Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 5.
- 97 See, e.g., D. Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses', (2003) 11 *Cardozo Journal of International and Comparative Law* 1, at 15, 30-2; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), 189; Reinold, *supra* note 21, at 284; K. Trapp, 'Can Non-State Actors Mount an Armed Attack?', in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015), 679, at 695; L. Moir, 'Action Against Host States of Terrorist Groups', in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015), 720, at 730. For a similar argument, see: R. Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden', (1999) 24 *Yale Journal of International Law* 559, at 565; B. Feinstein, 'A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them', (2004) 17 *Transnational Lawyer* 51, at 77.
- 98 It is moreover problematic in that, by definition, a state's inability to deal with the non-state actor will not infringe its due diligence obligation. Due diligence obligations are obligations of means, not of result, and are premised upon the capacity of the state, in the circumstances, to engage in that conduct. See F. Lozano Contreras, *La nocio#n de debida diligencia en derecho internacional pu#blico* (2007), at 220-8.
- 99 Similarly, Ruys and Verhoeven, *supra* note 7, at 317-18; Ruys, *supra* note 22, at 285; Antonopoulos, *supra* note 11, at 169-70.
- 100 ARS, *supra* note 27, Art. 50(1)(a).
- 101 Recall that Art. 51 of the Charter and Art. 21 of the ARS reflect different effects of the customary right of self-defence: Art. 51 concerns the effect of self-defence on the prohibition of force, Art. 21 its effect on the second set of legal relations.
- 102 M. Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *Handbook of International Humanitarian Law* (2013), 549.

- 103 ARS, *supra* note 27, Art. 50(1)(a).
104 Bothe, *supra* note 102, at 558.
105 Ibid.
106 Ibid., fn. 39.
107 Note that the applicability of the law of neutrality to conflicts between states and non-state actors is contested. See, e.g., the exchange between K. Chang, 'Enemy Status and Military Detention in the War Against Al-Qaeda', (2011) 47 *Texas International Law Journal* 1; R. Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda', (2011) 47 *Texas International Law Journal* 76; K. Heller, 'The Law of Neutrality does not Apply in the Conflict with Al-Qaeda, and it is a Good Thing too: A Response to Chang', (2011) 47 *Texas International Law Journal* 115.
108 C. Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved', (2003) 8 *Journal of Conflict and Security Law* 363, at 388.
109 N. Klein, *Maritime Security and the Law of the Sea* (2011), 275.
110 D.Humphrey, 'Belligerent Interdiction of Neutral Shipping in International Armed Conflict', (1997) 2 *Journal of Conflict and Security Law* 23, at 29.
111 See, e.g., Debate on the subject of the Falkland Islands, in (1982) 53 BYIL 540 (statement by Margaret Thatcher); and the various letters to the President of the UN Security Council in (1982) 53 BYIL 539-49.
112 British letter, 9 April 1982, addressed to the President of the UN Security Council in (1982) 53 BYIL 539.
113 For the UK's position, see C. Gray, 'The British Position in Regard to the Gulf Conflict', (1988) 47 ICLQ 420.
114 The US subsequently asserted a different position, and it may be wondered if this was in response to the indiscriminate policy followed by Iran and Iraq in the enforcement of these rights. On the evolution of the US position, see Humphrey, *supra* note 110, at 33-4.
115 Ibid., at 32-3.
116 Quoted by Gray, *supra* note 113, at 423.
117 On which see Klein, *supra* note 109, at 274.
118 P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (2007), 233-6.
119 Klein, *supra* note 109, at 275.
120 For a similar view, see R. O'Keefe, Book review: Stephen C. Neff, *War and the Law of Nations: A General History*, (2007) 66 CLJ 461, at 462.
121 For an overview, see Corten, *supra* note 6, Ch. 4.
122 On which see, e.g., Ruys, *supra* note 2, at 490 (arguing that Art. 51 neither prohibits armed attacks nor points to their illegality).
123 *Ministries trial*, *supra* note 14, at 329; *The Maria*, *supra* note 14, at 361. See also, Lubell, *supra* note 14, at 41; Dinstein, *supra* note 14, at 190.
124 Kammerhofer, *supra* note 50, at 40; A. de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World', (2016) 29 LJIL 19, at 22. But see Van Steenberghe, *supra* note 6, at 289-90. For a proposal in this regard, see A. Slaughter and W. Burke-White, 'An International Constitutional Moment', (2002) 43 HILJ 1, at 2.
125 Gray, *supra* note 90, at 93-197.

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Annex 79

**International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS
OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987)**

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Commentary
on the Additional Protocols
of 8 June 1977
to the Geneva Conventions
of 12 August 1949

International Committee of the Red Cross

Claude PILLOUD† · Jean DE PREUX ·
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Editors

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Protocol I

Article 85 – Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.
2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
 - (a) making the civilian population or individual civilians the object of attack;
 - (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
 - (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
 - (d) making non-defended localities and demilitarized zones the object of attack;
 - (e) making a person the object of attack in the knowledge that he is *hors de combat*;
 - (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
 - (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
 - (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
 - (d) making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
 - (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Documentary references

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59. *Commentary Drafts*, pp. 94-95 (Arts. 74-75). *XXIIInd Int. Conf. RC, Report*, pp. 20-21, paras. 65-67; pp. 50-68, DH/4/Corr.13; pp. 70-73, DH/4/Corr. 15-16.

Commentary

General remarks

- 3460 The draft of this article (Article 74) was modest: on the one hand, it made the provisions of the Conventions relating to the repression of breaches, supplemented by this Section, applicable to breaches of the Protocol; on the other hand, it designated any acts defined as grave breaches in the Conventions as grave breaches of the Protocol, if they were committed against the new categories of persons or objects protected under the Protocol. These two aims are the object of paragraphs 1 and 2 of the article adopted by the Conference.
- 3461 In this way the draft Protocol increased the number of situations in which already defined acts would become grave breaches; it only added one new grave breach to the existing list. In fact, a separate draft article (Article 75) covered the perfidious use of protective signs or signals, which the Conference decided to include as paragraph 3(f) of Article 85. The caution evident in these proposals was justified by the thought that the need to improve the effectiveness of the system laid down by the Conventions had priority.
- 3462 Even before introducing draft Article 74 in Committee, the ICRC deemed it useful, particularly in the light of special expert consultations, to submit a new proposal, also containing a list of grave breaches of the Protocol.¹
- 3463 When they had been introduced in Committee, the drafts of this article and of that relating to the perfidious use of protective signs and signals were studied successively, together with the majority of the amendments relating to them,² by Sub-Working Group A and by Working Group A of Committee I.
- 3464 The text drawn up by these two bodies was discussed and adopted, paragraph by paragraph and sub-paragraph by sub-paragraph in Committee, and then the article as a whole was adopted by consensus both in Committee I and in plenary.³
- 3465 In general the delegations which expressed views on the article as adopted considered that it represented an important step forward towards an improved application of humanitarian law. The text was not perfect, but it was a satisfactory compromise.
- 3466 Some regretted that certain breaches which were as grave as those listed in the article had not been included.⁴ Others regretted that the lack of precision of

¹ *O.R.* III, p. 318, CDDH/210/Annex 2, p. 2.

² *Ibid.*, pp. 317-322, 324-327.

³ Respectively: *O.R.* IX, p. 277, CDDH/I/SR.61, para. 50; *O.R.* VI, p. 291, CDDH/SR.44, para. 72.

⁴ For example, the use of means of combat as listed in the proposals CDDH/I/347 and Rev.1 and CDDH/418 (*O.R.* III, p. 322). On the exhaustive character of the list of grave breaches, cf. introduction to this Section, *supra*, p. 976, note 11.

certain rules would make their introduction in national legislation, as well as their application, difficult and possibly not very uniform.⁵

Paragraph 1

3467 The system of repression in the Conventions is not to be replaced, but reinforced and developed by this Section (Articles 85-91), so that it will in future apply to the repression of breaches of both the Protocol and the Conventions.⁶

Paragraph 2

3468 The qualification of grave breaches is extended to acts defined as such in the Conventions when they are committed against the following categories of persons and objects:⁷

- persons who have taken part in hostilities and have fallen into the power of an adverse Party within the meaning of Articles 44 (*Combatants and prisoners of war*) and 45 (*Protection of persons who have taken part in hostilities*): this definition is broader than that of prisoners of war in the Third Convention;
- refugees and stateless persons within the meaning of Article 73 (*Refugees and stateless persons*) (which makes them protected persons under the Fourth Convention);
- the wounded, sick and shipwrecked of the adverse Party: Article 8 (*Terminology*), sub-paragraphs (a) and (b) enlarges the corresponding categories as defined in the Conventions;
- medical or religious personnel, medical units and transports under the control of the adverse Party and protected by the Protocol: the same applies as for the wounded, sick and shipwrecked (*cf.* Article 8 – *Terminology*, sub-paragraphs (c), (d), (e) and (g)). The expression “under the control of the adverse Party” is justified by the fact that such persons and objects may come, for example, from a non-belligerent State, an aid society recognized and authorized by such a State or even an impartial international humanitarian organization which makes them available to a Party to the conflict.

3469 Several delegations would have preferred also to mention Article 75 (*Fundamental guarantees*), which applies to all persons “affected by a situation referred to in Article 1” in the power of a Party to the conflict who do not benefit

⁵ In general, we would refer, with regard to the drafting and scope of this article, to the following works quoted in the introduction to this Section (*supra*, p. 973, note 2): W.A. Solf and E.R. Cummings, *op. cit.*, pp. 221-242; M.C. Bassiouni, “Repression of Breaches...”, *op. cit.*, pp. 199-201; J. de Breucker, “La répression des infractions graves...”, *op. cit.*; E.J. Roucouas, *op. cit.*, pp. 65-133; B.V.A. Röling, “Aspects of the Criminal Responsibility...”, *op. cit.*, pp. 208-209; Ph. Bretton, “La mise en œuvre des Protocoles de Genève de 1977”, *op. cit.*, pp. 405-411.

⁶ On the system of the Conventions, supplemented by the Protocol, *cf.* introduction to this Section, *supra*, pp. 974-976.

⁷ For a more detailed description we refer to the commentary on the provisions mentioned.

from more favourable treatment under the Conventions or the Protocol. They abandoned this idea in a spirit of compromise in the face of opposition from those who were afraid of extending the concept of grave breaches – subject to universal jurisdiction – to breaches committed by a Party to the conflict against its own nationals.⁸

- 3470 One delegation pointed out that the reference to Article 45 (*Protection of persons who have taken part in hostilities*) only concerned persons whose status has not yet been established, but not those whose right to prisoner-of-war status has been rejected in the proper manner.⁹ On this point there is no doubt that, on the one hand the above-mentioned article “protects” those whose status has not yet been established, while on the other hand, those who have been granted prisoner-of-war status are no longer in need of this article; the question is more difficult for those envisaged by that delegation. First, there are those covered by the article concerned in the first sentence of paragraph 3: they are actually referred to rather than protected by that provision, as it merely refers to Article 75 (*Fundamental guarantees*), which is applicable anyway, but was not included in the paragraph under consideration here. As regards persons covered by the second sentence, they are or are not protected by the Fourth Convention in accordance with the provisions of its Article 4. If they are, they enjoy the protection offered by the penal provisions; if they are not, only Article 75 of the Protocol (*Fundamental guarantees*) applies, but subject to the limitations indicated above.

Paragraph 3

- 3471 The significance of the reminder in this paragraph of grave breaches defined in Article 11 (*Protection of persons*) will be explained below. Apart from this reminder, the paragraph deals with breaches related to the conduct of hostilities: hostile acts directed against protected persons or objects, or the effects of which exceed their legitimate objectives, and also the perfidious use of protective signs and signals. A grave breach belonging to the same category is defined in paragraph 4(b).
- 3472 This category is that governed by the body of law traditionally known as the “Hague law”, and it concerns qualified breaches of the provisions of Parts III and IV of the Protocol. Numerous fears were expressed that bringing this category under the system of repression of grave breaches would entail real danger: it would be much more difficult to define grave breaches “on the battlefield” and to try acts committed in the course of hostilities than to deal with acts committed

⁸ O.R. IX, p. 256, CDDH/I/SR.60, paras. 9-11; p. 283, CDDH/I/SR.61, para. 86. It should be noted that according to the commentary on that article, *supra*, pp. 866-870, other categories of persons may be protected by it. Finland's instrument of ratification, as a complement to a declaration on the categories of persons enjoying protection under Article 75, contains a declaration that “the provisions of Article 85 shall be interpreted to apply to nationals of neutral or other States not Parties to the conflict as they apply to those mentioned in paragraph 2”.

⁹ O.R. IX, p. 280, CDDH/I/SR.61, para. 68. In the same sense, J. de Breucker, *op. cit.*, p. 503; E.J. Roucouas, *op. cit.*, p. 93.

against persons or objects in the power of the enemy, as do the Geneva Conventions.¹⁰ However, the Conference considered that it was essential to include in this article rules corresponding to those of Parts III and IV: the differences between the traditional field of the Conventions and that of the Hague law should not entail insurmountable difficulties, as shown by various precedents.¹¹

Opening sentence

- 3473** In order to list all the grave breaches of the Protocol in this article, a reference is included here to the breach defined in Article 11 (*Protection of persons*), paragraph 4. That breach has its own constitutive elements, slightly different from those laid down in the opening sentence of this paragraph for the sub-paragraphs that it introduces.¹²
- 3474** Common constitutive elements applicable to all the sub-paragraphs of paragraph 3 are the following:¹³

- *wilfully*: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences¹⁴ (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions);¹⁵

¹⁰ See *O.R.* IX, p. 19, CDDH/I/SR.43, para. 17; pp. 35-36, CDD/I/SR.44, paras. 40-48.

¹¹ *ibid.*, p. 21, CDDH/I/SR.43, paras. 24 and 26; p. 25, para. 47; p. 28, CDDH/I/SR.44, para. 9; p. 32, para. 31.

¹² Art. 11, para. 4, uses the phrase “seriously endangers” and not “causing [...] serious injury”; it should also be noted that, in contrast with this paragraph, it only covers breaches against persons *in the power* of a Party other than that to which they belong.

¹³ We use the noun or the verb “act” below for the sake of clarity, but in the light of Art. 86 this should be understood to mean “conduct”. That article deals with repression of failures to act when there is a duty to act.

¹⁴ On the various concepts which are not all defined identically by national law, *cf.* for example, G. Stefani, G. Levasseur, B. Boulloc, *op. cit.*, pp. 213-234 (paras. 211-239). As regards recklessness, see also *supra*, p. 159, note 15. On failure to act and on negligence, *cf.* also commentary Art. 86, *infra*, p. 1005.

¹⁵ It should be noted that Austria when it ratified the Protocol made a reservation with regard to Articles 85 and 86: “Pour juger toute décision prise par un commandant militaire, les articles 85 et 86 du Protocole I seront appliqués pour autant que les impératifs militaires, la possibilité raisonnable de les reconnaître et les informations effectivement disponibles au moment de la décision soient déterminants.” (“In order to judge any decision taken by military commanders, Articles 85 and 86 of Protocol I will be applied with military imperatives, the reasonable possibility of recognising them and information actually available at the time of the decision, being decisive.” (Translated by the ICRC)).

- *in violation of the relevant provision*: in each of the sub-paragraphs this element refers to specific provisions of Parts III and IV, which we will indicate below in relation to each sub-paragraph;¹⁶
- *causing death or serious injury to body or health*: the effect must be such that, even if it does not cause death, it will affect people in a long-lasting or crucial manner, either as regards their physical integrity or their physical and mental health.¹⁷

Sub-paragraph (a)

- 3475** According to Article 49 (*Definition of attacks and scope of application*), paragraph 1, the term “attacks” means “acts of violence against the adversary, whether in offence or defence”. As defined in Article 50 (*Definition of civilians and civilian population*), anyone who is not a combatant is a civilian (*cf.* the provisions referred to in that article); in case of doubt regarding the status of a person, that person is to be considered as a civilian. The prohibition on attacking the civilian population and civilians – i.e., isolated civilians – is explicitly laid down in Article 51 (*Protection of the civilian population*), paragraph 2.¹⁸ All precautions must be taken with a view to sparing civilians, both in planning and in carrying out an attack (*cf.* Article 57 – *Precautions in attack*).
- 3476** It is a grave breach under this sub-paragraph to make the civilian population or individual civilians, knowing their status, the object of attack when the attack is wilfully directed against them and when the consequences defined in the opening sentence follow.

Sub-paragraph (b)

- 3477** This sub-paragraph is based on the same provisions as the preceding sub-paragraph, and in addition on Article 52 (*General protection of civilian objects*), which defines and generally protects civilian objects. The attacks concerned here are not those directly aimed at the civilian population or individual civilians, but attacks affecting them incidentally; “indiscriminate attacks” are defined and prohibited by Article 51 (*Protection of the civilian population*), paragraphs 4 and 5.
- 3478** The criterion of proportionality used in the same article, paragraph 5(*b*), to describe an example of such attacks, is defined here with reference to Article 57 (*Precautions in attack*); it weighs up “the concrete and direct military advantage anticipated” (paragraph 2(*a*)(iii)) and the obligation of “avoiding, and in any

¹⁶ For further details we refer also to the commentary on the provisions concerned.

¹⁷ Causing serious injury to body or health of persons protected under the Conventions is already qualified as a grave breach; *cf.* also *supra*, note 12, and commentary Art. 11, para. 4, *supra*, p. 158.

¹⁸ According to paragraph 3 of that article, a civilian who participates directly in hostilities would not be protected during such participation.

event [...] minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects” (paragraph 2(a)(ii)).

- 3479 This sub-paragraph 3(b), like sub-paragraph 3(c), adds the words “in the knowledge” to the common constitutive elements set out in the opening sentence: therefore there is only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness.
- 3480 It should also be noted that damage to objects, which is dealt with only to a limited extent in Article 147 of the Fourth Convention, is only mentioned in relation to the state of mind of the person committing the breach. The actual consequences defined by the opening sentence of the paragraph as constitutive elements of a breach, are death or serious injury to body or health in excess of what would be justified under the principle of proportionality.
- 3481 A grave breach, according to this sub-paragraph, is an indiscriminate attack wilfully launched in the knowledge that its consequences will be excessive as described in this sub-paragraph, and which produces the effects described in the opening sentence to such an extent as to be in violation of the principle of proportionality.¹⁹

Sub-paragraph (c)

- 3482 In addition to the above-mentioned provisions, Article 56 (*Protection of works and installations containing dangerous force*), must be referred to here; it grants special protection to works and installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations.²⁰ Even if they constitute military objectives they must not be made the object of attack if such attack may cause the release of forces contained therein, and consequent severe losses among the civilian population.
- 3483 This special protection, which applies under the same conditions for military objectives located at or in the vicinity of such works, can only cease in strictly prescribed circumstances (paragraph 2). In that case the civilian population continues to enjoy the general protection to which it is entitled, including precautionary measures, and the attack must be conducted with special precautions (paragraph 3).²¹
- 3484 The expressions “in the knowledge” and “excessive”, as well as the reference to objects, have the same significance here as in sub-paragraph (b). Like sub-paragraph (b), this sub-paragraph represses attacks directed against military

¹⁹ On the principles which determine the lawfulness of incidental civilian loss, and in particular the principle of proportionality, see commentary on Art. 51, *supra*, pp. 625-626; introduction to this Section, *supra*, p. 976, note 11; commentary on Art. 89, *infra*, p. 1033 (on the meaning of the phrase “serious violations”); see also J. Verhaegen, “Une interprétation inacceptable du principe de proportionnalité”, XXI-1-2-3-4 *RDPMDG*, 1982, p. 329.

²⁰ The list in Article 56 is exhaustive.

²¹ Paragraph 6 of that article urges Contracting Parties and Parties to the conflict to conclude further agreements to provide additional protection for such objects. Paragraph 7, which refers to Article 16 of Annex I, lays down a special sign for such works and installations.

objectives, but with incidental effects on the civilian population which are incompatible with the principle of proportionality. Consequently we are concerned here either with attacks against works or installations which are themselves military objectives or with attacks against military objectives located at or in the vicinity of such works, whether or not the special protection has ceased.

- 3485 On the other hand, the principle of proportionality can not be invoked to justify incidental effects on the civilian population of an attack intentionally directed against a work or installation which does not constitute a military objective: such an attack would fall under sub-paragraph (a).
- 3486 Under this sub-paragraph, it is a grave breach to wilfully launch an attack against the works or installations concerned, if these constitute a military objective, or against a military objective located at or in the vicinity of such works or installations, in the knowledge that this will have the above-mentioned excessive consequences, if the attack produces the effects described in the opening sentence to such an extent as to be in violation of the principle of proportionality.²²

Sub-paragraph (d)

- 3487 Non-defended localities and demilitarized zones are defined in and governed by Articles 59 (*Non-defended localities*) and 60 (*Demilitarized zones*), respectively. We only recall that the former may be established by a unilateral declaration or by agreement, while the latter can only be established by an agreement between the Parties to the conflict.²³
- 3488 As long as it retains its status, a non-defended locality shall not be made the object of attack. As long as it retains its status, the Parties to the conflict cannot extend their military operations to a demilitarized zone if that is contrary to the provisions of the agreement by which it was established; however, the military operations which may be permitted by the agreement cannot in any case include attacks. If they lose their status pursuant to Article 59 (*Non-defended localities*) or 60 (*Demilitarized zones*), or pursuant to the agreements, the non-defended localities and demilitarized zones nevertheless continue to have the benefit of the other provisions of the Protocol and other relevant rules of international law (*cf.* paragraph 7 of both articles).
- 3489 This sub-paragraph deals with zones which enjoy a special status; if they lose it, the rules of Part IV, Section I, and those of this Section relating to the distinction between combatants and military objectives, on the one hand, and the civilian population and civilian objects on the other hand, continue to apply.
- 3490 Thus a grave breach as laid down in this sub-paragraph is an attack wilfully directed against a non-defended locality or demilitarized zone, if the attacker is aware of their status and if it produces the effects defined in the opening sentence.

²² The references contained in note 19 *supra* also apply to this sub-paragraph.

²³ The Party in control of a non-defended locality or demilitarized zone must mark it, as far as possible, by such signs as may be agreed upon with the other Party (Art. 59, para. 6; Art. 60, para. 5).

Sub-paragraph (e)

- 3491** Paragraph 1 of Article 41 (*Safeguard of an enemy hors de combat*) provides that “a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack”; paragraph 2 defines the concept “*hors de combat*”. There is a breach of this rule not only when the attacker knows, but also when, in the circumstances, he should know that the person he is attacking is *hors de combat*.
- 3492** On the other hand, the sub-paragraph under consideration here requires that the attacker should actually know that the person is *hors de combat*, for there to be a grave breach. The words “in the knowledge”, which exclude cases of negligence, are superfluous since the opening sentence lays down the criterion of intent, i.e., wilful act.²⁴ These words have a different meaning in sub-paragraphs (b) and (c), where they relate to knowledge of the material effects of the breach.
- 3493** Thus a grave breach within the meaning of this sub-paragraph is committed when someone wilfully attacks a person he knows to be *hors de combat*, causing his death or serious injury to his body or health.

Sub-paragraph (f)

- 3494** Articles 53 and 54 of the First Convention prohibit abuse of the red cross, red crescent and red lion and sun²⁵ emblems and require that such abuse should be prevented and repressed. Nevertheless, the Conventions did not qualify their perfidious use as a grave breach. This omission is henceforth rectified.
- 3495** The protective emblems and signs recognized by the Conventions and the Protocol are first of all those which they have established or provided themselves:
- red cross, red crescent (First Convention, Article 38; Protocol I, Annex I, Article 3 – *Shape and nature*);
 - oblique red bands on a white ground (Fourth Convention, Annex I, Article 6);
 - blue triangle on an orange ground (Protocol I, Article 66 – *Identification*, paragraph 4; Annex I, Article 15 – *International distinctive sign*);
 - three bright orange circles (Protocol I, Article 56 – *Protection of works and installations containing dangerous forces*, paragraph 7; Annex I, Article 16 – *International special sign*);
 - signs agreed upon between Parties to the conflict (Protocol I, Article 59 – *Non-defended localities*, paragraph 6; Article 60 – *Demilitarized zones*, paragraph 5).
- 3496** As Article 18 (*Identification*) places distinctive signals on the same footing as distinctive emblems as regards the repression of misuse, the distinctive signals laid down by the Protocol and used in accordance with the relevant provisions, should be added to this list (Article 18 – *Identification*, paragraph 5; Annex I,

²⁴ In the same sense, E.J. Roucouanas, *op. cit.*, p. 107.

²⁵ On this latter emblem, *cf.* Editors' note, *supra*.

Article 6 – *Light signal*, Article 7 – *Radio signal*, Article 8 – *Electronic identification*).

- 3497 Next, Article 37 (*Prohibition of perfidy*) explicitly mentions the protected status of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict²⁶ (paragraph 1(*d*)).
- 3498 Finally, paragraph 1 of Article 38 (*Recognized emblems*) prohibits the improper use of any emblems, signs or signals provided for by the Conventions or the Protocol, or of other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property.
- 3499 To summarize therefore, the perfidious use of emblems, signs or signals provided for by the Conventions or the Protocol, or of emblems, signs, signals or uniforms referred to in Articles 37 (*Prohibition of perfidy*) and 38 (*Recognized emblems*) of the Protocol, for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under this sub-paragraph if it leads to the results defined in the opening sentence.²⁷

Paragraph 4

- 3500 Paragraph 3 deals with grave breaches “on the battlefield”. Paragraph 4 defines a grave breach of this nature in its sub-paragraph (*d*); apart from this, it is concerned with acts prejudicial to the rights of persons in the power of the enemy, as is the case in the Conventions. Some of the breaches described, which incontestably involve the individual responsibility of those who have committed the acts, follow almost inevitably from policy decisions taken by a Party to the conflict, rather than from purely individual initiatives (sub-paragraphs (*a*), (*b*) and (*c*)).

Opening sentence

- 3501 In contrast with paragraph 3, this paragraph does not lay down particular consequences as constitutive elements which the grave breaches it defines have in common. The opening phrase only states that the breaches must be committed wilfully and in violation of the Conventions or the Protocol, as the case may be.

²⁶ On the expression “neutral and other States not Parties to the conflict”, *cf.* commentary Art. 2, sub-para. (*c*), *supra*, p. 61.

²⁷ However, *cf.* commentary Arts. 37 and 38, *supra*, pp. 439 and 459 respectively, for the case where the United Nations may be engaged in hostilities and its emblem is therefore no longer a protective emblem within the meaning of Article 37 and of this sub-paragraph.

Sub-paragraph (a)

- 3502** Article 49 of the Fourth Convention prohibits all forcible transfers, as well as deportations of protected persons from occupied territory (paragraph 1).²⁸ Only the security of the population of the occupied territory or imperative military reasons can justify total or partial evacuation of an occupied area; such evacuations may only take place within the bounds of the occupied territory, except when for material reasons this is impossible, and protected persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased (paragraph 2). The Occupying Power may not deport or transfer parts of its own civilian population into the occupied territory (paragraph 6). The unlawful deportation or transfer of protected persons are among the grave breaches listed in Article 147.
- 3503** The part of the sub-paragraph dealing with the transfer or deportation of the population of the occupied territory is merely a repetition of Article 147 of the Fourth Convention, and Article 49 of that Convention, to which reference is made, continues to apply unchanged.
- 3504** Thus the new element in this sub-paragraph concerns the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies: this practice, which was a breach, is now a grave breach because of the possible consequences for the population of the territory concerned from a humanitarian point of view.

Sub-paragraph (b)

- 3505** Two articles of the Third Convention lay down an obligation to repatriate prisoners of war. First, Article 109: during hostilities the seriously wounded and seriously sick, unless it is against their will (*cf.* also Article 110, paragraph 1). Secondly, Article 118: all prisoners of war, without delay, after the cessation of active hostilities.²⁹
- 3506** As regards civilians, all protected persons under the Fourth Convention who find themselves in the territory of a Party to the conflict are entitled, in accordance with Article 35 of that Convention, to leave the territory at the outset of or during the conflict, unless their departure is contrary to the national interests of

²⁸ In fact, by using the word “nevertheless”, paragraph 2, which is dealt with later, clearly shows that paragraph 1 also prohibits forcible transfers within occupied territory. On the basis of *Commentary IV*, pp. 278-280 and 599 it may be concluded that such a forcible transfer was already a grave breach within the meaning of Article 147; W.A. Solf and E.R. Cummings, *op. cit.*, pp. 232-233, hold this view; E.J. Roucouas, *op. cit.*, p. 116, holds the opposite view.

²⁹ Subject, however, to Article 119, paragraph 5 (prisoners detained until the end of criminal proceedings or until the completion of punishment for an offence under criminal law). On the problems related to the application of Article 118 of the Third Convention, *cf. inter alia*, in addition to *Commentary III*, pp. 540-553, Ch. Shields-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, 1977; E.J. Roucouas, *op. cit.*, pp. 117-119 (and other works referred to there); W.A. Solf and E.R. Cummings, *op. cit.*, pp. 233-234 (and references there).

- the State. Only reasons of that nature can justify a Party to the conflict retaining a protected person who wants to leave the territory and possibly placing him in assigned residence or interning him – except in case of criminal proceedings or a sentence depriving him of his liberty. Restrictive measures will cease as soon as possible after the end of hostilities, though again an exception is made in case of criminal proceedings or sentences depriving those concerned of their liberty.³⁰
- 3507 Thus there is an essential difference between prisoners of war and civilians; prisoners of war must be repatriated, except for special cases;³¹ civilians are entitled to leave enemy territory subject to certain restrictions, but neither they nor the State in whose territory they are, have an obligation in this respect.
- 3508 The grave breach within the meaning of sub-paragraph 4(b) consists, in the case of prisoners of war, in failure to comply with Articles 109 or 118 of the Third Convention without valid and lawful reasons justifying the delay.³²
- 3509 With regard to civilians, the grave breach consists in delaying the departure of a foreign national who wants to leave the territory, in violation of Articles 35 or 134 of the Fourth Convention, without valid and lawful reasons justifying such delay.

Sub-paragraph (c)

- 3510 The policies and practices of *apartheid* have been referred to in a series of resolutions of the United Nations General Assembly. In particular, it adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid*³³ in its Resolution 3068 (XXVIII) of 30 November 1973. This declares that *apartheid* is a crime against humanity (Article I);³⁴ the same article declares that inhuman acts resulting from the policies and practices of *apartheid* and other similar policies and practices of racial segregation and discrimination, as defined in Article II, are crimes violating the principles of international law and constituting a serious threat to international peace and security.

³⁰ Cf. in particular Fourth Convention, Arts. 35-37, 41-43, 46, 132-134. The last article is concerned with facilitating the return of internees to their last place of residence or with their repatriation after the end of hostilities or occupation.

³¹ During hostilities, all seriously sick and wounded prisoners who are opposed to being repatriated (Third Convention, Article 109); after the end of active hostilities, prisoners who do not wish to be repatriated (each individual case requiring a thorough examination) (Third Convention, Art. 118); cf. *supra*, note 29. When ratifying the Protocol the Republic of Korea declared that the failure of a Detaining Power to repatriate prisoners if this accords with their clearly and freely expressed will is not a breach within the meaning of this paragraph.

³² Only material reasons such as circumstances making transportation impossible or dangerous are acceptable. The intention to use prisoners of war or civilians in one's power as a means of applying pressure on the adversary, for example, is not acceptable.

³³ As of 31 December 1984 there were 79 States Parties to this Convention.

³⁴ This qualification was already contained in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. On that Convention, cf. introduction to this Section, *supra*, pp. 977 and 980.

- 3511 Article II defines inhuman acts covered by the term “crime of *apartheid*” and committed for the purpose of establishing and maintaining domination by one racial group over any other racial group and systematically oppressing the latter. This term also covers similar policies and practices of racial segregation and discrimination.
- 3512 In this sub-paragraph the Protocol only condemns practices, whether the practices of *apartheid* or any other inhuman and degrading practices; as far as the policies are concerned, they will remain exclusively within the domain of crimes against humanity.
- 3513 Although the provisions of the Conventions and the Protocol never mention *apartheid* by name, they contain several articles explicitly prohibiting any adverse distinction founded on whatever criterion, including race.³⁵
- 3514 In addition, inhuman treatment is qualified as a grave breach by the relevant articles of the Conventions, and this concept of inhuman treatment encompasses outrages upon the human dignity of protected persons.
- 3515 Finally, if we take into account that this sub-paragraph applies only in situations covered by Article 1 (*General principles and scope of application*), it must be concluded that the practices concerned were already grave breaches of the Conventions, whatever their motive; this is simply a special mention of reprehensible conduct for which the motive is particularly shocking.

Sub-paragraph (d)

- 3516 Article 53 of the Protocol (*Protection of cultural objects and of places of worship*) deals with the protection of cultural objects and places of worship without prejudice, as it says itself, to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and to other relevant rules of international law. That article prohibits committing any acts of hostility against those objects which constitute the cultural or spiritual heritage of peoples and using them in support of the military effort.
- 3517 To qualify as a grave breach within the meaning of this sub-paragraph, the attack must have been committed wilfully in accordance with the opening sentence of the paragraph;³⁶ the objects must not have been used in support of the military effort (*cf.* Article 53 – *Protection of cultural objects and of places of worship*, sub-paragraph (*b*)); special protection must have been given to the objects in question by special arrangement, for example, within the framework

³⁵ Arts. 12/12/16/13 and 27 of the Conventions; Arts. 9, 10, 69, 70 and 75 of the Protocol.

³⁶ The meaning of the term “clearly recognized” was not elucidated during the Conference and allows for two interpretations. For E.J. Roucouas, *op. cit.*, p. 109, it is a question of identification; for J. de Breucker, *op. cit.*, p. 505, it apparently means recognition of the right to protection. This ambiguity is probably not of great importance: in the first case it duplicates the requirement of intent, which implies that the attacker is aware of the status of what he is attacking; in the second case, the term seems to be just as superfluous, since a special arrangement is required anyway.

of a competent international organization;³⁷ the objects must not have been located in the immediate vicinity of military objectives; and the attack must have caused extensive destruction of the objects.

Sub-paragraph (e)

- 3518 Guarantees for a fair and regular trial are laid down in Articles 99-108 of the Third Convention and 71-75 and 126 of the Fourth Convention. Articles 130 and 147 of these Conventions, respectively, qualify as a grave breach the act of depriving a protected person of the rights of fair and regular trial prescribed in these Conventions.
- 3519 At first sight paragraph 2 should have sufficed to make the above-mentioned penal provisions applicable to those mentioned in that paragraph; however, the object of this sub-paragraph is to ensure that the judicial guarantees laid down in Article 75 (*Fundamental guarantees*) are added to those of the Conventions insofar as they supplement or clarify the latter.
- 3520 It is in this respect that the sub-paragraph under consideration here supplements the penal provisions of the Conventions.

Paragraph 5

- 3521 This paragraph, which was considered indispensable or self-evident by some delegations, seemed out of place or dangerous to others.
- 3522 The former emphasized the need to confirm that there is only one concept of war crimes, whether the specific crimes are defined under the law of Geneva or The Hague and Nuremberg law.³⁸ Without denying that grave breaches of the Conventions and the Protocol are indeed war crimes, the latter preferred those instruments to stick to their own terminology in view of their purely humanitarian objectives.³⁹
- 3523 Finally the paragraph was adopted by consensus, despite some reservations, once a formula had been added which guaranteed the application of the Conventions and the Protocol.⁴⁰ The expression “without prejudice to” means

³⁷ Cf. commentary Art. 53, *supra*, p. 643, for further details on the special protection under the 1954 Convention and on the role of UNESCO in this respect. E.J. Roucouas, *op. cit.*, pp. 113-114, thinks that the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage could also constitute a special arrangement within the meaning of this sub-paragraph (cf. also commentary Art. 53, *supra*, pp. 645-646).

³⁸ Cf. also introduction to this Section, *supra*, pp. 977-979.

³⁹ In favour: in particular, *O.R.* IX, p. 282, CDDH/I/SR.61, para. 85; pp. 313-314, CDDH/I/SR.64, para. 49; p. 317, para. 69; p. 319, para. 84; *O.R.* VI, p. 293, CDDH/SR.44, paras. 81-82; p. 294, para. 90; p. 306, *id.*, Annex (Yugoslavia). Against: in particular, *O.R.* IX, p. 269, CDDH/I/SR.61, para. 4; p. 279, para. 62; p. 280, para. 69; p. 282, para. 84; p. 307, CDDH/I/SR.64, para. 10; p. 310, para. 29; *O.R.* VI, p. 293, CDDH/SR.44, para. 85.

⁴⁰ See *O.R.* IX, p. 280, CDDH/I/SR.61, para. 71.

that the affirmation contained in this paragraph will not affect the application of the Conventions and the Protocol.⁴¹ In the French text the expression used is “sous réserve”,⁴²

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⁴¹ The same affirmation is contained in Art. 75, para. 7.

⁴² The French text of Arts. 3 and 53 uses the term “sans préjudice” and the two terms have been used as equivalent in French. *Cf.* also Art. 16 of Protocol II.