Colombos International Law Essay Prize 2015:

'Though in a minority of one, Lord Goff was right in the *Pinochet* case.' Discuss.

A. Introduction

1. The reading of the House of Lords judgment in the extradition case of the former President of Chile, Senator Augusto Pinochet Ugarte, has been described as the judicial equivalent of a FIFA World Cup final penalties shoot-out.[1] Broadcast live on CNN, the decision of the House of Lords did not disappoint; it was the first time a domestic court refused to accord immunity to a former (or incumbent) head of state on the grounds that there can be no immunity against prosecution for 'international crimes.'[2] The decision was celebrated by human rights activists around the world and understood as an important step towards 'the end of impunity' for international crimes.[3]

2. Distracting from the jubilation, however, was the sobering single dissenting opinion by Lord Goff of Chieveley. Lord Goff had rejected the idea that international law no longer afforded immunity before foreign courts for (former) state officials accused of international crimes, both on legal and policy grounds. Legally, he did not recognize customary international law had developed such a limitation on immunity, and in terms of policy, he insisted on the need for states to explicitly accept such a limitation.[4]

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1 Warbick, C. et al, "I. The Future of Former Head of State Immunity after Ex Parte Pinochet", 48(4) *ICLQ* (1999) pp. 937 – 949, at p. 937.

2 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, *Ex Parte* Pinochet Ugarte (No.3) [2000] 1 AC pp. 147 – 292 [henceforth *Pinochet No.3*], Lord Browne-Wilkinson at p. 201. The Lords do not define the term 'international crimes,' but agree that for present purposes torture is the most important amongst them. Article 5 of the Rome Statute of the International Criminal Court (1998), however, defines "the most serious crimes of concern to the international community" as a) the crime of genocide; b) crime against humanity; c) war crimes; and d) the crime of aggression.

3 Amnesty International, "The Case of General Piochet: Universal jurisdiction and the absence of immunity for crimes against humanity", AI Index: EUR/45/21/98 (1998), at p. 4.

4 *Pinochet No.3*, *supra* note 2, Lord Goff at 211 and 220, respectively.

3. This essay will argue that the leading international jurisprudence on state immunity since *Pinochet No.3*, followed the key points made in the opinion of Lord Goff. In contrast, the key points made in the majority decision have not received such endorsement – being mutually exclusive to Lord Goff's – and instead have become an anomaly in the jurisprudence.

4. The structure of the essay is as follows. First, I will summarise the proceedings in the Pinochet extradition case (section B), the majority decision (section C), and Lord Goff's dissenting opinion (section D). Secondly, I will discuss the decision of the International Court of Justice (ICJ) in three cases involving questions of state immunity, and compare them to the dissenting opinion of Lord Goff in *Pinochet No.3* (section E). Lastly, I will conclude with a summary and look towards potential future developments in state immunity under international law.

B. The Proceedings

5. Following an international arrest warrant issued by Spain, Senator Pinochet was arrested by the Metropolitan Police on 17 October 1998. The arrest warrant charged Senator Pinochet, who was in London for a private medical visit, with the crimes of genocide and terrorism. The crimes had allegedly been committed during the military government led by Senator (then General) Pinochet and established following the *coup d'État* in 1973. The Spanish Judge issued a second more detailed arrest warrant on 22 October 1998, which charged Senator Pinochet with charges related to torture and hostage taking.

6. The Crown Prosecution Service (CPS), acting on behalf of the Government of Spain on the basis of the Extradition Act 1989, applied for the extradition of Senator Pinochet to Spain. The proceedings were heard by the Divisional Court, which quashed both warrants on 28 October 1998, the second warrant on the basis that Senator Pinochet was entitled to state immunity in respect of the acts with which he was

charged. The CPS appealed to the House of Lords with leave from the Divisional Court, which certified that the immunity of a former head of state from arrest and extradition proceedings was a point of law of general importance.

7. During the initial proceedings before the House of Lords (*Pinochet No.1*), sitting as a panel of five, the three-to-two majority decision decided that Senator Pinochet was not entitled to immunity.[5] However, this decision was set aside by the House of Lords on 17 December 1998 (*Pinochet No.2*), because Lord Hoffmann, one of the majority Lordships, had failed to disclose his role as a former director of Amnesty International Charity Ltd., an intervener in *Pinochet No.1*.[6] The case was heard before a new panel of seven Lords (*Pinochet No.3*), with the majority again deciding Senator Pinochet was not entitled to immunity from arrest and extradition as a former head of state.

C. The Majority Decision

8. The case raised important questions of public international law and related issues of domestic and international statutory interpretation. In particular, the House of Lords needed to reconcile the Convention Against Torture (CAT),[7] incorporated by section 134 of the Criminal Justice Act 1988, and the Vienna Convention on Diplomatic Relations, incorporated into by the Diplomatic Privileges Act 1964 through section 20 of the State Immunity Act 1978.[8] As Lord Browne-Wilkinson explained in the leading Judgment:

> [State immunity] is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged (…), it will be the first time (…) when a local domestic court has refused

5 R. v. Bartle and the Commissioner of Police for the Metropolis and Others, *Ex Parte* Pinochet [1998] UKHL 41.

6 In Re Pinochet [1999] UKHL 1.

7 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS Vol. 1465, p. 85.

8 Vienna Convention on Diplomatic Relations (1961) UNTS Vol. 500, p. 95.

> to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.[9]

9. Section 20 of the 1978 Act ensures that the immunity for a head of a diplomatic mission, as detailed by the Vienna Convention and enacted by the 1964 Act, also applies to a head of state. Consequently, as concluded by both the majority and Lord Goff, the immunity enjoyed by an incumbent head of state is a complete immunity attaching to the person and rendering him immune from all actions or prosecutions, or immunity *ratione personae*. When the head of state leaves his position, immunity continues to subsist with respect to acts performed in the exercise of his official functions, or immunity *ratione materiae*.[10]

10. The point of disagreement between Lord Goff and the majority – and the focus of the case – is whether the alleged actions of torture by a former head of state, in this case Senator Pinochet, would constitute an act committed as part of his *official functions* as head of state. The majority offered several justifications for their decision that torture, for the purposes of immunity, cannot rank as performance of an official function.

11. For Lord Browne-Wilkinson the most decisive argument was based on the "bizarre results" such recognition would cause, given two facts.[11] First, under the terms of the CAT, torture can only be committed by someone in an official capacity. Secondly, under the doctrine of state immunity, government officials are granted immunity abroad in recognition of the sovereignty of the state that they represent. Therefore, if torture is an official function, and all government officials can claim immunity *ratione personae* while in function and immunity *ratione*

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9 *Pinochet No.3*, *supra* note 2.

10 Lord Phillips of Worth Matravers, did not, however, agree with this assessment. See *Pinochet No.3*, *supra* note 2, Lord Phillips at 292.

11 *Pinochet No.3*, *supra* note 2, Lord Browne-Wilkinson at 205.

materiae after vacating their posts, no prosecutions could ever take place outside the state whose agents did the torturing unless immunity was expressly waived by that state.

D. Lord Goff's Dissenting Opinion

12. Lord Goff, in contrast, seconded the view expressed by the Divisional Court and the dissenting opinions of Lord Slynn of Hadley and Lord Lloyd of Berwick in *Pinochet No.1* that the criminal nature of an act does not deprive it from its character. In this regard, Lord Goff argued the word "functions" is well established as meaning governmental functions, in juxtaposition to private acts. Therefore, if the severity of torture, as an international crime was to change this understanding and hence the applicability of state immunity, as proposed by the appellants (and endorsed by the majority), such a change must, Lord Goff argued, be apparent from the CAT itself.

13. In examining the CAT Lord Goff found no explicit reference to a change in state immunity, or any trace in the *travaux préparatoires* of any intention for the Convention to exclude state immunity, nor did he see any reason why such a change should be implied. Indeed, besides this case failing the strict test for an implied term under international law, Lord Goff referred to well-established policy reasons for the existence of the doctrine of state immunity under international law. The doctrine exists to restrain one sovereign state from sitting in judgment on the behavior of another sovereign state. In effect, the doctrine delineates the limits of interference between different sovereign states.

14. Lord Goff illustrated the potential consequences of the break with this doctrine. Without state immunity the work of public officials, whose functions includes international travel, can be severely limited by foreign states wishing to do so, by maliciously instituting prosecutions. Lord Goff attempted to bring this point close to home by speculating about the potential arrest of British public officials abroad, on the basis of their

acquiescence with (potentially) illegal acts in Northern Ireland, by states in support of the IRA.

E. Confirmation of Lord Goff by the International Court of Justice

15. Since the judgment in *Pinochet No.3* the ICJ has dealt with similar questions surrounding state immunity in several cases. In the *Arrest Warrant Case*, the ICJ discussed the duty of states to respect the immunity of (incumbent) Ministers of Foreign Affairs.[12] In *Belgium v. Senegal*, the ICJ discussed the issued pertaining to the obligation to prosecute or extradite (*aut punire aut detere*) under the CAT.[13] And in a dispute between Germany and Italy concerning immunities of the state, the ICJ had an opportunity to pass judgment on the argument that certain international crimes could not attract immunity.[14] In each of these cases, the judgments of the ICJ endorsed the rationale of Lord Goff in his dissenting judgment in *Pinochet No. 3*.

16. In the *Arrest Warrant Case*, the ICJ found Belgium had violated its obligations under international law by issuing an (international) arrest warrant for the incumbent Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC). In describing the immunity *ratione materiae* for former Ministers for Foreign Affairs, the ICJ explicitly mentioned that only acts committed during their period in office *in a private capacity* could be excluded, thereby endorsing the juxtaposition of 'private' with 'official' by Lord Goff in his definition.[15]

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12 *Case Concerning the Arrest Warrant of 11 April* (Democratic Republic of the Congo *v.* Belgium) Judgment of 14 February 2002, ICJ Rep. 2002, pp. 3 – 34.

13 *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal) Judgment of 20 July 2012, ICJ Rep. 2012, pp. 422 – 463.

14 *Jurisdictional Immunities of the State* (Germany *v.* Italy: Greece Intervening) Judgment of 3 February 2012, ICJ Rep 2012, pp. 99 – 156.

15 *Arrest Warrant Case*, *supra* note 12, at p. 25 (para 61). See also the ICJ's discussion of the *Pinochet No.3* majority decision in response to Belgium's submission, at p. 24 (para 58).

17. The ICJ also relied heavily on the policy argument advanced by Lord Goff in his dissenting opinion. In upholding a sober reading of the state immunity doctrine, the ICJ argued that the doctrine ensures Ministers of Foreign Affairs can exercise their functions unhindered by any limitations on their ability to travel internationally, to act on behalf of their respective states.[16] Any limitation of the immunity accorded to them, as Belgium requested, would impede their ability to exercise that function, according to the policy argument of bot the ICJ and Lord Goff.

18. Furthermore, the ICJ emphasized that the grant of immunity did not mean *impunity*. In contrast to the majority decision in *Pinochet No.3*, the ICJ was satisfied that international law provides (four) options for criminal prosecutions of international crimes, and that those options existed alongside the immunity afforded to (senior) government officials.[17]

19. First, they enjoyed no immunity under international law in their own countries, where they can be prosecuted. Secondly, they will cease to enjoy immunity if their state decides to waive it. Thirdly, an international criminal court or tribunal, where such immunities are not accorded, may have jurisdiction over such crimes. Lastly, after a minister ceases to hold office, the individual will no longer hold all of the immunities. In this situation, courts in foreign states may, in certain circumstances, try former ministers in respect of acts committed during their period in office *in a private capacity*.

20. In the *Jurisdictional Immunities* case, the ICJ judged a dispute between Italy and Germany on the decision by an Italian court to deny Germany state immunity for crimes committed during the Second World War. Similar to the reasoning of the majority decision in *Pinochet No.3*, Italy

16 *Arrest Warrant Case*, *supra* note 12, at p. 22 (para 54).

17 *Arrest Warrant Case*, *supra* note 12, at p. 25 (para 60).

argued that no immunity should be granted with regards to international crimes. Similar to the logic of Lord Goff, however, the ICJ rejected the Italian argument and insisted on a strict division between procedural law (dealing with immunities) on the one hand, and substantive law (dealing with the status of the alleged crimes).[18]

21. The *Prosecute or Extradite Case* is an excellent example of how, in line with Lord Goff's opinion, international law regulated the immunities of former heads of state. The case started when a complaint was filed against the former head of state of Chad, Hissene Habré, with a Belgian investigating judge for *inter alia* crimes of torture. After assuring the Belgian courts had jurisdiction over the crimes complained of, the judge wrote to the Government of Chad, asking whether Mr Habré enjoyed any immunities as a former head of state. In response, the Minister of Justice of Chad stated that all immunities from legal process for Mr Habré had officially been lifted. Only *after* these assurances were received, was an international arrest warrant (*in abstentia*) issued by the Belgian judge.[19]

22. Additionally, even in the case of Senator Pinochet itself, did the options set out by the ICJ – and ridiculed by Lord Browne-Wilkinson[20] – provide sufficient. Following the decision by the House of Lords in *Pinochet No.3*, the Government of Chile requested to the Home Secretary that he release Senator Pinochet on medical grounds, which he did. Upon his return to Chile, nevertheless, Senator Pinochet found dozens of cases had been lodged against him. The Chilean Supreme Court subsequently found that the infamous Chilean Amnesty Law did not cover all Senator Pinochet's alleged crimes and in 2000 it removed his parliamentary immunity. In fact, the only reason Senator Pinochet escaped arrest in

18 *Jurisdictional Immunities, supra* note 14, at p. 140 (para 93).

19 *Prosecute or Extradite*, supra note 13, at p. 432 (para 26).

20 *Pinochet No.3*, *supra* note 2, Lord Browne-Wilkinson at 205.

Chile in 2002 was his claim to senile dementia and when he eventually died in 2006 he had been under house arrest pending several trials.

23. It should also be noted that since *Pinochet No.3* and the *Arrest Warrant Case*, international criminal tribunals and courts have indicted several heads of state (President Milosevic of Serbia, President Al Bashir of Sudan and President Kenyatta of Kenya).[21] In his dissenting opinion, Lord Goff insisted that the appropriate venue for the type of prosecution Senator Pinochet was facing were not domestic courts but, in fact, *international* forums.[22]

24. In contrast, the approach of the majority decision in *Pinochet No.3* to enable domestic prosecutions by denying former heads of state immunity has not seen any successful cases. In fact, in cases involving issues of state immunity and torture in subsequent cases before the House of Lords, the reasoning of the majority was interpreted as narrow as possible, and state immunity was upheld in every case.[23]

F. Conclusion

25. The argument in this essay has attempted to show how the single dissenting opinion of Lord Goff in *Pinochet No.3* has, with time, become the 'right' decision. The immediate consequences of Lord Goff's reasoning to accord immunity to a former head of state for international

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21 See *Prosecutor v. Milosevic*, International Criminal Tribunal for the Former Yugoslavia, Indictment, Office of the Prosecutor, 22 MAY 1999, PT-99-37; *Prosecutor v. Al Bashir*, International Criminal Court, Warrant of Arrest, Pre-Trial Chamber I, 4 March 2009, ICC-02/05-01/09; and *Prosecutor v. Kenyatta*, International Criminal Court, Application for Summonses, Pre-Trial Chamber II, 8 March 2011, ICC-01/09-02/11. It should also be noted that President Al Bashir was almost arrested in South Africa in pursuance of the ICC warrant. For an analysis of the issues surrounding immunity and the ICC see Jacobs, D., "The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation", in Stahn, C., *The Law and Practice of the International Criminal Court* (Oxford University Press: 2015).

22 *Pinochet No.3*, *supra* note 2, Lord Goff at 211.

23 See *Jones v. Saudi Arabia* [2006] UKHL 26; and *Al-Adsani v. United Kingdom, European Court of Human Rights, Grand Chamber, Judgment (Merits), 21 November 2001, App.No. 35763/97.*

crimes – the prevention of the extradition of Senator Pinochet – might have been unpopular. Nevertheless, his reasoning was vindicated in the long term by the distinguished opinion of the ICJ, in several cases.

26. The continued application of the state immunity doctrine to cases of former state officials has (re)produced a stable and predictable atmosphere in international diplomacy. At the same time, states are realizing the importance of forums such as the International Criminal Court – where immunities are not accepted – to address the problems of impunity of international crimes. The foresight of Lord Goff, to insist on international forums, has thus too been vindicated.