**Chapter Four**

**The *Pinochet* Judgment Fifteen Years On**

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**I.) Introduction**

I am delighted to have been invited to contribute to this volume. As a colleague of Professor Sandy Ghandhi for just over ten years, and a friend for even longer, I have benefitted, through countless engaging and challenging discussions, from Sandy’s wisdom, thoughtfulness and rigour. It is particularly his rigour that I believe sets Sandy apart as a human rights lawyer. Christopher Waters, in the first Chapter of this volume, has highlighted Sandy’s concern with “proper procedure” and his focus on the achievement of the furtherance of human protection “within the confines of the relevant treaty or legislation”. The work that Sandy and I did together on the *Pinochet* case, resulting in a co-authored piece published in the *Indian Journal of International Law* in 2000,[[1]](#footnote-1) fully reflects Sandy’s rigorous approach. The purpose of that article was to examine the House of Lord’s judgment in *Ex Parte Pinochet No. 3*[[2]](#footnote-2) and to highlight some of the potential implications of that judgment in terms of both domestic and international law, with a particular emphasis on the question of the protection of human rights.

For many leading scholars writing at the time, the *Pinochet* case was a game changer. According to Ruth Wedgewood, for example, the decision “changed the structure of international law”.[[3]](#footnote-3) William Aceves asserted that the *Pinochet* case represented an “emerging trend towards the development of a universal system of transnational law litigation”,[[4]](#footnote-4) while Christine Chinkin spoke of a victory for the globalization of human rights law over the horizontal vision of international law based upon the sovereign equality of States.[[5]](#footnote-5) Furthermore, the “unprecedented character” of the case led Andrea Bianchi to assert that “neither jurisdictional immunities nor act of State and other doctrines of judicial self-restraint are consistent with the notion of crimes of international law”.[[6]](#footnote-6) Sandy and I were far more circumspect in our analysis, noting the very limited *ratio* of the decision in relation to the various different elements at issue in the case, concluding, ultimately, that “in spite of the many claims that the case against Senator Pinochet stands at the threshold of a new international legal order, the reality is that the case was dependent on a certain very narrow question of UK law”.[[7]](#footnote-7)

Fifteen years after the *Pinochet* judgment this chapter will identify the key arguments in our original article and test that analysis against the present day State of international and domestic law, particularly within the context of the highly controversial relationship between immunities and human rights. Additionally, this chapter will seek to further analyse the judgment against recent case law emanating from domestic courts, the European Court of Human Rights and the International Court of Justice (ICJ). The analysis will also briefly consider the alternatives to the constant challenges to immunity from jurisdiction that have the potential further to undermine what is an important procedural safeguard in the conduct of international relations.

**II.) The *Pinochet* Case: A Limited Precedent**

It will be recalled, briefly, that Senator (then General) Augusto Pinochet had become Head of State in Chile after leading a *coup d’état* on 11 September 1973 and had remained in power in that country until 11 March 1990.[[8]](#footnote-8) Pinochet’s time in office was notable for the many appalling acts of brutality perpetrated by his forces against the civilian population of that country. In 1998, Senator Pinochet visited the United Kingdom to receive medical treatment. Judicial authorities in Spain learned of his visit to the UK and sought his extradition in order that he might stand trial in Spain for conspiracy to commit the crime of murder, torture and hostage-taking. As a result of this action, an international arrest warrant was issued on 16 October 1998 and a provisional arrest warrant was confirmed by a London Magistrate under section 8 of the Extradition Act 1989. In pursuance of this warrant, Pinochet was arrested in a London hospital on 17 October 1998. On 22 October, a further arrest warrant was issued by Bow Street Magistrates accusing Senator Pinochet of a range of additional offences.

Senator Pinochet commenced proceedings for *habeas corpus* and sought leave for judicial review of the issuance of the two provisional arrest warrants. The matter was heard before a Divisional Court on 28 October 1998 which quashed both warrants, primarily on the basis of the immunity to which Senator Pinochet was entitled as a former Head of State.[[9]](#footnote-9) The Crown Prosecution Service was given leave to pursue an expedited appeal to the House of Lords, which first heard the case between 4 and 12 November 1998. The House of Lords decision in *Pinochet No. 1* by a majority of 3 to 2 found that Senator Pinochet was not entitled to immunity in relation to crimes under international law.[[10]](#footnote-10) Unfortunately, for some, this decision was set aside by the House of Lords on 15 January 1999 on the ground that the Appellate Committee had not been properly constructed during the first hearing of the matter (*Pinochet No. 2*).[[11]](#footnote-11) The matter was reheard before the House of Lords on 18 January 1999 which delivered its final opinion on 24 March 1999 (*Pinochet No. 3*).[[12]](#footnote-12)

In order to facilitate the present discussion, it would seem apposite briefly to summarise the conclusions we reached in our *Indian Journal of International Law* article in relation to the decision of the House of Lords in *Pinochet No. 3*. In outlining the legal issues, we highlighted the two specific questions of law that had to be addressed by the Appellate Committee. First, the question had to be addressed as to whether the offences of which Pinochet was accused constituted extradition crimes within the meaning of the Extradition Act 1989. In other words, were the requirements of double criminality met? The second question concerned whether Senator Pinochet was entitled to any form of immunity in respect of those crimes. Naturally this second question would only need to be addressed if the answer to the first question was in the affirmative.[[13]](#footnote-13) In relation to the first question, we concluded that:

[T]here was a general lack of willingness among their lordships to pursue a policy-oriented analysis, with their choosing instead to adopt a strict black-letter approach to the question of statutory interpretation. Similarly…their lordships were generally slow to adopt arguments relating to the right to prosecute an individual accused of torture on the basis that the right existed in customary international law.[[14]](#footnote-14)

Our analysis of the issue of immunity drew attention to the inconsistency of the approach of their lordships to the crucial question of whether Pinochet was acting in an official capacity when he was committing torture or conspiring to torture.[[15]](#footnote-15) Crucially, Pinochet could not have committed the crime of torture as defined in the United Nations Convention Against Torture 1984 had he not been acting in an official capacity.[[16]](#footnote-16) However, insofar as Pinochet was entitled to immunity as a former Head of State, that immunity was only available in relation to his official acts. Accordingly, the immunity was co-extensive with the crime.

Three of the six law lords who made up the majority in the case sought to avoid this difficulty by asserting that Pinochet was not acting in an official capacity when he was committing the alleged crimes.[[17]](#footnote-17) However, if this were the case then no crime would have been committed by Pinochet. The other three Law Lords who made up the majority argued, on the contrary, that Pinochet had been acting in an official capacity.[[18]](#footnote-18) Ordinarily this would have meant that he was entitled to immunity. However, insofar as the international crime of torture had been incorporated into English law by section 134 of the Criminal Justice Act 1988 and that provision was enacted after the coming into force of the State Immunity Act 1978, which governed the question of State immunity, and, by analogy, Head of State immunity within English law, their lordships considered that Parliament could not have intended to create, or establish jurisdiction over, a crime that was co-extensive with an immunity from jurisdiction that would be available to anyone accused of committing that crime.

Ultimately, the decision of the majority in *Pinochet No.3*, although lengthy and, at times, rather confusing, correctly concluded that Pinochet could be extradited to Spain to stand trial in respect of acts of torture committed after 29 September 1988. As we know, Pinochet’s extradition was eventually blocked by Jack Straw, the then Home Secretary, on medical grounds. However, this should not take away from the fact that, as a matter of law, the House of Lords found that a former Head of State was *not* entitled to immunity form the criminal jurisdiction of the United Kingdom for acts of torture committed by them after the entry into force of section 134 of the Criminal Justice Act 1988. Accordingly, this was a highly significant and historic decision.

Nevertheless, given our analysis of the limited value of *Pinochet No. 3* as a precedent, it is important to note what the decision did not do. First, the decision did not support the assertion that torture was subject to universal jurisdiction by virtue of customary international law. Lord Millett argued forcibly that the prohibition of the crime of torture had been a peremptory norm (*jus cogens*) since at least 1973, the year in which Pinochet had taken power in Chile, and that Pinochet could be tried anywhere on the basis of universal jurisdiction for torture offences committed at any time during his regime. The rest of the majority were not persuaded by this analysis.[[19]](#footnote-19) They preferred the argument that the Torture Convention had conferred on the UK the right to assert jurisdiction in relation to allegations of torture as defined by the Torture Convention, and that that right had been exercised through the enactment and coming into force of the relevant provision of UK domestic law. Crucially, the status of torture as *jus cogens*,or a peremptory norm of international law, did not confer on States the right to claim universal jurisdiction. Furthermore, in relation to the question of jurisdiction, the decision in *Pinochet No.3* dealt only with criminal jurisdiction.

Secondly, in relation to the question of immunity from jurisdiction, the decision did not remove immunity for all State officials, serving or former. Thus, insofar as the case dealt only with a former Head of State, whose position was analogous to that of a diplomatic agent,[[20]](#footnote-20) it left open the question of the immunity of other State functionaries, as well as other individuals acting on behalf of the State, who may be entitled to immunity *rationae materiae* in respect of their official acts. It is worth noting that the question of the immunity of State officials from the criminal jurisdiction of foreign States remains highly controversial and is currently under consideration by the International Law Commission with a view to codification.[[21]](#footnote-21)

Finally, the decision rejected the idea that the *jus cogens* character of the prohibition against torture “trumped” any form of immunity from jurisdiction. This is, perhaps, the most controversial aspect of the decision and is deserving of further comment, not least because it is an argument that keeps being put forward despite its essential invalidity. It is, accordingly, an issue to which this chapter will return in due course.

**III.) Challenging Immunity from Jurisdiction in Cases involving Abuse of Human Rights**

Although the *Pinochet* case was unprecedented insofar as it was the first time “a former Head of a foreign country had been held accountable…before a municipal court for acts of torture allegedly committed while he was in his post”,[[22]](#footnote-22) thecase was certainly not the first time that the immunity of a State or a State official had been challenged in a domestic court. Having once been considered as absolute,[[23]](#footnote-23) the immunity of States and State officials from the domestic jurisdiction of foreign countries underwent a radical transformation during the latter half of the twentieth century in favour of the so-called restrictive doctrine of State immunity.

Under this doctrine, which sought to distinguish between official or sovereign acts (acts *jure imperii*) and non-sovereign acts (acts *jure gestionis*), a State or State official was entitled to immunity from the domestic courts of a foreign State only in respect of the former (i.e., acts *jure imperii*). The development of the restrictive doctrine occurred not as the result of formal international agreement but, rather, as a result of challenges to the absolute rule of State immunity by domestic legal authorities and within domestic courts leading, eventually, to the enactment of legislation crystalizing the restrictive theory.[[24]](#footnote-24) This seems to beg the question that if such an approach had been successful in relation to the restricting of immunity in the case of commercial transactions, why should a similar approach not prove equally successful in the context of limiting immunity of States and State officials in respect of breaches of international criminal law and massive human rights abuses? However, as will be shown, the approach has failed.

In fact a number of challenges to State immunity in the context of human rights claims had already been made in domestic courts, primarily within the United States, before the case against Pinochet was brought before the British courts, with varying degrees of success. One of the earliest such cases was *Filartiga v. Pena-Irala*[[25]](#footnote-25)in which the US Court of Appeals for the Second Circuit held that the Alien Tort Claims Act 1789, which provides for the exercise of jurisdiction by the courts of the United States in cases in which an alien sues for a tort “committed in violation of the law of nations or a treaty of the United States,” allowed for the exercise of jurisdiction in the US in a case brought by a Paraguayan national against a Paraguayan police official for acts of torture perpetrated in Paraguay. However, the *Filartiga* case did not directly address the potential immunity of the Paraguayan official. In a subsequent case involving similar allegations of State-sanctioned torture, that of *Siderman de Blake v. Republic of Argentina*,[[26]](#footnote-26) it was held that the Alien Tort Claims Act did not constitute an exception to the principle of sovereign (State) immunity albeit in relation to an action that directly impleaded a State, as opposed to an official of a State, as had been the case in *Filartiga.*

Given the jurisdictional complications of these US cases, a more important claim in the context of the *Pinochet* litigation, had previously been brought in the UK courts in the case of *Al-Adsani v. Government of Kuwait*. Sulaiman Al-Adsani was a dual British and Kuwaiti national who was allegedly tortured in Kuwait during May 1991 by various Kuwaiti officials directed by a relation (“the Sheikh”) of the Emir of Kuwait, resulting in burns to over 25% of his body. On 29 August 1992, Al-Adsani brought a civil claim against the Sheikh and certain other individuals. He later brought further claims against the Government of Kuwait. Apparently influenced by the case of *Filartiga v. Pena-Irala*, the Court of Appeal, in 1994, refused to apply the State Immunity Act 1978 and granted Al-Adsani leave to serve proceedings abroad against the Government of Kuwait.[[27]](#footnote-27) However, a request from the Government of Kuwait to strike out the claim on the ground of State immunity was granted by the High Court in 1995,[[28]](#footnote-28) and this was then unanimously upheld by the Court of Appeal in 1996.[[29]](#footnote-29) Leave to appeal was denied by the House of Lords.[[30]](#footnote-30)

Although the State Immunity Act 1978 confirmed the application of the restrictive doctrine of State immunity in the United Kingdom, the Act by no means removed the right of a foreign State to claim immunity from the jurisdiction of the British courts. Indeed, section 1 of the State Immunity Act 1978 explicitly provides for such immunity except as specified in the Act. The exceptions to immunity are outlined in sections 2-11 of the Act and deny immunity to foreign States only in a small range of situations, including, most importantly, in relation to commercial transactions.[[31]](#footnote-31) Additionally, in section 5, the Act denies immunity to a State in case of torts but only where those torts have been caused by an act or omission in the United Kingdom. Accordingly, in relation to the inflicting of torture occasioning injury committed in Kuwait, the right to claim immunity in the face of a tortious claim, according to the terms of the statute, remained with the foreign government. To this extent, the High Court and the Court of Appeal in *Al-Adsani* had merely applied the normal rules of statutory interpretation.

Having exhausted his available remedies in the United Kingdom, Mr Al-Adsani, initiated a claim before the European Court of Human Rights. The basis of his claim was not the torture inflicted upon him under Article 3 but, rather, the denial of the right to a fair trial in terms of Article 6.[[32]](#footnote-32) The decision of the Grand Chamber, by a very narrow majority of 9 votes to 8, was to the effect that State immunity “pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty”.[[33]](#footnote-33) On the other hand, according to the joint dissenting opinion of six of the minority, “the prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all of its legal effects in that sphere”.[[34]](#footnote-34)

By the time the Grand Chamber sat to hear this case in 2001, the *Pinochet* decision had been delivered. Given that *Pinochet* concerned a matter of criminal law and *Al-Adsani* concerned a civil claim, the former was not a direct precedent for the latter. Indeed, although the *Pinochet* decision was referred to in the judgment of the Grand Chamber, the majority sought to distinguish that case as a criminal case that removed the immunity *rationae materiae* from criminal jurisdiction of a former Head of State and “did not in any way affect the immunity *rationae personae* of foreign sovereign States from civil jurisdiction in respect of such acts”.[[35]](#footnote-35) For the minority, that distinction was spurious. According to Judge Ferrari Bravo, the Court need only have applied the decision in *Pinochet No.3* “to the effect that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to *contribute* to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment.”[[36]](#footnote-36) The rest of the minority merely rejected the distinction between civil and criminal proceedings as “not consonant with the very essence of the operation of the *jus cogens* rules”.[[37]](#footnote-37)

A slightly different approach was taken by the applicants in *Jones v. Saudi Arabia*,[[38]](#footnote-38) which was another civil claim involving similar facts to those in *Al-Adsani.* In *Jones*, Mr Jones and Mr Mitchell, with others, alleged that they had been systematically tortured while imprisoned in Saudi Arabia and claimed damages for physical and mental injuries they suffered as a result. In the first action, Mr Jones made claims against the Kingdom of Saudi Arabia and officials of the Ministry of the Interior led by Lieutenant-Colonel Abdul Aziz. His attempts to serve the claim against Aziz had failed and he sought permission to serve Aziz out of the jurisdiction.[[39]](#footnote-39) In the second action, Mr Mitchell and others made claims against four named individuals and sought permission to serve these individuals out of the jurisdiction.[[40]](#footnote-40) In the case brought by Jones, the Kingdom of Saudi Arabia claimed immunity for itself and for its agent in terms of section 1 and section 14(1) of the State Immunity Act 1978. In the Mitchell action, it claimed immunity for its agents in terms of section 14(1) of the 1978 Act. In both actions, at first instance, the right to serve Aziz and the four other officials was refused on the grounds of section 1 of the State Immunity Act 1978 and on the basis of the decision of the European Court of Human Rights in *Al-Adsani*. In relation to the individual defendants, the judge, Master Whitaker, found that the immunity of the Kingdom of Saudi Arabia attached also to them on the basis that, if this were not the case, the immunity of Saudi Arabia could be circumvented by impleading its officials.

The immunity of the Kingdom of Saudi Arabia was upheld at the Court of Appeal after a conjoined hearing.[[41]](#footnote-41) However, the Court was willing to accept a different approach in relation to the immunity of the individual officials. The decision to remove the immunity of the State officials relied heavily on the *Pinochet* decision. Mance LJ, in delivering the leading judgment, undertook an extensive review of relevant case law (primarily from the UK and the US). He acknowledged, first, that three of their lordships in *Pinochet No. 3* had stated, in *obiter*, that immunity *rationae materiae* would continue in respect of a former Head of State or other State official in civil proceedings.[[42]](#footnote-42) However, he then argued that at least some of their lordships in that case had concluded that Pinochet’s alleged acts could not be regarded as a function of a Head of State. For Mance, that finding could be applied equally to other State officials as well as to both civil and criminal cases and would have the effect of removing immunity *rationae materiae* in all cases involving allegations of torture. He concluded:

Once it has been firmly established (as it has been by *Ex p Pinochet (No 3)*) that a State can claim no immunity in respect of an individual officer committing systematic torture in an official context, the issue whether there is or should be civil immunity seems to me to acquire a different complexion, and to start from a different point, to that which applied when the argument was proceeding the other way around.[[43]](#footnote-43)

 In the House of Lords, this attempt to distinguish between the immunity of the State and that of a State’s officials in respect of the same acts was firmly rejected.[[44]](#footnote-44) Lord Bingham noted that section 1(1) of the State Immunity Act 1978, in line with the domestic law of other States, provides only for specified exceptions.[[45]](#footnote-45) He did not consider that the present case was one in which any of the relevant exceptions applied.[[46]](#footnote-46) Furthermore, he considered that there was ample authority to show that a foreign State is entitled to claim immunity for its servants in circumstances in which it can claim immunity for itself; to do otherwise would be to implead the State through the back door.[[47]](#footnote-47) Lord Bingham followed the clear reasoning of the majority in *Pinochet*, in finding that torture is only a crime under international law if it is committed by an official or person acting in an official capacity.[[48]](#footnote-48) Other than in that context, the *Pinochet* precedent was categorically different from the circumstances of the present case, particularly in relation the question of jurisdiction.[[49]](#footnote-49) Lord Hoffmann developed the jurisdictional question by noting that a conflict between the prohibition of torture and State immunity would exist if the prohibition on torture were subject to a rule of international law entitling or requiring States to assume civil jurisdiction over other States in cases where torture is alleged. [[50]](#footnote-50)

**IV.) Normative Hierarchy and the Problem of Impunity**

Needless to say, the European Court of Human Rights decision in *Al-Adsani* and the House of Lords decision in *Jones* were the subject of significant academic criticism. Two such criticisms are worthy of further comment at this point in the analysis. Alexander Orakhelashvili has repeatedly argued in favour of the importance of *jus cogens* and the normative hierarchy of international law.[[51]](#footnote-51) In relation to *Jones*,in particular, he argued that the normatively higher status of the prohibition on torture should have the effect of overriding the hierarchically inferior norm providing for State immunity.[[52]](#footnote-52) As has been seen, this argument reflects the views of the minority in the *Al-Adsani* case at the European Court of Human Rights. However, the argument was not persuasive to the majority in *Al-Adsani*. Furthermore, the issue of *jus cogens*, although referred to extensively in the various majority speeches in *Pinochet* in fact did not form the basis of any of their lordship’s decisions. In *Jones*, Mance LJ appeared to steer clear of the concept of *jus cogens* in his analysis, as did Lord Phillips who delivered a concurring opinion.[[53]](#footnote-53) In the House of Lords, once again, the issue of *jus cogens* was largely avoided essentially through the approved citation of the now famous words of Lady Hazel Fox to the effect that:

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite.[[54]](#footnote-54)

This procedural versus substantive differentiation is persuasive and has more recently been cited with approval by the ICJ in the *Jurisdictional Immunities of the State* case.[[55]](#footnote-55) However, for this author, the rejection of the *jus cogens* argument has a more practical aspect to it. If the *jus cogens* argument were to prevail, it would not be limited merely to the immunity of a State official, or even to the immunity of a Head of State. It would necessarily apply to all forms of immunity from jurisdiction. Furthermore, and even more problematically, it would “trump” not only immunity *rationae materiae*,covering official acts after the termination of a particular function, but also immunity *rationae personae*, an immunity that applies, for example, in relation to diplomatic personnel, as well as to serving Heads of State and other high-ranking State officials. Immunity would be subject to removal even where such individuals had merely been accused of violations of *jus cogens* norms. The unintended consequences of this and the potential impact on long established and important rules providing for the efficacious and orderly conduct of foreign relations, as well as for the physical security of State officials living and working outside their home country, could be devastating.

A separate criticism of the decision of the House of Lords in *Jones* was provided by Lorna McGregor who argued, perhaps in light of the Fox statement cited above, that “formalistic interpretive techniques are often employed to deny the impact of immunity on impunity”.[[56]](#footnote-56) Specifically, McGregor noted that the procedural immunity rule essentially trumps the substantive human rights norm, and does so more often than not where no other remedy exists for the applicant. This effectively results in the vast majority of cases in a denial of justice. Persuasive as this argument undoubtedly is, it is worth noting that many other procedural rules will have the same effect in situations where the procedural rules are often disparagingly described as legal technicalities. For example, in *Jones*, the torture of Jones and his fellow applicants is unlikely to have been isolated and probably occurred as part of a regime of mistreatment and torture of prisoners in gaols across Saudi Arabia. Nevertheless, Saudi nationals subjected to the same or similar appalling treatment would not be entitled to bring a claim before British courts on the basis of which might be described as a similarly formalistic procedural issue, specifically, the lack of jurisdiction. This might seem to be a rather extreme example. However, the point is that procedural matters should not simply be condemned as overly formalistic. As Sandy Ghandhi has long argued, they are an integral part of every legal process.[[57]](#footnote-57)

**V.) Immunity and Human Rights in International Courts**

Reference has already been made to the, admittedly rather narrow, decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom*. That decision was effectively upheld by the same court on 14 January 2014 when it delivered its long awaited judgment in the *Jones and others v. United Kingdom*,[[58]](#footnote-58)which was an application submitted as a result of the decision of the House of Lords in *Jones v. Saudi Arabia*. A Chamber of the ECtHR, by a majority of six to one, upheld the decision of the House of Lords to grant immunity to the Kingdom of Saudi Arabia and to certain of its officials in civil proceedings on the basis that immunity was a generally recognised rule of public international law. Immunity therefore did not contravene Article 6(1) of the European Convention on Human Rights. Furthermore, according to the Court, the immunity of the State could not be circumvented by suing that State’s officials.

Since *Pinochet*, in addition to the European Court of Human Rights, the issue of the extent of the immunity from jurisdiction of States and State officials from the domestic courts of foreign courts has been considered by the ICJ on at least two occasions. The *Arrest Warrant Case*[[59]](#footnote-59) concerned the validity of an arrest warrant issued by Belgium against Abdoulave Yerodia Ndombasi, the serving Minister of Foreign Affairs for the Democratic Republic of the Congo. The arrest warrant sought Yerodia’s detention and extradition to Belgium as a result of his alleged violations of international humanitarian law. The DRC claimed that Belgium had violated its sovereignty and that it was in breach of international law relating to immunity from jurisdiction. Most notably for present purposes, Belgium, in its argument before the ICJ, relied on the *Pinochet* case, asserting that that case had established that an exception to immunity existed in the case of serious crimes under international law.[[60]](#footnote-60) Given the above analysis, it is clear that this assertion was quite simply wrong and it was rightly ignored by the ICJ which held that the arrest warrant was a violation of Yerodia’s immunity from criminal jurisdiction and the inviolability of the incumbent Minister for Foreign Affairs of the DRC.

The separate concurring opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case* suggested the possibility of an emerging rule of international law providing potentially for the removal of immunity in cases of serious international crimes insofar as such activities cannot be considered as official acts.[[61]](#footnote-61) However, the evidence they provided for this assertion was rather limited and was made up, to a large extent, by the speeches of only two of their lordships in *Pinochet No. 3* and two in *Pinochet No.1*, the latter of which, of course, had been vacated and therefore was of no legal effect. The development of a rule of international law that serious international crimes cannot be regarded as official acts, were it to happen, would be welcome and would help significantly in clarifying the availability of immunities in cases of serious international crimes. However, the evidence that has emerged from the attempts by the International Law Commission to codify the question of the jurisdictional immunities of States and the resulting United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004[[62]](#footnote-62) suggests that State practice has, in fact, gone the other way. States are less and less willing to accepts further restrictions on their immunity and that of their officials from the jurisdiction of foreign States.

This perspective has been made all the clearer by the most recent decision of the ICJ on the issue of immunity from jurisdiction in the *Jurisdictional Immunities of the State* case in 2012.[[63]](#footnote-63) The case relates to an action initiated in the Italian courts by Mr Luigi Ferrini, an Italian national who had been arrested and deported to Germany during the Second World War. Mr Ferrini and many of his compatriots had been forced to work in munitions factories in Germany, had been subjected to gross violations of their human rights and were seeking compensation in respect of that treatment. The Italian courts, at first instance, and on appeal, dismissed Ferrini’s case due to the jurisdictional immunity of Germany.[[64]](#footnote-64) However, at the Italian Court of Cassation on 11 March 2004, in reliance to a significant degree on the decision of the English House of Lords in *Pinochet No. 3*,[[65]](#footnote-65) it was held that the immunity of Germany did not apply as the act complained of constituted an international crime.[[66]](#footnote-66) The case was returned to the original court, which held, nevertheless, that the claim was time barred. This decision was, however, reversed by the Court of Appeal of Florence, and Germany was held liable to pay damages.[[67]](#footnote-67) After the initial Court of Cassation decision in Ferrini, subsequent cases were brought by further claimants in Turin and Sciacca. These led to the filing of an interlocutory appeal by Germany before the Italian Court of Cassation requesting a declaration of lack of jurisdiction. By two orders of 29 May 2008, “the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany”.[[68]](#footnote-68) Ultimately, Germany brought the case to the ICJ, alleging *inter alia* that by allowing civil claims to be brought against it, Italy had failed to respect the jurisdictional immunity that Germany enjoyed under international law.[[69]](#footnote-69)

It is not intended here to provide a detailed analysis of the Court’s decision, something that has been done elsewhere by the present author.[[70]](#footnote-70) Nevertheless, given the reasoning outlined above, it should come as no surprise that the ICJ considered that the *Pinochet* decision was irrelevant to the present case on the grounds that “Pinochet concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself designed to establish its liability to damages.”[[71]](#footnote-71) The Court further noted that: “In its later judgment in *Jones v. Saudi Arabia*, the House of Lords further clarified this distinction, Lord Bingham describing the distinction between civil and criminal proceedings as ‘fundamental to the decision’ in *Pinochet*.”[[72]](#footnote-72) Ultimately, the ICJ found that there is no limitation of State immunity by virtue of “the gravity of the violation or the peremptory character of the rule breached”.[[73]](#footnote-73) It noted that none of the relevant State practice and none of the relevant multilateral treaties, including the European Convention on State Immunity, 1972, the United Nations Convention 2004 or the draft Inter-American Convention on Jurisdictional Immunity of States included such an exception to immunity. Although it has been criticised by some as being too State-centric,[[74]](#footnote-74) the ICJ in *Jurisdictional Immunities of the State*, in much the same way as the House of Lords sought to do in its *Pinochet* judgment, sought to State the law as it stands not as other would like it to be.

**VI.) Conclusions**

The decision in *Pinochet No. 3* certainly brought the issue of the relationship between immunities and human rights to the forefront of academic debate in international law. However, the decision itself has proved to be of limited value to proponents of further limitation of immunities beyond those of former Heads of States in relation to the crime of torture. It seems that States – and the highest national and international courts – are reluctant further to limit State immunity. As has been noted above, the International Law Commission is currently examining the question of “Immunity of State Officials from Foreign Criminal Jurisdiction”[[75]](#footnote-75) and it remains to be seen whether that work will result in a strengthening or diminution of the immunity of such individuals.

The decision in *Jurisdictional Immunities of the State* has likely ensured that it will be some time before domestic courts will feel able to challenge any form of jurisdictional immunities in the context of human rights violations. This may be seen as a bad thing. However, it should be taken as an opportunity to reconsider existing laws in order to better provide for the adjudication of human rights. One way forward might be to strengthen human rights bodies and international judicial processes. Pinochet was undoubtedly an evil man but it should not have been left to a Spanish judge to issue an arrest warrant to have him arrested in the United Kingdom. He could have been dealt with by other means, both judicial and political. Similarly, the judges of the ICJ should not be in a position to condemn the acts of the Nazi regime during the Second World War as they did in the *Jurisdictional Immunities of the State* case, and then not be able to test the appropriateness of the compensation paid by Germany to the entirety of its victims. Mr Ferrini should not have been left having to sue the German government in the Italian courts but should have been fully compensated by his home government who could then have sought compensation from Germany.

Perhaps, given the failure to further develop the Pinochet precedent beyond its very narrow *ratio*,it is time to consider other approaches to the development of human rights adjudication and application other than through challenging jurisdictional immunity. After all, immunity from jurisdiction, in all of its various forms, serves an important purpose in international relations and its demise would likely cause more problems than it would solve.

1. Sandy Ghandhi and J. Craig Barker, “The Pinochet Judgment: Analysis and Implications”, *Indian Journal of International Law* (2000) 40, 4: 657.i [↑](#footnote-ref-1)
2. *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)* [1999] 2 All E.R. 97 (hereinafter *Pinochet No. 3*). [↑](#footnote-ref-2)
3. Ruth Wedgewood, “International Criminal Law and Augusto Pinochet”, *Virginia Journal of International Law* 40, 4 (2000): 829, 831. Wedgwood further noted that “the case has dramatically limited the immunity that State officials can claim for criminal activities conducted during their days in power.” [↑](#footnote-ref-3)
4. William J. Aceves, “Liberalism and International Legal Scholarship: The *Pinochet* Case and the Move Toward a Universal System of Transnational Law Litigation”, *Harvard International Law Journal* 41, 1 (2000): 129, 135. [↑](#footnote-ref-4)
5. Christine Chinkin, “United Kingdom House of Lords: *Regina v. Bow Street Stipendiary Magistrate*, ex parte *Pinochet Ugarte*”, *American Journal of International Law* 93, 3 (1999): 703, 711. [↑](#footnote-ref-5)
6. Andrea Bianchi, “Immunity versus Human Rights: The *Pinochet* Case”, *European Journal of International Law* 10, 2 (1999): 237, 237. [↑](#footnote-ref-6)
7. Ghandhi and Barker, *supra* note 1, 707-708. [↑](#footnote-ref-7)
8. *Pinochet No. 3*, *supra* note 2. This factual account is drawn largely from the speech of Lord Browne-Wilkinson. [↑](#footnote-ref-8)
9. *Augusto Pinochet Ugarte* [1999] ILM38 (Q.B. Div’l Ct, 1998) [↑](#footnote-ref-9)
10. *Ex parte Pinochet Ugarte No. 1* [1998] 4 All E.R. 897; [1998] 3 W.L.R. 1456. [↑](#footnote-ref-10)
11. *Ex parte Pinochet Ugarte No. 2* [1999] 1 All E.R. 577; [1999] 2 W.L.R. 272. [↑](#footnote-ref-11)
12. *Pinochet No. 3*, *supra* note 2. [↑](#footnote-ref-12)
13. Ghandhi and Barker, *supra* note 1, 658-661. [↑](#footnote-ref-13)
14. *Ibid*., 706. [↑](#footnote-ref-14)
15. Immunity from jurisdiction is available to individuals either *rationae personae*, if they have a particular status or fill a particular office, for example as a diplomatic agent or Head of State. Immunity *rationae personae* continues as long as they have that status or office. Immunity *rationae materiae* is an immunity available to individuals either in relation to a specific act or residually after termination of the status or office attracting immunity *rationae personae* but only in respect of an official act performed on behalf of a State. Effectively this immunity is the immunity of the State as applied to an individual. The issue of whether an individual is acting within his or her official capacity is accordingly crucial to the determination of whether that person is or is not entitled to immunity. [↑](#footnote-ref-15)
16. Article 1 of the United Nations Convention Against Torture 1984 defines torture in the following terms: “For the purposes of this Convention, the term ‘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, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” [↑](#footnote-ref-16)
17. Lords Browne-Wilkinson, Hutton and Phillips. [↑](#footnote-ref-17)
18. Lords Hope, Saville and Millett. [↑](#footnote-ref-18)
19. For a detailed analysis of the jurisdictional question see Ghandhi and Barker, *supra* note 1, 677-694. We concluded, at 689: “Lord Millett aside, none of their lordships were willing to find that there existed in customary international law … a right to prosecute alleged offenders wherever they are found. In other words, customary international law did not provide for universal jurisdiction against torturers. Accordingly, the only legal base for the exercise of universal jurisdiction against an individual accused of the crime of torture is provided by treaty, specifically the Torture Convention.” [↑](#footnote-ref-19)
20. Section 20(1) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 (and hence the Vienna Convention on Diplomatic Relations 1961, which was incorporated verbatim into UK law by the 1964 Act) “subject…to any necessary modifications…shall apply to (a) a sovereign or other Head of State…as it applies to a Head of a diplomatic mission.” Article 39(2) of the Vienna Convention on Diplomatic Relations 1961 provides that diplomatic agents (and hence Heads of States) retain immunity after they have ceased to function as a diplomatic agent (or Head of State) but only in respect to “acts performed by such person in the course of his functions as a member of the mission”. Accordingly, a diplomatic agent (or Head of State) has immunity *rationae personae* up until the point where he ceases his functions after which time he retains residual immunity *rationae material* in respect of his official acts. [↑](#footnote-ref-20)
21. Analytical Guide to the Work of the International Law Commission, “Immunity of State Officials from Foreign Criminal Jurisdiction”, http://legal.un.org/ilc/guide/4\_2.htm. [↑](#footnote-ref-21)
22. Bianchi, *supra* note 6, 237. [↑](#footnote-ref-22)
23. The origins of the rule of absolute immunity are disputed and it is asserted that the rule was never part of the civil law tradition. The origins of the rule within the common law tradition are linked to established rules of diplomatic immunity, and based on notions of sovereignty, equality and dignity (see *The Schooner Exchange v. McFaddon* 7 Cranch 116, 31 L.Ed. 287 (1812)). On the theory of absolute immunity as applied in the United Kingdom, see the decisions of the Court of Appeal in *The Parlement Belge* (1880) 5 P.D. 197 and *The Porto Alexandre* [1920] P. 20 and the House of Lords in *The Christina* [1938] A.C. 483. On the application of the approach in the United States of America see the decision of the US Supreme Court in *Berizzi Bros. Co. v. S.S. Pesaro* [1926] 271 U.S. 362. [↑](#footnote-ref-23)
24. The move to the restrictive approach was commenced in the US by the so-called Tate Letter (Letter from Jack B. Tate, Acting Legal Adviser of the US Department of State to Acting Attorney General Phillip B. Perlmann (May 19 1952) reprinted in 26 *Department of State Bulletin* 984 (1952). The process in the UK took significantly longer and was primarily facilitated by the judiciary through a series of cases culminating with the Court of Appeal decisions in *The Phillipine Admiral* [1976] 2 WLR 214 and *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529 and ultimately confirmed by the House of Lords in *I Congress Del Partido* [1981] 2 All ER 1064. The restrictive theory was enacted into legislation the Foreign Sovereign Immunities Act 1976 in the US and the State Immunity Act 1972 in the UK. See also the European Convention on State Immunity 1972. [↑](#footnote-ref-24)
25. *Filartiga v. Pena-Irala* 630 F2d 876 (2d. Cir. 1980). [↑](#footnote-ref-25)
26. *Siderman de Blake v. Republic of Argentina* 965 F.2d 699 (1992). [↑](#footnote-ref-26)
27. *Al-Adsani v. Government of Kuwait and Others* [1994] P.I.Q.R. 236; 100 ILR 465. [↑](#footnote-ref-27)
28. *Al-Adsani v Government of Kuwait and Others* [1993] 103 ILR 420. [↑](#footnote-ref-28)
29. *Al-Adsani v Government of Kuwait and Others* [1996] 107 ILR 536. [↑](#footnote-ref-29)
30. For a more detailed survey of the various hearings in this case see Ed Bates, “The *Al-Adsani* Case, State Immunity and the International Legal Prohibition on Torture” *Human Rights Law Review* 3, 1 (2003): 193. [↑](#footnote-ref-30)
31. State Immunity Act 1978, s. 3. [↑](#footnote-ref-31)
32. The issue as to whether a successful claim to State immunity was in breach of Article 6 ECHR was considered in *Al-Adsani v. UK* 2001-XI 79; (2002) 34 EHRR 273, alongside two other cases: *Fogarty v. UK* (2001-XI 157; (2002) 34 EHRR 302) and *McElhinney v. Ireland* (2001-XI 37; (2002) 34 EHRR 322). [↑](#footnote-ref-32)
33. *Al-Adsani*, *supra* note 32,¶ 54. [↑](#footnote-ref-33)
34. *Al-Adsani*, *supra* note 32,Joint Dissent of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajid at ¶ 4. [↑](#footnote-ref-34)
35. *Al-Adsani*, *supra* note 32,¶ 65. [↑](#footnote-ref-35)
36. *Al-Adsani*, *supra* note 32,dissenting opinion of Judge Ferrari Bravo. [↑](#footnote-ref-36)
37. *Al-Adsani*, Joint Dissent, *supra* note 32,¶ 4. [↑](#footnote-ref-37)
38. ?? [↑](#footnote-ref-38)
39. *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*. Unreported decision of Master Whitaker, 30 July 2003. [↑](#footnote-ref-39)
40. *Mitchell and others v Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*. Unreported decision of Master Whitaker, 30 July 2003. [↑](#footnote-ref-40)
41. *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2005] QB 699; [2005] 2WLR 808. [↑](#footnote-ref-41)
42. *Ibid*., ¶57. [↑](#footnote-ref-42)
43. *Ibid*., ¶74. [↑](#footnote-ref-43)
44. *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2007] 1AC 270; [2006] 2WLR 1424. [↑](#footnote-ref-44)
45. *Ibid*, ¶7. [↑](#footnote-ref-45)
46. *Ibid,* ¶9. [↑](#footnote-ref-46)
47. *Ibid* ¶¶11-13. [↑](#footnote-ref-47)
48. *Ibid*, ¶19. [↑](#footnote-ref-48)
49. *Ibid*, ¶34. [↑](#footnote-ref-49)
50. *Ibid*, ¶¶43-46 [↑](#footnote-ref-50)
51. Alexander Orakhelashvili, “State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong”, *European Journal of International Law*, 18, 5 (2007) 955. See also Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006). [↑](#footnote-ref-51)
52. *Ibid*, 963-70. [↑](#footnote-ref-52)
53. *Jones, supra*, note 41, ¶101 *et seq* [↑](#footnote-ref-53)
54. Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) 525. Cited in *Jones*, *supra* note 44, ¶44. [↑](#footnote-ref-54)
55. *Jurisdictional Immunities of the State* (*Germany v. Italy*: *Greece* intervening), 2012 I.C.J 99 (3 Feb.), ¶¶92-97 [↑](#footnote-ref-55)
56. Lorna McGregor, “Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty” *European Journal of International Law* 18, 5 (2007) 903, 905. [↑](#footnote-ref-56)
57. See for example, Sandy Ghandhi “Avena and other Mexican Nationsl (Mexico v United States of America), Provisional Measures, order of 5 February 2003” *International and Comparative Law Quarterly* 53: 3 (2004) 738 [↑](#footnote-ref-57)
58. *Jones v United Kingdom (Application 34356/06 and 40528/06)* decision of 14 January 2014. [↑](#footnote-ref-58)
59. *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), 2002 I.C.J. 3 (11 Apr.). [↑](#footnote-ref-59)
60. *Ibid*, ¶56. [↑](#footnote-ref-60)
61. ####  *Arrest Warrant Case*, *supra* note 60, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal: “immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for ‘official’ acts. It is now increasingly claimed in the literature…that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform: (Robert Goff J...and Lord Wilberforce articulated this test in *1* *Congreso del Partido* [1978] QB 500, at 528 and [1983] 1 AC 244, 268 respectively). This view is underscored by the increasing realisation that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case: Supreme Court, 29 May 1962, 36 ILR 5, 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R v. Bartle and the Commissioner of Police for the Metropolis and Others*, ex parte *Pinochet* (‘*Pinochet III*’); and of Lords Steyn and Nicholls of Birkenhead in *‘Pinochet I*’, as well as the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2).”

 [↑](#footnote-ref-61)
62. UN Doc.A/59/508. [↑](#footnote-ref-62)
63. *Jurisdictional Immunities of the State*, *supra* note 55. [↑](#footnote-ref-63)
64. See *Ibid.*, ¶ 27. [↑](#footnote-ref-64)
65. *Ibid.*,¶ 87. [↑](#footnote-ref-65)
66. *Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004 (Rivista di diritto internazionale, vol. 87, 2004, 539; 128 ILR 658.(2004). [↑](#footnote-ref-66)
67. See *Jurisdictional Immunities of the State*, *supra* note 55, ¶27. [↑](#footnote-ref-67)
68. *Giovanni Mantelli and others* (Italian Court of Cassation, Order No. 14201 (Mantelli) *Foro italiano*, vol. 134, 2009, I, 1568); and *Liberato Maietta* (Order No. 14209 (Maietta) *revisita di dritto* internazionale, vol. 91, 2008, 86). *Jurisdictional Immunities of the State*, *supra* note 55, ¶28. [↑](#footnote-ref-68)
69. See further *Jurisdictional Immunities of the State*, *supra* note 55, ¶¶ 15, 16, 17 and 37. [↑](#footnote-ref-69)
70. For my own analysis of the case see J. Craig Barker, “*Jurisdictional Immunities of the State (Germany v. Italy*)Judgment of 3 February 2012”, *International and Comparative Law Quarterly* 62, 3 (2013): 741; and J. Craig Barker, “Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in *Germany v. Italy*”, *International Community Law Review* 15, 4 (2013): 415. [↑](#footnote-ref-70)
71. *Jurisdictional Immunities of the State*, *supra* note 55, ¶87. [↑](#footnote-ref-71)
72. *Ibid.* [↑](#footnote-ref-72)
73. *Jurisdictional Immunities of the State*, *supra* note 55 ¶89. [↑](#footnote-ref-73)
74. The most damning criticism of the decision came from within the Court itself in the form of the Dissenting Opinion of Judge Cançado Trindade *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), 2012 I.C.J 179 (3 Feb.). [↑](#footnote-ref-74)
75. See above, note 21. [↑](#footnote-ref-75)