15. The above criteria may be varied in individual cases, at the discretion of the Crown prosecutor.
16. If the offender is facing other minor non-drug charges and wishes to enter the DTC, he/she will be required to plead guilty to those charges prior to entering the programme.
17. Consistency in team members, particularly the Judge, Crown and treatment providers are essential to the success of the DTC. The offenders identify with the Judge and develop a personal relationship that is an important component of the dynamic of the DTC. Seeing the same offender week after week and commending them for their progress (or addressing relapses) is an important component of their treatment.
18. See Case Studies *infra*. Laura Luetke, 1999, *Drug Treatment Court Case Studies*, Unpublished paper, CAMH, Toronto.
19. The National Center on Addiction and Substance Abuse at Columbia University, *Behind Bars: Substance Abuse and America's Prison Population* (1998).
20. The DTC Evaluation Team has been funded by the National Crime Prevention Centre to conduct an in depth evaluation of the Toronto Drug Court. The research component will examine *inter alia*, cost-effectiveness, recidivism rates, and impact on long-term substance abuse. An interim report is expected in the spring of the year 2000.
21. Centre for Addiction and Mental Health, Treatment Team.
22. For example in New York State possession of a half a gram of cocaine or 16 ounces of marijuana requires a minimum sentence of 1–3 years.
23. General Barry McCaffrey, Director, Office of National Drug Control Policy, in NAACP's *The Crisis*.
24. Philip S Anderson, President, American Bar Association.
25. Martin L Reisig, *Rediscovering Rehabilitation: Drug Courts Community Correction and Restorative Justice*.
26. The cost of treatment at the Toronto Drug Treatment Court is estimated at $4,500.00 per offender; the cost of incarcerating that same inmate for a year is approximately $46,720, or $128.00 a day.
27. National Association of Drug Court Professionals.

* On a personal note I wish to acknowledge the dedication and professionalism of each and every member of the Drug Treatment Court Team and the treatment staff at the CAMH. In addition I wish to thank the members of the Steering Committee whose countless hours of meetings and discussions were integral to whatever modest success the Drug Treatment Court has enjoyed. Finally, I wish to thank the members of the Community Advisory Committee whose dedication to the goal of breaking the cycle of drugs and crime, has been central in the launching of this pilot project.

Ex parte Pinochet and the Concept of State Immunity*: Some Reflections

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The judgement of the House of Lords in *Ex parte Pinochet* delivered on 24 March 1999 assumes particular significance from the point of view of International Law for the reason that the central issue around which most of the argument turned was whether Senator Pinochet was entitled to immunity as the

*Judgement of the House of Lords reported in [1999] 2 WLR 827; also reported in [1999] 2 All ER 97.

former Head of State of Chile, which, if answered in the affirmative, would defeat a request made by the Government of Spain to extradite Senator Pinochet from the United Kingdom to stand trial in Spain, for crimes committed during the period when he was Head of State in Chile. As pertinently observed by Lord Browne-Wilkinson:

> It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to 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 ground that there can be no immunity against prosecution for certain international crimes.

The principal focus of this article is, therefore, on the complex interplay as revealed in the several opinions of the Lords of Appeal, between two well established principles of international law, namely, state immunity or that a Head of State or former Head of State and the question of personal responsibility for crimes against international law. In examining the several opinions of the Lords of Appeal, from the above perspective, it is necessary to deal with them in relation to the following issues:

(i) Applicability of the double criminality principle in extradition law and its impact on the approach adopted by the House of Lords;
(ii) The centrality accorded to the Torture Convention in the judgement; and the
(iii) Impact on the concept of state immunity.

Applicability of the double criminality principle

The double criminality principle which forms a cornerstone in the law of extradition requires that for purposes of extradition, the conduct complained of must constitute a crime under the respective laws of the requesting and the requested states. Thus for the purpose of the *Pinochet case*, the crimes alleged to have been committed by Senator Pinochet must constitute crimes, both under the laws of Spain and of the United Kingdom.

One of the critical issues that the Law Lords had to contend with, in dealing with the Spanish request was the "extra-territorial character" of some of the offences alleged to have been committed by Senator Pinochet and which formed the basis of the extradition request. The double criminality principle is given effect to in s. 2 of the Extradition Act 1989 of the United Kingdom under two headings. First, the general principle as set out in s. 2(1)(a) states:

> s. 2(1)(a) 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 twelve months or any greater punishment and which however described in the law of the foreign state . . . is so punishable under that law.

The second, set out in s. 2(1)(b) read with s. 2(2), refers to an extra-territorial offence against the law of a foreign state which is punishable under that law with imprisonment for a term of twelve months, or any greater punishment, and which, in corresponding circumstances would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of twelve months, or any greater punishment.

This element of the principle of double criminality is of particular relevance in the present instance where the Spanish extradition request also covered crimes alleged to have been committed by Senator Pinochet against Spanish nationals in a third country. Thus the Court proceeded on the basis that an extra-territorial

offence against the law of Spain should have been an extra-territorial offence in the United Kingdom on the date when the offence took place.

The Court, confronted with the territorial character of English criminal jurisdiction in terms of which "a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries", recognised the extra-territorial character of the class of crimes which were regarded as international crimes in the aftermath of the Second World War.

Lord Browne-Wilkinson observed in his judgement:

> 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 when 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.

The Court adverted to the fact that the obligations placed on the United Kingdom consequent to it being a State Party to that Convention were incorporated into the law of the United Kingdom by s. 134 of the Criminal Justice Act 1988 which came into force on 29 September 1988. Accordingly s. 134 of the Act had created a new crime under United Kingdom law—the crime of torture—and, as required by the Torture Convention, all acts of torture wherever committed were made criminal under United Kingdom law and made triable in the United Kingdom.

Accordingly, the Lords of Appeal came to the conclusion that as acts of torture committed extra-territorially did not become punishable under English Law until s. 134 of the Criminal Justice Act 1988 came into effect on 29 September 1988, acts of torture committed outside the requesting state prior to that date were not extraditable.

The consequence of requiring acts of torture committed extra-territorially to be a crime under United Kingdom law at the date such acts of torture were committed, was that the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 were to be considered non-extraditable crimes. The categories of charges in the extradition request were thus drastically reduced and only two charges of conspiracy to torture and a single act of torture committed after the relevant date survived from the original twenty-two charges which comprised the Spanish request for extradition.[1]

Having thus dealt with the issues arising from the application of the double criminality principle from the somewhat limited perspective of the "relevant date" when the Convention against Torture became part of the United Kingdom law, given the territorial character of the general criminal jurisdiction prevailing in the United Kingdom, the Court had then to consider whether in relation to the surviving charges, Senator Pinochet enjoyed sovereign immunity.

Centrality of the Torture Convention

The obligations imposed on the United Kingdom, Spain and Chile by virtue of being State Parties to the Convention against Torture was central to the opinions of the majority of the Lords of Appeal who held that Senator Pinochet had no immunity from extradition from the United Kingdom to a third country, for acts of torture committed in his own country while he was Head of State, after the date when the Convention came into effect in all three countries.

Certain contradictions which have arisen consequent to the "Convention-based approach" to the question of extraditable crimes is best illustrated in the opinion

of Lord Browne-Wilkinson. Adverting to the fact that the Republic of Chile had accepted before the House of Lords that the international law prohibition against torture has the charter of *jus cogens* or a prohibition under peremptory norms of international law, Lord Browne-Wilkinson cites with approval the following passage from the Order of the Tribunal for Former Yugoslavia in the *Ferundzija case*:

> 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 . . . 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.[2]

In response to a suggestion by Counsel for Senator Pinochet that although torture was contrary to international law "it was not strictly an international crime in the highest sense", His Lordship comes to the clear conclusion that—

> 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.

Having travelled thus far down the path of treating torture as "an international crime in the highest sense" the question then arises as to why it became necessary for Lord Browne-Wilkinson to fall back on the Torture Convention to determine the question whether Senator Pinochet was entitled to sovereign immunity in respect of acts of torture alleged to have been committed while he was Head of State of Chile.

The dichotomous approach of Lord Browne-Wilkinson towards the question of the existence of the crime of torture as an independent international crime is best illustrated in the following passage in the judgement:

> I have doubts whether, before coming into force of the Torture Convention, the existence of the international crime of torture as *jus 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 judgement the Torture Convention did provide what was missing, a worldwide universal jurisdiction.

The hesitancy of Lord Browne-Wilkinson to treat torture as a crime *jus cogens* or in his own words "a fully constituted international crime" stems from his pre-occupation with the fact that there was neither a formal penal tribunal constituted nor a system of universal jurisdiction vesting national courts with extra-territorial jurisdiction, to punish the crime of torture. This lacunae, according to His Lordship, was filled only with the adoption of the Torture Convention. The inherent weakness of such a restrictive approach is revealed when one examines the position with regard to well established international crimes such as piracy.[3] Traditionally, there was neither a penal tribunal established nor universal jurisdiction conferred by a Convention to deal with the international crime of piracy. However, national courts, in particular, the English courts, always treated the crime of piracy as a crime under customary international law over which the national courts exercised extra-territorial jurisdiction under common law.

In the present instance, the House of Lords was confronted with a situation where the request for extradition involved extradition crimes, many of which were extra-territorial in character. The satisfaction of the double criminality principle as contained in the Extradition Act of 1989 required that "in

corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom". It is this requirement which appears to have largely influenced Lord Browne-Wilkinson to tread the relative safety of the path provided by the Torture Convention which gave the British courts, through specific statutory provision, extra-territorial jurisdiction from the date when the Convention entered into force for the United Kingdom.

This Convention-based approach, not only excluded from consideration by the Court, a very large number of those charges, which formed the basis of the extradition request and which as the House of Lords observed, constituted "a substantial change in the circumstances", it also had a negative impact on the larger question of personal responsibility of individuals under general international law in respect of international crimes.

Impact on the Concept of State Immunity

The question whether the provisions of the Torture Convention evince an intention to waive immunity "*sub silentio*" or by implication, which was the subject of considerable discussion in the judgement, is of central importance in examining the impact of *Ex parte Pinochet* on the concept of state immunity.

The Torture Convention does not contain any provision which deals expressly with the question whether a Head of State or a former Head of State would enjoy immunity in respect of a charge of having committed the crime of torture.[4] The several opinions of the Law Lords reflect an interesting divergency of approach stemming from the fundamental premise adopted by them on the legal basis for English courts to exercise jurisdiction in respect of individual criminal responsibility for the crime of torture.

The first of these approaches is illustrated in the opinion of Lord Browne-Wilkinson of the majority which doubted the existence of an international crime of torture as *jus cogens*. Thus, Lord Browne-Wilkinson, giving central focus to the Torture Convention, adverts to the fact that an essential feature of the international crime of torture as defined in the Convention is that it must be committed "by or with the acquiescence of a public official or other person acting in an official capacity". The resulting position is that in cases of allegations of torture, the defendants must of necessity be state officials who committed torture, acting in an official capacity. Consequently, if the Head of State or a former Head of State is deemed to enjoy immunity, in the absence of an express provision on waiver of state immunity in the Torture Convention, it would, in his Lordship's opinion, result in an absurdity whereby the person most responsible for the crime would escape liability, while his inferior officers would be held liable under the Convention.

Thus Lord Browne-Wilkinson, interpreting the Convention in a manner intended to give effect to its objectives, arrives at the conclusion that a notion of continued immunity for former Heads of State would be incompatible with the provisions of the Convention and indeed its fundamental objective.

> . . . 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 have been frustrated. In my judgement, 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.

This approach underlines the fact that since torture, contrary to the Convention can only be committed by a public official or other person acting in an official capacity, and a plea of state immunity can be asserted only in respect

of such persons, it would be inconsistent with the obligations under the Convention, for a State Party to be able to invoke state immunity in respect of crimes under the Convention. Thus a waiver of immunity must be read *sub silentio* into the Convention, in order to give effect to its obligations.

A contrary approach is reflected in the dissenting opinion of Lord Goff of Chieveley which emphasised the proposition that a state's waiver of its immunity by treaty must always be express. In support of this proposition he cites Oppenheim according to whom the only instances 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 the proceedings relating to the merits of the case.[5] His Lordship also cites the Report of the International Law Commission and the Commentary on Draft Articles on Jurisdictional Immunities of States.

> 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, 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 norm for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, . . .[6]

As succinctly underlined by Lord Goff, the general effect of the above passage is that, in a treaty concluded between states, consent by a State Party to the exercise of jurisdiction against it must be express. 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. The only example given of such an exception is the actual submission to the jurisdiction of the courts of another state. The approach adopted by Lord Goff on the question whether the fact of being a State Party to the Torture Convention constitutes an implied waiver of sovereign immunity is premised on these principles.

Invoking established principles of treaty law, Lord Goff adverts to the fact 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."[7] In the present case, he finds nothing in the negotiating text of the Torture Convention which sheds any light on the proposed implied term. The *travaux preperatories* of the negotiations had not revealed any trace of consideration being given to the question of waiver of state immunity.[8]

The negotiations on the Torture Convention had commenced in 1979, five years before the adoption of the Convention. As a possible explanation of the *travaux preperatories* of the conference not disclosing any intention to exclude the principle of state immunity, Lord Goff opines that there may have been recognition at an early stage that so many states would not be prepared to waive their immunity. Given the fundamental nature of the issue and the possible risk of jeopardising negotiations, there may have been a general awareness that the matter was not worth pressing. He surmises 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.

Pursuing this line of reasoning, Lord Goff takes into account the fact that the Torture Convention applies not only to a series of acts of systematic torture, as under customary international law, but to the commission or the acquiescence of even a single act of mental torture.[9] This factor, raises considerable difficulties in reading into the Convention, the question of implied waiver.

Adverting to the fact that extradition could be sought in certain jurisdictions on the basis of "a simple allegation" unsupported by *prima facie* evidence, Lord Goff underlines the inherent implications of excluding immunity *ratione materiae* in respect of former Heads of State or public officials. State immunity *ratione materiae* operates to protect such persons from legal process in foreign countries, not only where they are guilty of torture, but also to preclude such process in respect of alleged crimes. In the words of Lord Goff, these could include—

> 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 States perform an executive role and who may therefore be regarded as punishable by governments of states which, for deeply felt political reasons, deplore their actions while in office.

Such reasoning, according to Lord Goff, could well have persuaded possible State Parties to the Torture Convention that it would be unwise to give up the protection afforded by the principle of state immunity. In the result, the subject of waiver of state immunity could well not have been pursued by states on the basis that, to press for its adoption would only imperil the very substantial advantages which could otherwise be achieved by the Convention, even if no waiver of state immunity was included in it.

Stressing the implications of the *travaux preparatories* not evincing any intention in the Convention to exclude state immunity, Lord Goff examines two hypotheses on the basis of the argument of the Appellant, the Government of Spain. The first was the hypotheses 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. The second was that, despite the above, none of the states involved thought it right to raise the matter for discussion during the negotiating process. The necessary conclusion which follows from these hypotheses is that, either 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. Lord Goff concludes that it is difficult to imagine that either of the propositions could be correct and that it cannot have "crossed the minds of the responsible civil servants that state immunity was excluded *sub silentio* in the Convention".

The proposition that State Parties to the Torture Convention had implicitly excluded state immunity in respect of the crimes under the Convention, where jurisdiction is vested in national courts, is thus viewed by Lord Goff as "a remarkable surrender of the basic protection afforded by international law" and the fact that it should be done by implication, as "most improbable".

Conclusion

The centrality accorded to the Torture Convention by the majority of the Lords of Appeal in *Ex parte Pinochet*, required them to consider the difficult issue whether the Torture Convention removes state immunity by implication, in the absence of any express provision on the question whether Heads of State or for-

mer Heads of State either are or are not to have immunity in respect of a charge of having committed torture.

The principle of state immunity, having its origins in the classical concept of sovereign immunity, *par in parem non habet imperium*, has over time acquired the character of a principle *jus cogens*. A necessary corollary of this principle is that a waiver of such immunity must always be express.

Whenever the international community thought it necessary that the principle of state immunity should not act as a bar in respect of the commission of grave international crimes, heinous in character and constituting a threat to the very fabric of international society, specific provision to that effect was made in the legal instruments dealing with such crimes. This was in explicit recognition of the fact that the *jus cogens* principle of state immunity could only be removed by express waiver or agreement.

In this respect, a crucial factor that should not be lost sight of is the fact that whenever an international tribunal was created for the exercise of international criminal jurisdiction in respect of grave international crimes, such as war crimes, crimes against humanity or genocide, the constituent instrument establishing such tribunals expressly provided for the non-applicability of state immunity. These instruments contained the additional safeguard that international crimes such as torture must be of a widespread or systematic character before the jurisdiction of such tribunals could be invoked. This was adverted to in several opinions of the Lords of Appeal.[10]

The inclusion of such express provision on non-applicability of immunity underlines both the gravity of the crimes in question as well as the *jus cogens* character of state immunity, which could not be lightly departed from, absent express agreement.

The question should then be posed, if the international community thought it wise to make such express provision depriving a plea of sovereign immunity in respect of grave international crimes, where it concerned the exercise of international criminal jurisdiction, would such a fundamental factor be allowed to go by default of *sub silentio*, where it involves the exercise of national jurisdiction. After all, the essence of the *par in parem non habet imperium* principle is rooted in the immunity one sovereign enjoys from the jurisdiction of another. The absurdity which results in reading an implied term into the Torture Convention was amply dealt with in the opinion of Lord Goff of Chieveley, referred to above.

If the international community thought it prudent to make express provision on non-applicability of immunity where it concerns international criminal jurisdiction, such prudence, surely would have dictated a similar approach, where exercise of national criminal jurisdiction was concerned, if exclusion of immunity was the clear intention when the Torture Convention was negotiated.

The pre-occupation of the Law Lords with the territorial character of English criminal jurisdiction, resulted in reliance being placed on the Torture Convention which conferred extra-territorial jurisdiction in respect of the crime of torture. In that process, the reading into the Torture Convention, of an implied term excluding state immunity brought about a result which was clearly untenable.

The opinion of Lord Hope of Craighead acquires particular relevance in pointing to the alternate path that was open for the Law Lords to tread, when confronted with this issue.

> 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 deferred in Article 1. It is just that the obligations which were recognised by customary international law in the case of such 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.

Similarly, Lord Millett, favouring a broader approach to these issues, took the view that crimes prohibited by international law attracted universal jurisdiction under customary international law, if two criteria were satisfied. First, they had to be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Second, they had to be so serious and on such a scale that they could justifiably be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.

Lord Millett concluded that every state had jurisdiction under customary international law, to exercise extra-territorial jurisdiction in respect of international crimes which satisfied the above criteria. Lord Millett's approach to the double criminality issue is thus premised on a broad and flexible customary international law basis and stands in contrast to the narrow convention based approach of the majority. He cogently argues that while the jurisdiction of the English criminal courts was usually statutory, it was nevertheless supplemented by the common law.

> Customary international law was part of the common law and accordingly the English courts had and always had had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

Lord Millett therefore had no difficulty in treating the systematic use of torture as a fully constituted international crime. In his 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.

Such an approach based on the customary law character of the crime of torture leads to the reasonable conclusion that English courts already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges made against Senator Pinochet and that it did not require the authority of statute to exercise it.

This broad and flexible approach has the merit that while meeting the requirements of the double criminality principle, it avoids the complex issues relating to the application of the concept of sovereign immunity in the context of the Torture Convention. The recognition of torture as a crime *jus cogens* under general international law, it is submitted, provides a relatively sound legal basis, if the equally established principle of international law of sovereign immunity is to be displaced, in the context of the nature of the charges made against the former Head of State of Chile. Such an approach would have avoided the thorny issue of reading into the Torture Convention, somewhat artificially, an implied waiver of state immunity, which the Lords of Appeal had to grapple with.

Endnotes

1. The exclusion from the consideration by the Court of a very large number of the charges contained in the Spanish request constituted, according to the Lords of Appeal, "a substantial change in the circumstances". They pointed out that this would obviously require the Secretary of State of the UK to reconsider his decision to issue an "authority to proceed" in respect of the Spanish request—*per* Lord Browne-Wilkinson.

2. *Prosecutor v Ferundzija* (unreported), 10 December 1998. International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10.
3. Article 105 of the United Nations Convention on the Law of the Sea (1982) now provides for the exercise of universal jurisdiction in respect of the crime of piracy.
4. The immunity enjoyed by a Head of State while in office was absolute immunity, which was accorded *ratione personae* or attaching to his person, rendering him immune from all actions whether or not they were done for the benefit of the state. On the other hand, a former Head of State enjoyed only a restricted form of immunity, *ratione materiae* in relation to acts done as part of his official functions when he was Head of State.

   The immunity attached to Head of State and former Heads of State is discussed by Sir Arthur Watts QC, former Legal Adviser to the British Foreign and Commonwealth Office, in a Paper entitled *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*" and cited with approval by Lord Hutton:

   > 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.
   >
   > 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 State 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 . . .
   >
   > 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".
5. Oppenheim's International Law, Vol 1, pp 351–355.
6. Yearbook of the International Law Commission (1991) Vol II, Part 2.
7. The requirement of an intention to create legal relations which is found in the law of contract is not found in the Vienna Convention on the Law of Treaties. However the International Law Commission which drafted the Convention has stated that "in so far as this (requirement) may be relevant in any case, the element of intention is embraced in the phrase 'governed by international law' "—Fourth Report on the Law of Treaties, Yearbook of the International Law Commission, 1965, Vol II, p 12.

   According to Fitzmaurice, there are today three main schools of thought on the subject of treaty interpretation, "which could conveniently be called (i) the 'intentions of the parties' or 'founding fathers' school; (ii) the 'textual' or 'ordinary meaning of the words' school; and (iii) the 'teleological' or 'aims and objects' school". The ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be constructed (and are indeed normally held) compounded of all three. However, each tends to confer the primacy on one particular aspect of treaty interpretation, if not to the exclusion, certainly to the subordination of the others": Fitzmaurice, "The Law and Procedure of the International Court of Justice; Treaty Interpretation and Certain other Treaty Points" (1951) 28 *British Yearbook of International Law* (BYIL) 1.

   Note also, Article 31 of the Vienna Convention which states:

   > "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
   >
   > (2) . . .
   >
   > (3) . . .

(4) A special meaning shall be given to a term if it is established that the parties so intended."

8. Article 32 of the Vienna Convention states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) lead to a result which is manifestly absurd or unreasonable"

The *travaux preparatories* or the preparatory work of a treaty is not defined in the Vienna Convention. According to the International Law Commission, "to do so might only lead to the possible exclusion of relevant evidence" (Commentary, YBILC 1966, Vol II, p 223).

It normally includes the records of negotiations between the states that participate in the drafting of the treaty and also records of the work of independent bodies of experts such as the International Law Commission. Accordingly to McNair "whatever value there may be in preparatory work is that it may afford evidence of the common intention of the parties"—McNair, "Treaties" p 421.

9. *Contra*, position under international instruments establishing International Criminal Tribunals when a high threshold is required to be established, in order to invoke the jurisdiction of such Tribunals.

For eg, Part 5 of the Statute of the International Tribunal for the former Yugoslavia includes torture as one of the crimes against humanity. In the Report of the Secretary General to the United Nations, it is explained that crimes against humanity refer to inhuman acts of a very serious nature, such as wilful torture or rape, committed as a part of widespread or systematic attack against any civilian population.

Part 3 of the Statute of the International Tribunal for Rwanda (1994) include torture as one of the crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population.

Article 7 of the Rome Statute establishing the International Criminal Court similarly provides: "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". The crime of torture is listed in the Article as a crime against humanity.

10. For instance Article 7 of the Charter of the Nuremberg Tribunal (1945) provides:

"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".

Similar provision is contained in the Tokyo Charter of 1946 establishing the Tokyo War Crimes Tribunal. The Convention on the Prevention and Suppression of the Crime of Genocide (1948) 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".

The Statute of the International Criminal Tribunal for the former Yugoslavia (1993) and the Statute of the International Criminal Tribunal for Rwanda (1994) and most recently the Rome Statute of the International Criminal Court (1998) made similar express provision.

Article 27 of the Rome Statute makes specific provision on "Irrelevance of official capacity" which appears to the most detailed provision dealing with exclusion of immunity in an international instrument:

"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 the Statute, nor shall it, in and of itself, constitute a grounds for reduction of sentence".