

**MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2025
IN THE SUPREME COURT OF JUSTICE
IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT ARREST
WARRANT**

SLICK BLAGGER

Appellant

-v-

**(1) WESMINSTER MAGISTRATES' COURT
(2) COMMISSIONER OF POLICE FOR THE METROPOLIS
(3) HIS MAJESTY'S PRISON BELMARSH**

Respondents

INDEX TO BUNDLE: COUNSEL FOR THE RESPONDENTS

Tab Number	Document Description	Page Number
1	Moot Problem	2
2	Skeleton Argument	5
3	List of Authorities	10
4	Part 2 of the International Criminal Court Act 2001	11
5	<i>Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia</i> 24 October 2024	20
6	<i>R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)</i> [1999] UKHL 17; [2000] 1 AC 147	24
7	<i>Joint Concurring Opinion of Judges Eboe-Osui, Morrison, Hofmański and Bossa to Al Bashir</i> 6 May 2019	29
8	<i>R v Horseferry Magistrate's Court, ex p Bennett</i> [1994] 1 AC 42	38
9	<i>R v Secretary of State for the Home Department ex p Schmidt</i> [1995] 1 AC 339	42
10	<i>Warren v Attorney General for Jersey</i> [2011] UKPC 10; [2012] 1 AC 22	47

Edward O'Connor

Michael Freeman

Counsel for the Respondents

**MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2025
IN THE SUPREME COURT OF JUSTICE
IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT ARREST
WARRANT**

SLICK BLAGGER

Appellant

-v-

**(4) WESMINSTER MAGISTRATES' COURT
(5) COMMISSIONER OF POLICE FOR THE METROPOLIS
(6) HIS MAJESTY'S PRISON BELMARSH**

Respondents

MOOT PROBLEM

1. The Republic of Massuman ("Massuman") and the United States of Rolostan (the "USR") have been engaged in an ongoing armed conflict since the early 1990's. The USR believed that Massuman was developing nuclear weapons which they feared would one day be used against them. Massuman has always maintained that its nuclear programme was only to develop an alternative energy source for the country. The International Atomic Energy Agency has consistently confirmed this to be the case.
2. On 3 March 2022 the USR launched a pre-emptive strike against Massuman's nuclear research facility. The attack caused massive destruction of the facility which, in turn, triggered a large explosion that led to the release of a large part of the radioactive reactor core into the environment and the deposition of radioactive materials into the surrounding area. More than 5,000 Massumanis in the surrounding area died, many more were injured and more than 50,000 will suffer long term consequences as a result of radiation exposure. It is believed that a large proportion of Massuman will now remain uninhabitable for approximately 15 to 20 years. The President of the USR, Slick Blagger, maintains that, notwithstanding the devastating loss of life, the strike was necessary to prevent a nuclear attack by Massuman on the USR.
3. Massuman has been a State Party to the International Criminal Court ("ICC") since 1999. It is one of the ICC's founding members. The USR is not a State Party to the ICC. On 1 January 2024 the ICC issued an arrest warrant for President Blagger alleging that he, as Commander in Chief of the armed forces of the USR, was responsible for War Crimes in Massuman under Article 8(2)(a) and (b) of the ICC Statute.
4. On 1 September 2024 President Blagger was travelling with his family by private jet to New York to address the UN General Assembly. While the plane was just outside of UK airspace, the UK Civil Aviation Authority sent a message to the pilot informing her that, due to extreme weather conditions over the Atlantic it was imperative that the plane land immediately. The pilot landed at Heathrow Airport. Once on the ground President Blagger and his family were invited to wait in the airport VIP lounge while further inquiries were

made about whether it was safe to fly. Once in the VIP lounge President Blagger was arrested by UK police officers pursuant to the ICC arrest warrant. He was taken into custody. It then transpired there had been no inclement weather over the Atlantic and this had been a ruse engineered by UK police to encourage the pilot to land so that they could arrest President Blagger.

5. In accordance with section 5 of the International Criminal Court Act 2001 (“ICC Act 2001”) President Blagger was produced before District Judge Stipe at Westminster Magistrates Court on 2 September 2024. Blagger challenged his arrest and resisted transfer to the ICC on the basis that:
 - (i) As a serving Head of State he enjoys full immunity from prosecution: relying on *Bartle and the Commissioner of Police for the Metropolis and Others; Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet v R* [1999] UKHL 17; and
 - (ii) That his surrender to the ICC would be an abuse of process as he had been tricked into UK jurisdiction, and but for that trickery it would not have been possible to arrest him: relying on *R v Horseferry Road Magistrates Court, ex parte Bennett (No. 1)* [1994] AC 42.
6. His arguments challenging arrest and surrender were dismissed. He applied to the High Court for *habeas corpus* pursuant to section 12 of the ICC Act 2001. The matter was heard by Mrs Justice Fair on 25 November 2024.
7. Mrs Justice Fair held that President Blagger did not enjoy Head of State Immunity. She relied upon Article 27 of the ICC Statute (Irrelevance of Official Capacity) and the ICC Appeals Chamber decision in *Prosecutor v Omar Hassan Ahmad Al-Bashir – Judgment in the Jordan Referral re Al-Bashir Appeal* 6 May 2019 (copy provided),¹ in particular paragraphs 95 to 162. Mrs Justice Fair cited section 50(5) of the ICC Act 2001 which provides that “*the court shall take into account any relevant judgment or decision of the ICC*” when interpreting and applying Articles 6, 7 and 8(2) of the ICC Statute. As the crimes alleged against Blagger are crimes under Article 8(2) she held that the Court could also rely on ICC decisions in interpreting section 23 of the ICC Act 2001 (Provisions as to state or diplomatic immunity).
8. She further held that even if President Blagger had been tricked into landing in the UK, it would not be an abuse of process for him to be surrendered to the ICC. In so doing she placed considerable reliance on the decision of the UN International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Prosecutor v Mrksic & Others* “Decision on the Motion for Release by the Accused Slavko Dokmanović”,² 22 October 1997, (copy provided), in particular the Trial Chamber’s reasoning set out at paragraphs 57 to 78.

¹ *The Al-Bashir Case* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF

² *The Dokmanovic Case*

9. President Bagger appeals to the Supreme Court. The three Respondents are jointly represented.
10. The Supreme Court has directed that:
 - (i) Leading counsel should address whether Slick Bagger's position as Head of State meant he was immune from arrest for the purpose of his surrender to the ICC; and that
 - (ii) Junior counsel should address whether the manner in which Slick Bagger was lured into the UK means it would be an abuse of process to surrender him to the ICC.

**MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2025
IN THE SUPREME COURT OF JUSTICE
IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT ARREST
WARRANT**

SLICK BLAGGER

Appellant

-v-

**(1) WESMINSTER MAGISTRATES' COURT
(2) COMMISSIONER OF POLICE FOR THE METROPOLIS
(3) HIS MAJESTY'S PRISON BELMARSH**

Respondents

SKELETON ARGUMENT FOR THE RESPONDENTS

A. INTRODUCTION

1. It is submitted on behalf of the respondents that:
 - a. The appellant was not immune from arrest for the purpose of surrender to the ICC.
 - b. It would not be an abuse of process to surrender the appellant to the ICC.

B. GROUND 1

2. Part 2 of the International Criminal Court Act 2001 ("the ICC Act") makes provision for the arrest and surrender of persons subject to warrants of the International Criminal Court ("the ICC").

Section 23 does not confer immunity

3. Section 23 of the ICC Act makes provision for state or diplomatic immunity.
 - a. Section 23(2) sets out a procedure by which any existing immunity might be waived: "*Where— (a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and (b) waiver of that immunity is obtained by the ICC in relation to a request*

for that person's surrender; the waiver shall be treated as extending to proceedings under this Part in connection with that request."

- b. Section 23(6) clearly contemplates immunity as being conferred by other sources of law: "*any privilege or immunity attaching to a person by reason of the status of that person... as head of state...under – (a) the Diplomatic Privileges Act ... (b) any other legislative provision ... (c) any rule derived from customary international law.*"

4. Immunity is therefore neither conferred nor necessarily implied by section 23 itself.

Customary international law does not confer immunity from ICC jurisdiction

5. There is no rule of customary international law conferring immunity *ratione personae* from the jurisdiction of international criminal courts. This position has been upheld by the ICC.
 - a. In *Arrest Warrant of 11th April 2000 (DRC v Belgium)* 14 February 2002 ("*Arrest Warrant*") at [61], cited at [29] of *Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia ("Mongilia")* 24 October 2024 cited the ICJ noted obiter that immunities under international law would not bar criminal jurisdiction before "certain international courts", going on to cite the ICC as an example.
 - b. In *Mongolia* at [30], the ICC reiterated that "*while personal immunities operate in relations between States, they do not protect individuals, including Heads of State, from prosecution by international criminal courts*".
6. The case of *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* [1999] UKHL 17; [2000] 1 AC 147 ("*Pinochet*") relied on by the Appellants is authority for a status of immunity before national courts. It is not authority for immunity before international courts.

The English court as a jurisdictional surrogate for the ICC.

7. The *Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to Al Bashir* at [441]-[444] explains that a requested state executing an ICC warrant does so as jurisdictional "surrogate" of the ICC itself.
8. This position is consistent with the summary procedure prescribed by Parliament for the execution of ICC warrants in sections 2 and 5 of the ICC Act, which places the

domestic enforcement organs at the disposal of the ICC subject only to very limited procedural checks.

9. The Respondent's execution of the warrant against the Appellant was carried out in exercise of the surrogate jurisdiction of the ICC, to which no personal immunity attaches under customary international law.

The basis of immunity

10. Head of State immunity flows from the principle of the sovereign equality of states. As Lord Browne-Wilkinson observed in *Pinochet* at page 201G, "it is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state". This logic does not justify the 'vertical' immunity from international prosecution claimed by the Appellant.

C. GROUND 2

The Bennett test is not of general application.

11. The only applicable test would be the second limb of the formula established by Lord Lowry in *R v Horseferry Magistrate's Court, ex p Bennett* ("*Bennett*") [1994] 1 AC 42 at p.74 that "a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process...because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."
12. In *R v Secretary of State for the Home Department ex p Schmidt* ("*Schmidt*") [1995] 1 AC 339, Lord Jauncey at pp.377-8 observes that the test established by Lord Lowry in *Bennett* applied because the jurisdiction of the Divisional Court is the "only bulwark" against abuse of process. As in *Schmidt*, this does not apply to the instant proceedings.
13. Similarly, the appellant has the opportunity to raise abuse of process at trial before the ICC, which is "likely to have powers similar to those held to exist in *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett*": see *Schmidt* at p.378, per Lord Jauncey.

Even if the Bennett test is to apply, the high threshold is not met.

14. On the interpretation of *Bennett* in *Schmidt*, it is to be noted that *Bennett* involved, as described by Lord Jauncey in *Schmidt* at p.379, a “forcible abduction”. The instant case cannot be described as such.
15. Lord Lowry notes in *Bennett* at p.74 that the jurisdiction to stay proceedings must be exercised carefully and “sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.” There is thus not only a high bar, but even if that high bar is met, the Court should be cautious of engaging the relevant jurisdiction.
16. On the interpretation of the test for abuse of process in *Warren v Attorney General for Jersey* (“*Warren*”) [2011] UKPC 10; [2012] 1 AC 22, Lord Dyson JSC adopts at [24]-[25] the balancing exercise summarised in Professor Choo’s *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed (2008), at p. 132.
 - a. The relevant factors to be weighed are, “[t]he seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.”
 - b. As Lord Kerr notes in *Warren* at [83], citing Lord Steyn in *R v Latif* [1994] 1 WLR 104 at p.113, “the public interest in ensuring that those that are charged with grave crimes should be tried” will be a relevant factor.
 - c. In *Warren* at [63], Lord Hope described the conduct of the police as “a sustained, deliberate and, one might say, cynical act of law-breaking.” Even so, it was open to the commissioner in that case to dismiss a claim of abuse of process.
 - d. Balancing the gravity of the crime allegedly committed by the Appellant on this appeal, the nature of the instant proceedings, and the conduct of the executive, it is submitted that it was open to District Judge Snipe to dismiss the Appellant’s challenge to arrest on grounds of abuse of process.

D. CONCLUSION

17. For these reasons, the Court is respectfully invited to determine both grounds in favour of the Respondents.

Edward O'Connor

Michael Freeman

Counsel for the Respondents

List of Authorities

Document Description	Page(s)	Passage(s)
Part 2 International Criminal Court Act 2001	pp.2, 4, 14-15, 21-2	ss.2, 5, 23, 36-8
<i>Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia</i> 24 October 2024	pp.11-12	[29]-[30]
<i>R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)</i> [1999] UKHL 17; [2000] 1 AC 147	p.201	201G
<i>Joint Concurring Opinion of Judges Eboe- Osuji, Morrison, Hofmański and Bossa to Al Bashir</i> 6 May 2019	pp.185-7	[441] and [444]
<i>R v Horseferry Magistrate's Court, ex p Bennett</i> [1994] 1 AC 42	pp.74-5	74F-75A
<i>R v Secretary of State for the Home Department ex p Schmidt</i> [1995] 1 AC 339	pp.377-9	377H-378B; 379C-E
<i>Warren v Attorney General for Jersey</i> [2011] UKPC 10; [2012] 1 AC 22	pp.32; 40-1; 46	[24]-[25]; [63]; [83]

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes



International Criminal Court Act 2001

2001 CHAPTER 17

An Act to give effect to the Statute of the International Criminal Court; to provide for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court; and for connected purposes. [11th May 2001]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

- C1** Act modified (21.2.2009) by [Banking Act 2009 \(Parts 2 and 3 Consequential Amendments\) Order 2009 \(S.I. 2009/317\)](#), arts. 1, 3, [Sch.](#)
- C2** Act applied (with modifications) (8.2.2011) by [The Investment Bank Special Administration Regulations 2011 \(S.I. 2011/245\)](#), reg. 1, [Sch. 6 Pt. 1](#) (with reg. 27(a))
- C3** Act applied (with modifications) (8.7.2021) by [The Payment and Electronic Money Institution Insolvency Regulations 2021 \(S.I. 2021/716\)](#), reg. 2, [Sch. 3 paras. 2, 3](#) (with reg. 5) (as amended (4.1.2024) by [The Payment and Electronic Money Institution Insolvency \(Amendment\) Regulations 2023 \(S.I. 2023/1399\)](#), regs. 1(2), 4)

PART 1

THE INTERNATIONAL CRIMINAL COURT

1 The ICC and the ICC Statute

(1) In this Act—

“the ICC” means the International Criminal Court established by the Statute of the International Criminal Court, done at Rome on 17th July 1998;

“the ICC Statute” means that Statute; and

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

“ICC crime” means a crime (other than the crime of aggression) over which the ICC has jurisdiction in accordance with the ICC Statute.

- (2) References in this Act to articles are, unless otherwise indicated, to articles of the ICC Statute.
- (3) Schedule 1 to this Act contains supplementary provisions relating to the ICC.

Commencement Information

- II** Act wholly in force at 1.9.2001; Act not in force at Royal Assent see [s. 82](#); Act in force for specified purposes at 13.6.2001 and otherwise 1.9.2001 by [S.I. 2001/2161](#), [arts. 2, 3](#) (as amended (25.6.2001) by [S.I. 2001/2304](#), [art. 2](#))

PART 2

ARREST AND DELIVERY OF PERSONS

Proceedings on request

2 Request for arrest and surrender

- (1) Where the Secretary of State receives a request from the ICC for the arrest and surrender of a person alleged to have committed an ICC crime, or to have been convicted by the ICC, he shall transmit the request and the documents accompanying it to an appropriate judicial officer.
- (2) If it appears to the Secretary of State that the request should be considered by an appropriate judicial officer in Scotland, he shall transmit the request and the documents accompanying it to the Scottish Ministers who shall transmit them to an appropriate judicial officer.
- (3) If the request is accompanied by a warrant of arrest and the appropriate judicial officer is satisfied that the warrant appears to have been issued by the ICC, he shall endorse the warrant for execution in the United Kingdom.
- (4) If in the case of a person convicted by the ICC the request is not accompanied by a warrant of arrest, but is accompanied by—
 - (a) a copy of the judgment of conviction,
 - (b) information to demonstrate that the person sought is the one referred to in the judgment of conviction, and
 - (c) where the person sought has been sentenced, a copy of the sentence imposed and a statement of any time already served and the time remaining to be served,
 the officer shall issue a warrant for the arrest of the person to whom the request relates.
- (5) In this Part a warrant endorsed or issued under this section is referred to as a “section 2 warrant”.

Changes to legislation: *International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

3 Request for provisional arrest

- (1) This section applies where the Secretary of State receives from the ICC a request for the provisional arrest of a person alleged to have committed an ICC crime or to have been convicted by the ICC.
- (2) If it appears to the Secretary of State that application for a warrant should be made in England and Wales—
 - (a) he shall transmit the request to a constable and direct the constable to apply for a warrant for the arrest of that person, and
 - (b) on an application by a constable stating on oath that he has reason to believe—
 - (i) that a request has been made on grounds of urgency by the ICC for the arrest of a person, and
 - (ii) that the person is in, or on his way to, the United Kingdom,an appropriate judicial officer shall issue a warrant for the arrest of that person.
- (3) If it appears to the Secretary of State that application for a warrant should be made in Scotland—
 - (a) he shall transmit the request to the Scottish Ministers who shall instruct the procurator fiscal to apply for a warrant for the arrest of that person, and
 - (b) on the application by the procurator fiscal, which shall state—
 - (i) that a request has been made on grounds of urgency by the ICC for the arrest of a person, and
 - (ii) that the person is in, or on his way to, Scotland,an appropriate judicial officer shall issue a warrant for the arrest of that person.
- (4) Where an appropriate judicial officer issues a warrant under this section, he shall notify the Secretary of State and, where the proceedings are in Scotland, the Scottish Ministers that he has done so.
- (5) In this Part a warrant issued under this section is referred to as a “provisional warrant”.

4 Dealing with person arrested under provisional warrant

- (1) A person arrested under a provisional warrant shall be brought before a competent court as soon as is practicable.
- (2) If there is produced to the court a section 2 warrant in respect of that person, the court shall proceed as if he had been arrested under that warrant.
- (3) If no such warrant is produced, the court shall remand him pending the production of such a warrant.
- (4) Provision shall be made by Order in Council under paragraph 3 of Schedule 1 (power to make provision to give effect to Rules of Evidence and Procedure) specifying—
 - (a) the period for which a person may be so remanded at any time, and
 - (b) the total period for which a person may be so remanded,having regard to the time limits specified in Rules of Evidence and Procedure for the purposes of article 92.3.
- (5) If at any time when the person is so remanded there is produced to the court a section 2 warrant in respect of him—
 - (a) the court shall terminate the period of remand, and

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

- (b) he shall be treated as if arrested under that warrant—
 - (i) if he was remanded in custody, at the time the warrant was produced to the court;
 - (ii) if he was remanded on bail, when he surrenders to his bail.
- (6) If no such warrant is produced to the court before the end of the period of the remand (including any extension of that period), the court shall discharge him.
- (7) The fact that a person has been discharged under this section does not prevent his subsequent arrest under a section 2 warrant.

5 Proceedings for delivery order

- (1) A person arrested under a section 2 warrant shall be brought before a competent court as soon as is practicable.
- (2) If the competent court is satisfied—
 - (a) that the warrant—
 - (i) is a warrant of the ICC and has been duly endorsed under section 2(3), or
 - (ii) has been duly issued under section 2(4), and
 - (b) that the person brought before the court is the person named or described in the warrant,
 it shall make a delivery order.
- (3) A “delivery order” is an order that the person be delivered up—
 - (a) into the custody of the ICC, or
 - (b) if the ICC so directs in the case of a person convicted by the ICC, into the custody of the state of enforcement,
 in accordance with arrangements made by the Secretary of State.
- (4) In the case of a person alleged to have committed an ICC crime, the competent court may adjourn the proceedings pending the outcome of any challenge before the ICC to the admissibility of the case or to the jurisdiction of the ICC.
- (5) In deciding whether to make a delivery order the court is not concerned to enquire—
 - (a) whether any warrant issued by the ICC was duly issued, or
 - (b) in the case of a person alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed.
- (6) Whether or not it makes a delivery order, the competent court may of its own motion, and shall on the application of the person arrested, determine—
 - (a) whether the person was lawfully arrested in pursuance of the warrant, and
 - (b) whether his rights have been respected.
- (7) In making a determination under subsection (6) the court shall apply the principles which would be applied on an application for judicial review.
- (8) If the court determines—
 - (a) that the person has not been lawfully arrested in pursuance of the warrant, or
 - (b) that the person’s rights have not been respected,

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

it shall make a declaration or declarator to that effect, but may not grant any other relief.

- (9) The court shall notify the Secretary of State (and, where the proceedings are in Scotland, the Scottish Ministers) of any declaration or declarator under subsection (8) and the Secretary of State shall transmit that notification to the ICC.

6 Supplementary provisions as to proceedings before competent court

- (1) The following provisions apply in relation to proceedings before a competent court under section 5.
- (2) In the case of proceedings in England and Wales—
- (a) the court has the like powers, as nearly as may be, including power to adjourn the case and meanwhile to remand the person whose surrender is sought, as if the proceedings were the summary trial of an information against that person;
 - (b) if the court adjourns the proceedings, it shall on doing so remand the person whose surrender is sought;
 - (c) the proceedings are criminal proceedings for the purposes of Part 1 of the [F1 Legal Aid, Sentencing and Punishment of Offenders Act 2012];
 - (d) section 16(1)(c) of the Prosecution of Offences Act 1985 (c. 23) (defence costs on dismissal of proceedings) applies, reading the reference to the dismissal of the information as a reference to the discharge of the person arrested.
- (3) In the case of proceedings in Scotland—
- (a) the court has the like powers, including power to adjourn the case and meanwhile to remand the person whose surrender is sought, and the proceedings shall be conducted as nearly as may be in the like manner, as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by that person;
 - (b) the provisions of the Legal Aid (Scotland) Act 1986 (c. 47) relating to such proceedings, or any appeal proceedings following thereon, apply to that person.

Textual Amendments

- F1** Words in s. 6(2)(c) substituted (1.4.2013) by [Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(c. 10\)](#), s. 151(1), [Sch. 5 para. 56](#); S.I. 2013/453, art. 3(h) (with savings and transitional provisions in S.I. 2013/534, art. 6)

7 Consent to surrender

- (1) A person arrested under this Part may consent to being delivered up into the custody of the ICC or, in the case of a person convicted by the ICC, of the state of enforcement.

This is referred to below as “consent to surrender”.

- (2) Consent to surrender may be given—
- (a) by the person himself, or
 - (b) in circumstances in which it is inappropriate for the person to act for himself, by reason of his physical or mental condition or his youth, by an appropriate person acting on his behalf.

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

- (3) If no such request is received by the Secretary of State before the end of the period of 96 hours beginning with the time of the arrested person's unscheduled landing—
 - (a) the Secretary of State shall forthwith notify the court of that fact, and
 - (b) the court shall, on receipt of the notification, discharge the arrested person.
- (4) If the Secretary of State receives such a request before the end of that period, he shall notify the court without delay of his decision whether to accede to the request.
- (5) If the Secretary of State notifies the court that he has decided to accede to the request—
 - (a) the court shall, on receipt of the notification, terminate the period of remand, and
 - (b) the provisions of section 21 (request for transit) apply with the substitution for the reference in subsection (2)(c) to the time of arrival in the United Kingdom of a reference to the time of notification to the court.
- (6) If the Secretary of State notifies the court that he has decided not to accede to the request, the court shall, on receipt of the notification, discharge the arrested person.
- (7) In the applications of subsections (3) to (6) to proceedings in Scotland, any duty of the Secretary of State to notify the court shall be read as a duty to notify the Scottish Ministers who shall forthwith notify the court accordingly.

Supplementary provisions

23 Provisions as to state or diplomatic immunity

- (1) Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person.
- (2) Where—
 - (a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and
 - (b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,
 the waiver shall be treated as extending to proceedings under this Part in connection with that request.
- (3) A certificate by the Secretary of State—
 - (a) that a state is or is not a party to the ICC Statute, or
 - (b) that there has been such a waiver as is mentioned in subsection (2),
 is conclusive evidence of that fact for the purposes of this Part.
- (4) The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching to a person shall not be taken against that person.
- (5) The power conferred by section 1 of the United Nations Act 1946 (c. 45) (power to give effect by Order in Council to measures not involving the use of armed force) includes power to make in relation to any proceedings such provision corresponding to the provision made by this section in relation to the proceedings, but with the omission—

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

(a) in subsection (1), of the words “by reason of a connection with a state party to the ICC Statute”, and

(b) of subsections (2) and (3),

as appears to Her Majesty to be necessary or expedient in consequence of such a referral as is mentioned in article 13(b) (referral by the United Nations Security Council).

(6) In this section “state or diplomatic immunity” means any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under—

(a) the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968 (c.18), the International Organisations Act 1968 (c.48) or the State Immunity Act 1978 (c.33),

(b) any other legislative provision made for the purpose of implementing an international obligation, or

(c) any rule of law derived from customary international law.

Modifications etc. (not altering text)

- C4** S. 23 applied (with modifications) (8.3.2018) by The United Nations (International Residual Mechanism for Criminal Tribunals) Order 2018 (S.I. 2018/187), arts. 1(1), 33(1)(2) (with art. 3)
- C5** S. 23(5) extended (IoM) (1.4.2004) by S.I. 2004/714, art. 2(a)
- C6** S. 23(5) extended (Jersey) (with modifications) (8.10.2014 coming into force in accordance with art. 1) by The International Criminal Court Act 2001 (Jersey) Order 2014 (S.I. 2014/2706), arts. 1, 2(a), Sch.
- C7** S. 23(5) extended (Guernsey) (coming into force in accordance with art. 1 of the amending S.I.) by The International Criminal Court Act 2001 (Guernsey) Order 2022 (S.I. 2022/865), art. 2(1)(a)

24 Delivery up of persons subject to criminal proceedings, &c

Schedule 2 makes provision for cases where the Secretary of State receives a request from the ICC for the arrest and surrender, or provisional arrest, of a person—

(a) against whom criminal proceedings are pending or in progress before a national court, or who has been dealt with in such proceedings,

(b) against whom extradition proceedings are pending or in progress in the United Kingdom, or in respect of whom a warrant or order has been made in such proceedings, or

(c) against whom proceedings are pending or in progress in the United Kingdom for a delivery order under—

(i) the United Nations (International Tribunal) (Former Yugoslavia) Order 1996 (S.I. 1996/716), or

(ii) the United Nations (International Tribunal) (Rwanda) Order 1996 (S.I. 1996/1296),

or against whom a delivery order has been made in such proceedings.

25 Documents having effect as warrants, &c

(1) For the purposes of this Part the copy of a warrant issued by the ICC that is transmitted to the Secretary of State shall be treated as if it were the original warrant.

(2) Where facsimile transmission is used—

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

34 Taking of fingerprints or non-intimate sample

- (1) The provisions of Schedule 4 have effect with respect to the taking of fingerprints or a non-intimate sample in response to a request from the ICC for assistance in obtaining evidence as to the identity of a person.
- (2) In subsection (1) and that Schedule “fingerprints” and “non-intimate sample” have the meaning given by section 65 of the Police and Criminal Evidence Act 1984 or, in Northern Ireland, Article 53 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

35 Orders for exhumation

Proceedings before the ICC in respect of an ICC crime are criminal proceedings for the purposes of [F14 paragraph 6 of Schedule 5 to the Coroners and Justice Act 2009] or section 11 of the Coroners Act (Northern Ireland) 1959 (c.15(N.I.)) (power of coroner to order exhumation).

Textual Amendments

F14 Words in s. 35 substituted (25.7.2013) by Coroners and Justice Act 2009 (c. 25), s. 182(4)(e), Sch. 21 para. 45 (with s. 180); S.I. 2013/1869, art. 2(o)(xvi)

36 Provision of records and documents

- (1) This section applies where the Secretary of State receives a request from the ICC for the provision of records and documents relating to—
 - (a) the evidence given in any proceedings in England and Wales or Northern Ireland in respect of conduct that would constitute an ICC crime, or
 - (b) the results of any investigation of such conduct with a view to such proceedings.
- (2) The Secretary of State shall take such steps as appear to him to be appropriate to obtain the records and documents requested, and on their being produced to him he shall transmit them to the ICC.

37 Investigation of proceeds of ICC crime

- (1) Where the Secretary of State receives a request from the ICC for assistance—
 - (a) in ascertaining whether a person has benefited from an ICC crime, or
 - (b) in identifying the extent or whereabouts of property derived directly or indirectly from an ICC crime,
 the Secretary of State may direct a constable to apply for an order or warrant under Schedule 5.
- (2) In that Schedule—
 - Part 1 makes provision for production or access orders,
 - Part 2 makes provision for the issuing of search warrants, and
 - Part 3 contains supplementary provisions.

Changes to legislation: International Criminal Court Act 2001 is up to date with all changes known to be in force on or before 05 May 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

38 Freezing orders in respect of property liable to forfeiture

Where the Secretary of State receives a request from the ICC for assistance in the freezing or seizure of proceeds, property and assets or instrumentalities of crime for the purpose of eventual forfeiture, he may—

- (a) authorise a person to act on behalf of the ICC for the purposes of applying for a freezing order, and
- (b) direct that person to apply for such an order under Schedule 6.

National security

39 Production or disclosure prejudicial to national security

- (1) Nothing in any of the provisions of this Part, or any corresponding provision of an Act of the Scottish Parliament, requires or authorises the production of documents, or the disclosure of information, which would be prejudicial to the security of the United Kingdom.
- (2) For the purposes of any such provision a certificate signed by or on behalf of the Secretary of State to the effect that it would be prejudicial to the security of the United Kingdom for specified documents to be produced, or for specified information to be disclosed, is conclusive evidence of that fact.

Supplementary provisions

40 Verification of material

If in order to comply with a request of the ICC it is necessary for any evidence or other material obtained under this Part to be verified in any manner, the Secretary of State may give directions as to the nature of the verification required.

41 Transmission of material to the ICC

- (1) Any evidence or other material obtained under this Part by a person other than the Secretary of State, together with any requisite verification, shall be sent to the Secretary of State for transmission to the ICC.
- (2) Where any evidence or other material is to be transmitted to the ICC, there shall be transmitted—
 - (a) where the material consists of a document, the original or a copy, and
 - (b) where the material consists of any other article, the article itself or a photograph or other description of it,as may be necessary to comply with the request of the ICC.

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. **ICC-01/22**
Date: **24 October 2024**

PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Presiding Judge**
Judge Sergio Gerardo Ugalde Godínez
Judge Haykel Ben Mahfoudh

SITUATION IN UKRAINE

Public

Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Karim A. A. Khan KC

Ms Brenda J. Hollis

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Competent authorities of Mongolia

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

Presidency

Assembly of States Parties

27. Consequently, article 27 of the Statute has the effect of removing any and all international law immunities of officials, including Heads of State, and binds to that effect States Parties, as well as States that have accepted the Court's jurisdiction, not to recognise any kind of immunity or apply special procedural rules that they may attach to any persons. Whether these persons are nationals of States Parties or nationals of non-States Parties is irrelevant. The Statute, in any case, does not make any distinction in this regard. States Parties and States that have accepted the Court's jurisdiction have therefore the obligation to arrest and surrender any person for whom the Court has issued a warrant of arrest, irrespective of their official capacity and nationality. The obligation to arrest and surrender is one of the means to 'give effect' to the obligation to cooperate with the Court in the execution of its mandate.

28. Therefore, any arguable bilateral obligation that Mongolia may owe to the Russian Federation to respect any applicable immunity that international law may allow to Heads of State is not capable of displacing the obligation that Mongolia owes to the Court, which is tasked with exercising its jurisdiction on grave crimes of international concern that threaten the peace and the security of the States Parties to the Statute, and even of the international community as a whole. Given its nature and purpose, such a multilateral obligation cannot be altered or superseded by any bilateral commitments that may conflict with the Rome Statute's objectives.

29. In its submissions, Mongolia references the International Court of Justice's ('ICJ') judgment in the *Arrest Warrant* case.²⁵ While Mongolia's Submissions provide a partial quotation, the Chamber finds it important to consider the full context of the ICJ judgment for reference, as follows:

[...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, [...] and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."²⁶ (emphasis added)

²⁵ Mongolia's Submissions, paras 60-62.

²⁶ International Court of Justice, Judgment of 14 February 2002 in the *Arrest Warrant* case, para. 61.

30. Hence, while personal immunities operate in relations between States, they do not protect individuals, including Heads of State, from prosecution by international criminal courts. The Chamber recalls that the rationale for foreign state officials being entitled to raise personal ('diplomatic') immunity consistent with the 1961 Vienna Convention on Diplomatic Relations is preventing the use of prosecutions by national authorities to unduly interfere and limit the free exercise of the functions of State organs mandated with operating on the territory of another State and, therefore, impede the concerned State's ability to freely engage in international action. However, this situation does not arise with the International Criminal Court which is inherently independent of States, strictly impartial and acts in the general interests of the international community.

31. The Chamber holds the view that the International Criminal Court is not only indisputably international in nature but also inherently independent of State influence. It performs functions that align with the general interests of the international community by exercising jurisdiction over the most serious international crimes, which include grave breaches of fundamental norms of international law. As recognised in the Statute's Preamble, the crimes falling within the Court's jurisdiction are 'of concern to the international community as a whole' since they 'threaten the peace, security and well-being of the world'. This high aim is shared and upheld by the 124 States that have ratified the Rome Statute, a number that represents about two-thirds of the international community. This confirms the commitment to prosecute the most serious crimes of concern to the international community and, in doing so, putting an end to impunity for the perpetrators of these crimes.

32. The Chamber further notes that, since the moment the Statute was signed and came into force, the Court has progressively evolved to the effect that it acts in the interests of the international community as a whole. In this respect, it is to be noted that the United Nations Security Council ('UNSC'), which is entrusted with the primary responsibility for the maintenance of international peace and security, has recognised the role of the Court in different instances, particularly in the resolutions referring the situations in Darfur and Libya to the Court. The Chamber also recalls that the Prosecutor reports regularly to the members of the UNSC on the situations in Darfur and Libya, with none of them objecting to the role of the Court, its mandate, or its international character.

1 A.C.

A

[HOUSE OF LORDS]

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

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

C

Extradition—Extradition crime—Double criminality—Torture committed outside jurisdiction of both requesting state and England—Alleged offences committed before extraterritorial torture punishable in England—Extradition requested after offence made punishable under English law—Whether relevant time for consideration of criminality date of offence or date of request—Whether offence extraditable—Extradition Act 1989 (c. 33), s. 2
International Law—State immunity—Former head of state—Request for extradition in respect of crimes of torture and conspiracy to torture relating to period when applicant head of state—Whether immunity in respect of acts performed in exercise of functions as head of state—Whether governmental acts of torture attributable to functions of head of state—Whether former head of state entitled to immunity racione materiae in relation to acts of torture—Diplomatic Privileges Act 1964 (c. 81), s. 2(1), Sch. 1, arts. 29, 31, 39—State Immunity Act 1978 (c. 33), s. 20(1)—Criminal Justice Act 1988 (c. 33), s. 134(1)

D

E

F

G

H

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

¹ Extradition Act 1989, s. 2: see post, pp. 193G–194c.

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

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

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

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

Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3) (H.L.(E.)) [2000]

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

On the rehearing of the appeal:—

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

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

A

B

C

D

E

F

G

H

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

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

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

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

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

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

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

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

D *State immunity*

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

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

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

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

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

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

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

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

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

Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa

I.	OVERVIEW	4
A.	The Questions Presented.....	4
II.	CRUCIAL CONSIDERATIONS OF FACT AND LAW	6
A.	Some Background Matter	7
1.	UN Security Council Resolution 1593 (2005).....	7
2.	The Darfur Situation at the UN Security Council.....	7
(a)	Prior UN Security Council Resolutions on Darfur	7
(b)	The Cassese Commission Report.....	10
(c)	Debate during Adoption of Resolution 1593 (2005)	14
3.	Some Precursors to the Appeal	14
B.	Bedrock Principles of Law.....	18
1.	Juristic History of Sovereign Immunity from National Jurisdictions	18
(a)	Definition of Jurisdiction	18
(b)	Bynkershoek on the Basis of Jurisdiction.....	18
2.	Jurisdiction of International Courts over International Crimes	23
(a)	The Bearing of the Origin and Nature of Jurisdiction on the Essential Question of Whether Heads of State Enjoy Immunity before International Courts.....	23
(b)	What is an ‘International Court’	24
(c)	Advantages of an International Criminal Court.....	26
(d)	The Differentiated Quality of an International Court in International Law in relation to International Crimes	27
(e)	The Nascence of a ‘New International Law’ Norm Rejecting Immunity before International Tribunals.....	31

(f)	The Development of the International Norm Rejecting Immunity before International Tribunals: Fostering at Nuremberg	56
(g)	Consolidation of the International Norm Rejecting Immunity before International Tribunals: Adoption by the United Nations	65
(h)	The Anti-Immunity Norm relative to Incumbency	72
3.	Reconciling Relevant Interests of International Law	77
4.	Considerations of Obligations Erga Omnes	80
5.	Norms of Jus Cogens	83
6.	The Reasoning of the International Court of Justice on Jus Cogens and Violations of International Criminal Norms	85
7.	A Look at certain other Distinctions	89
(a)	Substantive Jurisdiction and Procedural Immunity	89
(b)	Immunities <i>Ratione Materiae</i> and <i>Ratione Personae</i>	97
(c)	Regarding the Crime of Genocide against the background of Obligations <i>Erga Omnes</i> and <i>Jus Cogens</i>	103
III.	DISPOSITIVE CONSIDERATIONS	110
A.	Whether UN Security Council Resolution 1593 (2005) and the Rome Statute preserve Immunity of Mr Al-Bashir	111
1.	UN Security Council Resolution 1593 (2005)	111
(a)	Interpreting UN Security Council Resolutions	111
(b)	The Terms of UN Security Council Resolution 1593 (2005)	122
(c)	Comparisons with resolutions establishing <i>ad hoc</i> tribunals	133
2.	The Purpose of Article 13(b) of the Rome Statute	141
3.	Reconciling Articles 27 and 98 of the Rome Statute	163
(a)	A Review of certain Arguments on Reconciling Articles 27 and 98 of the Rome Statute	163
(b)	An Analysis in Four Steps	165
(i)	Step 1: The Court's International Criminal Jurisdiction	165

(ii)	Step 2: The Court’s Authority to Exercise its Jurisdiction.....	166
(iii)	Step 3: The Court’s Authority to Exercise Jurisdiction without Exemptions of Immunity	166
(iv)	Step 4: A Juristic Algebra	168
B.	Whether Customary International Law Preserves Immunity for President Al-Bashir notwithstanding UN Security Council Resolution 1593 (2005) and the Rome Statute	171
	Whether Customary International Law Obstructs National Jurisdictions from Cooperating with International Courts.....	171
(a)	The Principle of Effectiveness in International Law	174
(b)	The Reason for the Horizontal Immunity	180
(c)	Surrogation of Jurisdiction.....	185
C.	Two Vital Lessons	187
IV.	CONCLUSION.....	189

1. The reasons given in the Appeals Chamber's judgment¹ afford a simpler and adequate basis for resolving the question of immunity of a Head of State, being the dominant feature of this appeal. In our view, however, the importance and circumstance of that question recommend a certain view of the further analysis that underscores the correctness of the Appeals Chamber's judgment on that subject. The aim of this opinion is to reveal that further analysis in a connected way.
2. It is important to stress that the extent of this joint concurring opinion is limited to the normative question of immunity of Heads of State before this Court. This opinion does not deal with the question whether the Pre-Trial Chamber was correct in referring Jordan to the Assembly of States Parties and to the Security Council of the United Nations. Judge Eboe-Osuji, Judge Morrison and Judge Hofmański (as the Majority of the Appeals Chamber) have answered that question in the main judgment of the Appeals Chamber; while Judge Bossa joins Judge Ibañez in a partial dissent as to that question.

I. OVERVIEW

A. The Questions Presented

3. The ultimate question of substance to be answered in this appeal is whether, in the particular circumstances of this case, Mr Omar Al-Bashir, as the President of Sudan at the material times, enjoyed immunity before this Court, thus justifying Jordan's failure to comply with the Court's request for his arrest and surrender.
4. But that ultimate question of substance is accessible only through the narrower door of the procedural question: whether the Court was required first to obtain from Sudan a waiver of President Al-Bashir's immunity, as a prerequisite to the request to Jordan to arrest and surrender him.
5. For present purposes, the focus of the inquiry must remain on whether or not the immunity is recognised in the judicial processes of this Court. Many have found this to be a vexing question in the construction of the Rome Statute. Notably, article 98(1)

¹ 'Judgment in the Jordan Referral re Al-Bashir Appeal', 6 May 2019, ICC-02/05-01/09-397.

of the Rome Statute contemplates a certain prerequisite in the terms of ‘unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.’ Taking a practical view of the matter, it would be idle to dwell on the inquiry whether the efficacy of international law reasonably depends on any serious view that Mr Al-Bashir, as the President of Sudan, would waive any immunity that would be his to enjoy as such. For, that really is what is entailed by the idea of requiring the Court to obtain from ‘Sudan’ a waiver of President Al-Bashir’s immunity, as a precondition to the Court’s entitlement to present a request to Jordan for his arrest.² Yet, the idleness of that particular inquiry may be noted in passing, if only to illustrate immediately the relative fallacy of the idea of realistic dichotomy between matters of procedure and of substance, for purposes of justice.

6. For present purposes, then, the questions in the appeal are as follows:
- i. In the circumstances of the present case, did Mr Al-Bashir enjoy immunity at the material time, which prevented Jordan from arresting and surrendering him to the Court, as the Court requested?
 - ii. As a necessary dimension of the foregoing question, was the Court required to obtain the waiver of Mr Al-Bashir’s immunity from Sudan as a precondition to presenting the request to Jordan for his arrest and surrender?
 - iii. Naturally, an affirmative answer to the foregoing questions would absolve Jordan from any imputation of error. But, in the event of a negative answer, the eventual question becomes this: ought Jordan to be referred to the Assembly of States Parties or to the UN Security Council or to both?
7. We would answer the questions as follows:

- i. No
- ii. No

² In this connection, it may be considered, as a matter of judicial notice, that foreign relations is in most States the prerogative of the Head of State as a matter of international law. Unsurprisingly, that is also the case with Sudan. Notably, section 58(1) of the Interim National Constitution of the Republic of the Sudan (2005) provides as follows, among other things: ‘The President of the Republic is the Head of the State and Government and represents the will of the people and the authority of the State; he/she shall exercise the powers vested in him/her by this Constitution and the Comprehensive Peace Agreement and shall, without prejudice to the generality of the foregoing, perform the following functions: [...] (j) represent the State in its foreign relations, appoint ambassadors of the State and accept credentials of foreign ambassadors, (k) direct and supervise the foreign policy of the State and ratify treaties and international agreements with the approval of the National Legislature’.

- iii. Judge Eboe-Osuji, Judge Morrison and Judge Hofmański answer ‘No’; while Judge Bossa answers ‘Yes’.

8. As regards the first and second questions, the decision of the Pre-Trial Chamber is correct in the outcome: in finding that, by virtue of Security Council resolution 1593 (2005), Mr Al-Bashir did not enjoy immunity from arrest. Therefore, Jordan failed to comply with the Court’s request for his arrest and surrender. When the Security Council refers a situation to the Court pursuant to article 13(b) of the Statute, Head of State immunity cannot be invoked at the Court in any direction—horizontal or vertical. We do, however, reject any suggestion on the part of the Pre-Trial Chamber to the effect that there may be in customary international law a reserve of immunity that may be asserted before this Court, if not for article 27(2) of the Rome Statute. In our view, article 27(2) reflects customary international law in relation to immunity before an international criminal court in the exercise of its own proper jurisdiction.

9. On the third question, as noted earlier, Judge Eboe-Osuji, Judge Morrison and Judge Hofmański do not agree with the Pre-Trial Chamber’s decision; while Judge Bossa does. But that ground of appeal calls for no further analysis in this opinion; for present purposes, the Appeals Chamber’s judgment and the partly dissenting opinion are entirely adequate for all that needs to be said on the matter.

10. For the avoidance of doubt, this joint concurring opinion only concerns the specific circumstances of this case; involving the co-efficient incidence of the Rome Statute (which imposes upon its States Parties the obligation of full cooperation with the Court) and a Security Council resolution (which expressly imposes upon a specific UN Member State an obligation of full cooperation with the Court notwithstanding that the State in question is not a party to the Rome Statute).

II. CRUCIAL CONSIDERATIONS OF FACT AND LAW

11. This part will engage a review both of background information and some substrate legal principles and considerations that bear directly or indirectly on the questions presented.

An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.

440. Neither dignity nor inconvenience is enough to override the imperatives that bear in favour of the exercise of criminal jurisdiction by the ICC, considered even from the perspective of customary international law.

(c) Surrogation of Jurisdiction

441. A further consideration in the circumstances of the present case, viewed from the perspective of the Pre-Trial Chamber's customary international law pronouncements in the *South Africa Referral Decision*, engages the question as to whose jurisdiction is being exercised when the ICC requests a State Party to arrest and surrender a person to the Court. **Is it the criminal jurisdiction of the requested State that is being exercised, in an apparent violation of the customary international law rule of immunity embodied in the maxim *par in parem non habet imperium*? Or is it the jurisdiction of the ICC which the requested State is exercising as a surrogate of the ICC?**

442. One way to look at the matter is that the combined operation of articles 4(2) and 59 of the Rome Statute results in the conclusion that it is the jurisdiction of the Court that is being exercised when there is a request to a State Party to arrest and surrender a person to the Court. According to article 4(2): 'The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.'⁵³⁰ For its part, article 59 deals with arrest proceedings in the custodial State. It provides as follows:

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

⁵³⁰ It is noted that article 4(2) is not necessarily saying the same thing as article 3(3), which provides: 'The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.'

- (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
 4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).
 5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
 6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
 7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

443. Article 59 is a carefully calibrated regime. It seeks to ensure that notwithstanding that the proceedings are undertaken on behalf of the ICC, they must nevertheless be done in a manner that is respectful of the domestic legal order, in order to avoid needless conflict between the two regimes. But that need to be respectful of the domestic legal order does not make the arrest and surrender process an exercise of domestic criminal jurisdiction as such. This is because the domestic legal process being followed for purposes of article 59 could not result in a trial within the domestic realm of the charges concerned in the underlying ICC indictment. Furthermore, it is significant that article 59(4) forbids the domestic regime from second-guessing the correctness or regularity of the ICC arrest warrant that is the subject matter of the proceeding contemplated in article 59. In that regard, article 59(4) provides as follows: 'It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).'

444. The combined effect of article 4(2) and article 59 thus serves to insulate the criminal jurisdiction of the requested State from attaching, as such, to the foreign sovereign of a third State indicted at the ICC. Therefore, the requested State should

not be seen to be exercising the kind of jurisdiction that is forbidden of forum States under customary international law in relation to foreign sovereigns.

445. The foregoing analysis has an enhanced value, in the specific circumstances of the need to implement Security Council resolution 1593 (2005). It is important to stress, in this connection, that this conclusion, as it specifically concerns Security Council resolution 1593 (2005), depends on the unique circumstances of that resolution as a Chapter VII measure, which all UN Member States are obligated (or expected) to implement according to its terms, pursuant to the various provisions of the UN Charter which create that obligation or expectation. If in implementing that resolution, States Parties to the Rome Statute execute the ICC request under the direction of article 59, they should not be seen as exercising their own criminal jurisdiction. They are merely acting as jurisdictional surrogates of the ICC, for the purposes of enabling it to exercise its jurisdiction effectively as authorised by the Security Council resolution in question.

C. Two Vital Lessons

446. Before concluding, it is important to underscore two vital lessons from the foregoing review. The primary lesson is that there is no rule of customary international law that recognises *immunity* for high officials of states, including Heads of State, before an international criminal tribunal that has jurisdiction to try suspects of crimes under international law. Article 27 of the Rome Statute appropriately reflects this reality of customary international law.

447. However, the proposition does not go the extra step of presenting a positive proposition that a particular international criminal tribunal may properly exercise *jurisdiction* over a particular high official of a state. Whether an international court may properly exercise jurisdiction is a primary question that depends on the source of the jurisdiction of the particular international criminal tribunal. If the source of *jurisdiction* is customary international law, then the absence of a rule of customary international law that recognises *immunity* for a high state official before an international criminal tribunal would have the logical consequence of leaving that tribunal duly free to exercise that customary law *jurisdiction* over any state official.

[1994]

[HOUSE OF LORDS]

A

REGINA v. HORSEFERRY ROAD MAGISTRATES' COURT,
Ex parte BENNETT

1993 March 3, 4, 8, 9;
 June 24

Lord Griffiths, Lord Bridge of Harwich,
 Lord Oliver of Aylmerton, Lord Lowry
 and Lord Slynn of Hadley

B

Justices—Committal proceedings—Jurisdiction—Defendant removed from South Africa to England—Collusion alleged between police forces—Arrest in London lawful—Whether court having jurisdiction to inquire into circumstances of defendant's presence within jurisdiction—Whether court empowered to refuse trial where abuse of process shown—Whether jurisdiction vested in justices

C

The defendant, a citizen of New Zealand who was alleged to have committed criminal offences in England, was traced to South Africa by the English police and forcibly returned to England. There was no extradition treaty between the two countries, and although special arrangements could be made for extradition in a particular case under section 15 of the Extradition Act 1989 no such proceedings were taken. The defendant claimed that he had been kidnapped from the Republic of South Africa as a result of collusion between the South African and British police and returned to England, where he was arrested and brought before a magistrates' court to be committed to the Crown Court for trial. The defendant sought an adjournment to enable him to challenge the court's jurisdiction. The application was refused and he was committed for trial. He sought judicial review of the magistrates' court's decision. The Divisional Court of the Queen's Bench Division, refusing the application, held that the English court had no power to inquire into the circumstances under which a person appearing before it had been brought within the jurisdiction.

D

E

On appeal by the defendant:—

Held, allowing the appeal (1) (Lord Oliver of Aylmerton dissenting), that where a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant had been found, the courts in the United Kingdom should take cognisance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, it might stay the prosecution as an abuse of process and order the release of the defendant (post, pp. 61H–62B, F–G, 64E–F, 67F–68B, C–D, 73F–G, 74F–H, 84B–D).

F

G

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C. and *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95, D.C. considered.

H

(2) That the jurisdiction exercised by magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to protect the court's process from abuse was

1 A.C. **Reg. v. Horseferry Rd. Ct., Ex p. Bennett (H.L.(E.))**

- A confined to matters directly affecting the fairness of the trial of the particular accused with whom they were dealing and did not extend to the wider supervisory jurisdiction for upholding the rule of law; that the wider responsibility was vested in the High Court and where a question arose as to the deliberate abuse of the extradition procedures the magistrates should adjourn the matter so that an application could be made to the Divisional Court, which was the proper forum for deciding the matter; and that, accordingly, the case would be remitted to the Divisional Court for further consideration (post, pp. 64B–D, F, 68C–D, 73E–F, 78C–E, 84B–D).
- B *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108, D.C. applied.
Decision of the Divisional Court of the Queen's Bench Division [1993] 2 All E.R. 474; 97 Cr.App.R. 29 reversed.
- C The following cases are referred to in their Lordships' opinions:
Ashton, In re [1993] A.C. 9; [1993] 2 W.L.R. 846; [1993] 2 All E.R. 663, H.L.(E.)
Atkinson v. United States of America Government [1971] A.C. 197; [1969] 3 W.L.R. 1074; [1969] 3 All E.R. 1317, H.L.(E.)
Chu Piu-wing v. Attorney-General [1984] H.K.L.R. 411
- D *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401; 48 Cr.App.R. 183, H.L.(E.)
Frisbie v. Collins (1952) 342 U.S. 519
Grassby v. The Queen (1989) 168 C.L.R. 1
Ker v. Illinois (1886) 119 U.S. 436
Lam Chi-ming v. The Queen [1991] 2 A.C. 212; [1991] 2 W.L.R. 1082; [1991] 3 All E.R. 172; 93 Cr.App.R. 358, P.C.
- E *McC. (A Minor), In re* [1985] A.C. 528; [1984] 3 W.L.R. 1227; [1984] 3 All E.R. 908; 81 Cr.App.R. 54, H.L.(N.I.)
Mills v. Cooper [1967] 2 Q.B. 459; [1967] 2 W.L.R. 1343; [1967] 2 All E.R. 100, D.C.
Moevao v. Department of Labour [1980] 1 N.Z.L.R. 464
Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C.
- F *Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak* [1982] Q.B. 398; [1981] 3 W.L.R. 60; [1981] 2 All E.R. 129; 72 Cr.App.R. 250, D.C.
Reg. v. Croydon Justices, Ex parte Dean [1993] Q.B. 769; [1993] 3 W.L.R. 198; [1993] 3 All E.R. 129, D.C.
Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, D.C.
- G *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64; [1991] 2 W.L.R. 1028; [1991] 2 All E.R. 366; 93 Cr.App.R. 329, H.L.(E.)
Reg. v. Grays Justices, Ex parte Low [1990] 1 Q.B. 54; [1989] 2 W.L.R. 948; [1988] 3 All E.R. 834; 88 Cr.App.R. 291, D.C.
Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, D.C.
- H *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199
Reg. v. Horsham Justices, Ex parte Reeves (Note) (1980) 75 Cr.App.R. 236, D.C.
Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497; 63 Cr.App.R. 95, H.L.(E.)
Reg. v. Oxford City Justices, Ex parte Smith (1982) 75 Cr.App.R. 200, D.C.

Lord Lowry

Reg. v. Horseferry Rd. Ct., Ex p. Bennett (H.L.(E.))

[1994]

C.J.C. said, at p. 205, "The court is entitled to protect its process from abuse" and also referred, at p. 207, to "the danger of generalising the application of the doctrine of abuse of process." In *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, 476, Woodhouse J. spoke approvingly of "the much wider and more serious abuse of the criminal jurisdiction in general," whereas Richmond P., giving expression to reservations about the view in which he had concurred in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, referred, at p. 471, to the need to establish "that the process of the court is itself being wrongly made use of." I think that the words used by Woodhouse J. involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by the President. The question still remains what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds.

A

B

C

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *Reg. v. Grays Justices, Ex parte Low* [1990] 1 Q.B. 54 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *Reg. v. Horsham Justices, Ex parte Reeves (Note)*, 75 Cr.App.R. 236 it was held to be an abuse of process to pursue charges when the magistrates had already found "no case to answer." It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

D

E

F

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the

G

H

1 A.C.

Reg. v. Horseferry Rd. Ct., Ex p. Bennett (H.L.(E.))

Lord Lowry

A prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely “pour encourager les autres.”

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24, while quite clear that there was jurisdiction to try the applicant, relied on *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199 for the existence of a discretion to make an order of prohibition. Woodhouse J. in *Hartley* had also recognised the jurisdiction to try Bennett, but expressed the court’s conclusion that to do so in the circumstances offended against “one of the most important principles of the rule of law.” The court’s decision in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95 to the contrary effect was influenced by *Ex parte Susannah Scott*, 9 B. & C. 446, *Sinclair v. H.M. Advocate*, 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373. *Scott* and *Sinclair* were decisions on jurisdiction and formed the basis of the decision in *Ex parte Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend, Lord Griffiths, has described the argument advanced by the applicant and the manner in which Lord Goddard C.J. dealt with that argument in the court’s judgment by reference to the cases of *Scott* and *Sinclair*. Then, having disposed of an argument based on provisions of the Army Act relating to arrest, the Lord Chief Justice came to “the only point in which there was any substance . . . whether there has been such delay that this court ought to interfere:” p. 379A. Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it, at p. 379:

F “What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.”

This brief review strengthens my inclination to prefer *Ex parte Mackeson* to *Ex parte Driver* and to the Divisional Court’s judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *Reg. v. Hartley*. My noble and learned friend, Lord Griffiths, has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of jurisdiction and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondent: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process (“the fruit of the poisoned tree”), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore a fortiori the view in this jurisdiction ought to favour trying

1 A.C. **Prebble v. Television New Zealand Ltd. (P.C.)**

A was improperly procured, the actual sales of the state-owned assets and all other allegations relating to the impropriety of the transactions remain open and can be ventilated in court.

B For these reasons, their Lordships are unable to agree with the majority of the Court of Appeal that the interests of justice demand a stay. Although (as in all cases where Parliamentary privilege is in issue) the court will be deprived of the full evidence on these issues, the plaintiff is entitled to have his case heard and the defendant is able to put forward the overwhelming majority of the matters upon which it relies in justification of the alleged libel.

C Their Lordships will humbly advise Her Majesty that the appeal against that part of the order of the Court of Appeal which ordered a stay of proceedings should be allowed but the remainder of such order should be affirmed. The defendant must pay the plaintiff's costs before their Lordships' Board and in the courts below.

Solicitors: Alan Taylor & Co.; Cruickshanks; Moon Beaver.

S. S.

D

E

[HOUSE OF LORDS]

In re SCHMIDT

1993	Nov. 15, 16, 17; 26	Roch L.J. and Sedley J.
F 1994	May 3, 4; June 30	Lord Templeman, Lord Ackner, Lord Jauncey of Tullichettle, Lord Slynn of Hadley and Lord Lloyd of Berwick

G

Extradition—Habeas corpus—Abuse of process—Applicant's presence within jurisdiction secured by means of deception—Applicant arrested—Foreign state requesting extradition—Secretary of State issuing authority to proceed—Whether High Court having residual jurisdiction to order release on ground of abuse of process—Extradition Act 1989 (c. 33), s. 11(3)

H

The applicant, a German national, was accused by prosecuting authorities in Germany of drug offences committed between 1987 and 1991. On 13 August 1991, an international arrest warrant was issued by a German court. The applicant was then living in the Republic of Ireland. In 1992, an officer of the extradition squad of the International and Organised Crime Branch of the Metropolitan Police telephoned to the applicant and his solicitor in Ireland and said that he was investigating a cheque fraud and was anxious to exclude the applicant from his inquiries. He invited the applicant to come to England to be interviewed and

In re Schmidt (H.L.(E.))

[1995]

told the applicant's solicitor that if the applicant did not come his name would probably be circulated as that of a suspect and he would be liable to be arrested when he next came to the United Kingdom. There was no truth in the allegation of cheque fraud, which was simply a device to persuade the applicant to enter the United Kingdom. On 17 November 1992, the applicant and his solicitor met the police officer in London. The applicant accompanied the officer to a police station where he was arrested on a provisional warrant under section 8(1)(b) of the Extradition Act 1989¹ issued that morning. On 18 November, he was remanded in custody, and on 18 February 1993, following an extradition request made by the German Government and an authority to proceed issued by the Secretary of State under section 7 of the Act of 1989, he was committed to custody to await the decision of the Secretary of State as to his return to Germany. He applied for a writ of habeas corpus on the basis that the ruse adopted by the police officer to persuade him to come to the United Kingdom had been an abuse of power by the executive and was an abuse of process of the courts of England and Wales that vitiated the whole extradition proceedings. He also applied for judicial review by way of certiorari to quash the decision to issue the authority to proceed. The Divisional Court of the Queen's Bench Division refused the applications.

On appeal by the applicant against the refusal of the application for habeas corpus:—

Held, dismissing the appeal, that in proceedings under the Extradition Act 1989 the magistrate hearing an application for committal had no power to refuse to commit the fugitive on the ground that the proceedings might be an abuse of process but must commit him if the requirements of section 9(8) of the Act of 1989 were satisfied; and that the High Court had no jurisdiction to intervene in the proceedings but only such discretion as was conferred on it by section 11(3) of the Act of 1989, the safeguard for the fugitive in the case of an alleged abuse of power being the general discretion of the Secretary of State under section 12(1) as to the making of an order for his return (post, pp. 368c, 374d, 378H–379A, 380C, D–E).

Atkinson v. United States of America Government [1971] A.C. 197, H.L.(E.) and *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64, H.L.(E.) followed.

Dictum of Viscount Dilhorne in *Government of Australia v. Harrod* [1975] 1 W.L.R. 745, 757, H.L.(E.) not applied.

Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42, H.L.(E.) distinguished.

Per curiam. The police officer's conduct was not in any event so grave or serious as would have warranted the intervention of the High Court had it possessed such a power (post, pp. 368c, 380c, D–E).

Decision of the Divisional Court of the Queen's Bench Division, post, pp. 342G et seq., affirmed.

The following cases are referred to in the opinion of Lord Jauncey of Tullichettle:

Atkinson v. United States of America Government [1971] A.C. 197; [1969] 3 W.L.R. 1074; [1969] 3 All E.R. 1317, H.L.(E.)

¹ Extradition Act 1989, s. 11(3); see post, p. 371G–H.

1 A.C.

In re Schmidt (H.L.(E.))

Lord Jauncey
of Tullichettle

A (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

Lord Lowry, after rejecting the argument that the facts relied on had nothing to do with the process of the courts because they were not part of it, said, at p. 76: "They are the indispensable foundation for the holding of the trial."

B Mr. Newman referred to the second affidavit of Mr. Michael Forde, an Irish barrister well versed in Irish constitutional law, who opined that the actings of D.S. Jones contravened the applicant's constitutional rights to personal liberty and to access to the courts in Ireland. He argued that since the applicant's appearance before the English court resulted from a breach of the laws of Ireland the High Court had power to intervene in what was necessarily a tainted process. *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 applied in all proceedings including extraditions where an individual was brought before English courts in circumstances involving a breach of the rule of law resulting from violation of international, foreign or domestic law and *Atkinson v. United States of America Government* [1971] A.C. 197 and *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* should no longer be followed.

D My Lords, I am satisfied that *Bennett* has no such general application as the applicant contends. The issue in that case was whether the English courts should decline to try the accused by staying the prosecution. That the power to intervene, which was held to exist in the High Court, was related only to a trial is abundantly clear from the passages in the speeches to which I have referred. Indeed, there was no reason in that case to consider the power in any other context. However, the matter went further because Lord Griffiths said, at pp. 62–63:

E "The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondent that the examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64 and *Atkinson v. United States of America Government* [1971] A.C. 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court."

F In this passage Lord Griffiths far from doubting or detracting from those decisions is recognising their application to the different procedures which apply in extradition from England. In my view the position in relation to a pending trial in England is wholly different to that in relation to pending proceedings for extradition from England. In the former case the High Court in its supervisory jurisdiction is the only bulwark against

378

Lord Jauncey
of Tullichettle

In re Schmidt (H.L.(E.))

[1995]

any abuse of process resulting in injustice or oppression which may have resulted in the accused being brought to trial in England. In the latter case, not only has the Secretary of State power to refuse to surrender the accused in such circumstances but the courts of the requesting authority are likely to have powers similar to those held to exist in *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett*. An accused fugitive is thus likely to have not one but two safeguards against injustice and oppression before being brought to trial in the requesting state.

It must also be remembered that the extradition procedures to which this appeal relates flow from the European Convention on Extradition and are designed to facilitate the return of accused or convicted persons from one contracting state to another. The removal of the requirement that the requesting state should provide prima facie evidence of the alleged crime demonstrates that extradition proceedings between contracting states were intended to be simple and speedy, each state accepting that it could rely upon the genuineness and bona fides of a request made by another one. The advantages of bringing an accused to trial while evidence on both sides is fresh are obvious. To confer on the High Court a power such as the applicant contends for would be to inhibit the carrying out of this intention.

Mr. Newman also argued that the opening words of section 11(3) "Without prejudice to any jurisdiction of the High Court apart from this section" amounted to implicit recognition of an existing jurisdiction to intervene in cases such as the present. I do not consider that this argument is sound. There is ample content for these words in: (1) section 6 which imposes restrictions on the committal and return of a person in circumstances such as that the alleged offence was of a political character or that conviction was obtained in the accused's absence; (2) section 13(6) which entitles a person to whom an order for return relates to apply for judicial review within a specified time of the Secretary of State's decision to make the order; and (3) section 16(1) which entitles a person committed under section 9 to apply to the High Court for discharge when he is still in the United Kingdom after a specified period.

My Lords, I summarise my conclusions on this branch of the case thus. *Atkinson v. United States of America Government* [1971] A.C. 197 decided that Parliament had excluded the jurisdiction of the courts to refuse to surrender a person under the Act of 1870 when to do so would be unjust or oppressive. *Reg. v. Governor of Pentonville Prison, Ex parte Narang* [1978] A.C. 247 emphasised that the statutory powers conferred upon the courts by the Act of 1881 in relation to the Empire had been considerably restricted by section 8(3) of the Act of 1967. *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64 pointed out that the re-enactment of section 8(3) in section 11(3) of the Act of 1989 demonstrated that in relation to foreign countries no discretion to refuse the return of a foreign fugitive had previously existed. The dicta in *Government of Australia v. Harrod* [1975] 1 W.L.R. 745 and *In re Osman*, 28 February 1992 were obiter. *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 related to the very different situation of the power to stay an English prosecution. Accordingly, the position now is that in extradition proceedings under the Act of 1989 the

1 A.C.

In re Schmidt (H.L.(E.))

Lord Jauncey
of Tullichettle

A High Court has power to intervene only in the circumstances predicated by the Act and has no inherent common law supervisory power as contended for by the applicant. The principal safeguard for the subject of extradition proceedings therefore remains in the general discretion conferred upon the Secretary of State by Parliament in section 12. It follows that the Divisional Court were correct in concluding that the decisions in *Atkinson* and *Sinclair* had not been affected by *Bennett* and should be followed. That is sufficient for disposal of the appeal but in deference to the arguments of counsel I must refer to the alternative argument advanced by Mr. Alun Jones for the respondents to the effect that even if the High Court did have power to intervene the circumstances here were not of such a nature as would, within the reasoning of *Bennett*, entitle it to intervene.

C In the Divisional Court, Roch L.J. considered that even if the court had power to intervene the conduct of the Metropolitan Police was not so grave or serious as to warrant intervention. Sedley J., on the other hand, considered that the conduct of D.S. Jones amounted to coercion akin to the conduct criticised by this House in *Bennett*.

D There was in this case no question of forceable abduction as in *Bennett*. The only sanction attached to the ruse was that the applicant, if he did not attend a meeting with D.S. Jones in England, would be arrested when his presence in England was next detected by the authorities. In these circumstances to suggest that he had no alternative but to come to this country and was thereby coerced seems to me to be unrealistic. Had he chosen to remain in Ireland, there was nothing that the authorities here could have done about it. At the very worst, he was tricked into coming to England but not coerced. In *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 A.C. 225, a drug dealer was persuaded by a United States drug enforcement agent to travel from Thailand to Hong Kong in order to receive payment for drugs exported from Thailand to the United States. There was no extradition between the two countries for drug offences. On arrival in Hong Kong the applicant was arrested and proceedings for his extradition to the United States were commenced. He submitted, inter alia, that it would be oppressive and an abuse of process for a government agency to entice a criminal to a jurisdiction from which extradition was available. In answer to this submission Lord Griffiths said, at pp. 242–243:

G “As to the suggestion that it was oppressive or an abuse of process the short answer is that international crime has to be fought by international co-operation between law enforcement agencies. It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for the drug barons. . . . In the present case the applicant and S.C. came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not because of any unlawful conduct of the authorities but because of their own

Privy Council

A

Warren and others v Attorney General for Jersey

[on appeal from the Court of Appeal of Jersey]

[2011] UKPC 10

B

2011 Feb 9, 10;
March 28Lord Hope of Craighead DPSC, Lord Rodger of
Earlsferry, Lord Brown of Eaton-under-Heywood,
Lord Kerr of Tonaghmore, Lord Dyson JJSC*Crime — Abuse of process — Police conduct — Police obtaining evidence against
defendants through unlawful surveillance operation in foreign jurisdictions —
Fairness of defendants' trial not compromised by unlawful acts — Whether
prosecution abuse of process — Whether convictions to be quashed*

C

Officers of the States of Jersey Police received intelligence that the defendants were engaged in a conspiracy to import a large quantity of cannabis into Jersey from the Netherlands. They understood that one of the defendants, W, would travel by car from Jersey through France and Belgium to collect the consignment in Amsterdam. In order to conduct a surveillance operation, and with the consent of the Attorney General, they fitted tracking and audio monitoring devices to W's car. In arranging for consents to be obtained from the foreign authorities for the installation of similar devices, the officers asked a senior prosecutor in the Jersey Law Officers Department whether evidence procured by means of an audio device would be admissible in a Jersey court if no such consents were obtained. The senior prosecutor commented that the Jersey court would be unlikely to exclude evidence so obtained. The three foreign authorities consented to the use of the tracking device but neither the Dutch nor the French authority permitted the use of the audio device. Immediately before W was expected to travel, the officers learned that he was intending to use a hire car which he would collect on arrival in France. The officers sought and received from the French authorities consent to install the tracking device in the hire car. However they travelled to France and fitted both the tracking and the audio devices, misleadingly informing the French police that the latter was back-up equipment for the former. W drove the car to Amsterdam where, by means of the audio device, the officers obtained recordings of conversations between him and a local conspirator which provided compelling evidence of the defendants' plans for the importation of the drugs to Jersey from the Netherlands. The defendants were accordingly charged with conspiracy to import the drugs. They applied for a stay of their trial on the ground of abuse of process, submitting that the only evidence against them had been obtained by police misconduct. The commissioner, sitting in the Royal Court at a preparatory hearing, found that the police officers' conduct had been unlawful and reprehensible, that they had acted unlawfully in foreign jurisdictions and engaged in deliberate deceit of their French counterparts, that they had deceived the Attorney General and the Chief Officer of Police, and that their conduct had been approved by certain senior officers. However he concluded that there had been no deceit of a foreign court and no suggestion of prejudice or unfairness to the defendants such that a fair trial could not take place, that the defendants were charged with a serious, organised and international drug trafficking conspiracy and that swift action had been required if evidence were to be obtained. He accordingly held that the balance fell in favour of refusing a stay. The Court of Appeal of Jersey refused the defendants leave to appeal. They were subsequently convicted of the offence.

D

E

F

G

H

On the defendants' appeal against the refusal of the stay—

Held, (1) that the two categories of case in which the court might exercise its jurisdiction to stay proceedings for abuse of process, namely, where it would be

- A impossible to give the accused a fair trial and where it was necessary to protect the integrity of the criminal justice system, were distinct and to be considered separately; that in the first category no question of balancing interests arose and in the second category fairness to the accused was not the proper focus of the court's attention; that, in determining whether to stay criminal proceedings in the second category on the ground of executive misconduct, the court would take into account the particular circumstances of the individual case and, exercising a broad discretion, would strike a balance between the public interest in ensuring that those accused of serious crime were prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute; that, given the infinite variety of case in which such an issue might arise, rigid classifications as to the circumstances in which a stay might be ordered were inappropriate and the fact that "but for" the executive misconduct the defendant would not have stood trial was no more than a relevant factor which the court would consider; and that the court's jurisdiction to order a stay was not disciplinary in character and was not to be used to punish, or to mark the court's disapproval of, police misconduct (post, paras 22–26, 28–30, 36–37, 59, 60, 69, 72, 80, 83–86).
- B *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, HL(E), *R v Latif* [1996] 1 WLR 104, HL(E) and *R v Maxwell* [2011] 1 WLR 1837, SC(E) considered.
- C
- D *R v Grant* [2006] QB 60, CA disapproved.
(2) Dismissing the appeal, that although there had been grave prosecutorial misconduct without which there would have been no trial and as a result the case for a stay was of considerable weight, it had not been perverse or irrational for the commissioner to conclude that that case was outweighed by the cumulative effect of the facts that the defendants were charged with a serious offence, their ringleader was a professional drug dealer with a long record of offending, the senior prosecutor's comments partially mitigated the officers' misconduct, there had been no attempt to mislead the Jersey court, and there had been real urgency in securing the evidence; and that, accordingly, the commissioner's ruling would be upheld (post, paras 45–51, 56, 59, 60–63, 69, 72, 78–80, 81).
- E Decisions of Sir Richard Tucker [2008] JRC 50 and of the Court of Appeal of Jersey [2009] JCA 135; 2009 JLR 248 affirmed.
- F The following cases are referred to in the judgments:
Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91; [2001] 2 WLR 56; [2001] 1 All ER 577, HL(E)
Bennett v HM Advocate 1995 SLT 510
Panday v Virgil (Senior Superintendent of Police) [2007] UKPC 24; [2008] AC 1386; [2008] 3 WLR 296, PC
R v Croydon Justices, Ex p Dean [1993] QB 769; [1993] 3 WLR 198; [1993] 3 All ER 129, DC
- G *R v Glennon* (unreported) 16 September 1998, Curtis J, Nottingham Crown Ct
R v Grant [2005] EWCA Crim 1089; [2006] QB 60; [2005] 3 WLR 437, CA
R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138, HL(E)
R v Horseferry Road Magistrates' Court, Ex p Bennett (No 2) [1995] 1 Cr App R 147, DC
- H *R v Khan (Sultan)* [1997] AC 558; [1996] 3 WLR 162; [1996] 3 All ER 289, HL(E)
R v Latif [1996] 1 WLR 104; [1996] 1 All ER 353, HL(E)
R v Looseley [2001] UKHL 53; [2001] 1 WLR 2060; [2001] 4 All ER 897, HL(E)
R v Maxwell [2009] EWCA Crim 2552, CA; [2010] UKSC 48; [2011] 1 WLR 1837, SC(E)
R v Mullen [2000] QB 520; [1999] 3 WLR 777, CA

32

Warren v Attorney General for Jersey (PC)
Lord Dyson JSC

[2012] 1 AC

conveying the impression that the court will adopt the approach that the end justifies any means.”

24 In his dissenting judgment, Lord Brown of Eaton-under-Heywood JSC referred at para 107 to what Professor Andrew L-T Choo said in *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed (2008), p 132 where he summarised the approach of the courts of England and Wales to the second category of case:

“The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a ‘balancing’ test that takes into account such factors as the seriousness of any violation of the defendant’s (or even a third party’s) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.”

25 The Board considers that this is a useful summary of some of the factors that are frequently taken into account by the courts when carrying out the balancing exercise referred to by Lord Steyn in *R v Latif*. But it is also necessary to keep in mind his salutary words that an infinite variety of cases can arise and how the discretion should be exercised will depend on the particular circumstances of the case. Mr Farrer QC suggested that it is possible to identify categories of cases where the court will always grant a stay. He gave as examples the unlawful abduction cases (such as *Ex p Bennett* [1994] 1 AC 42 and *R v Mullen* [2000] QB 520); entrapment cases (such as *R v Looseley* [2001] 1 WLR 2060); and cases which involve the breach of an assurance that there will be no prosecution in circumstances such as those that occurred in *R v Croydon Justices, Ex p Dean* [1993] QB 769.

26 The Board recognises that, at any rate in abduction and entrapment cases, the court will generally conclude that the balance favours a stay. But rigid classifications are undesirable. It is clear from *R v Latif* and *Mullen’s* case that the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. It is true that in *Ex p Bennett* the need for a balancing exercise was not mentioned, but that is no doubt because the House of Lords considered that the balance obviously came down in favour of a stay on the facts of that case (the kidnapping of a New Zealand citizen to face trial in England).

27 In *Panday v Virgil (Senior Superintendent of Police)* [2008] AC 1386, when giving the judgment of the Board, Lord Brown of Eaton-under-Heywood said at para 28 that the factor common to the second category of abuse of process cases and the central consideration underlying the whole principle is that “the various situations in question all involved the

40

Warren v Attorney General for Jersey (PC)
Lord Dyson JSC

[2012] 1 AC

reason to think that he did not take these matters into account in conducting the balancing exercise. A

57 In any event, the deception of the Attorney General and Crown Advocate Jowitt was part of the overall deception that the police practised in order to conceal the fact that the necessary consents had not been obtained for the audio device. It was merely one aspect of that deception. Even if the commissioner had not considered the effect of the deception on the Attorney General and Crown Advocate Jowitt, it is difficult to conceive that, if he had done so, he would have reached a different conclusion. B

58 The short answer to this part of the challenge is that there is no reason to suppose that the commissioner failed to have regard to the points to which he did not specifically refer; or that if he did fail to have regard to them, they would have made any difference to the outcome. C

Conclusion

59 For all these reasons, the Board will therefore humbly advise Her Majesty that these appeals should be dismissed.

LORD HOPE OF CRAIGHEAD DPSC

60 I wish to add just a few words of my own to Lord Dyson JSC's judgment, with which I am in full agreement. D

61 First, it must be stressed that the States of Jersey Police cannot be allowed to escape censure for the illegality that they resorted to in this case on the view that it was just an operational decision for the police. The line between effective policing and illegal conduct may be a fine one, and in some cases it may be necessary for the police to work very close to the margin that divides what is legitimate from what is illegitimate. But in this case the officers concerned knew perfectly well that they did not have the necessary authority for the use in France, Holland or Belgium of the audio device in the car that was to be provided to Welsh by the French hire company. So they tricked the French police into thinking that the only device that they were installing was a tracking device. The junior officers who went to France were told that by their superiors that if any questions were asked by the French police they were to lie to them. The margin between what was legitimate and what was illegitimate was well known, and it was crossed deliberately in defiance of the laws of the foreign states. E F

62 There seems to be no doubt that this attitude was encouraged by Crown Advocate Jowitt's unwise advice to Detective Inspector Pashley that no court on the Island would be likely to exclude the evidence but that it was an operational decision for him to take. But the range of operational decisions that the police may take does not include deliberate law-breaking, either at home or abroad. The police cannot take the law into their own hands. If conduct of that kind were to be permitted it would undermine the rule of law itself. That is why any abuse of state, or police, power must always be taken very seriously. It may lead the court to conclude that, however strong the evidence may appear to be against him, the defendant cannot have a fair trial or that, even if he can, it would be an affront to the public conscience to allow the proceedings to continue. G H

63 The commissioner in this case, having carried out the balancing exercise identified by Lord Steyn in *R v Latif* [1996] 1 WLR 104, 113, said

[2012] 1 AC

Warren v Attorney General for Jersey (PC)
Lord Hope of Craighead DPSC

A that he had no doubt where the balance lay. He said that it would not be an
affront to justice to allow the prosecution to continue, quite the reverse:
para 40. I would not, for my part, have come down so firmly in favour of
that result as he appears to have done. In my opinion the issue was much
more finely balanced, and I think that it would have been open to him to
have decided the case the other way. There was no question in this case of
B the evidence having been obtained by torture, coercion, procurement or
entrapment. And the commissioner was right to describe the situation with
which the police were confronted as a serious and organised international
drug trafficking conspiracy. But this was not just a minor infringement of
the law, resorted to in a situation of acute emergency. It was a sustained,
deliberate and, one might say, cynical act of law-breaking. I am not
C persuaded that the decision which the commissioner took was not one that
was open to him. But the result of this appeal must not be taken as an
indication that conduct of this kind will always lead to the same conclusion.

64 One further point. The leading case on what is to be taken to be an
affront to the public conscience which requires the criminal proceedings to
be stayed is *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994]
1 AC 42. Paul James Bennett, a citizen of New Zealand, was being deported
D from South Africa to New Zealand in 1991 as an illegal immigrant. There
were at that time no direct flights between New Zealand and South Africa,
so another route had to be chosen. Following an unsuccessful attempt to
deport him by way of Taiwan it was decided to return him to New Zealand
by way of London instead. He was arrested by a detective sergeant of the
Metropolitan Police when he arrived at Heathrow Airport on 22 February
1991. The case is usually presented as one where Bennett was brought to
E this country by unlawful means and there was an undoubted abuse of
process by the prosecuting authorities. In *R v Latif* [1996] 1 WLR 104, 112,
for example, Lord Steyn said that Bennett had been forcibly abducted and
brought to this country to face trial in disregard of extradition laws: see also
R (Mullen) v Secretary of State for the Home Department [2005] 1 AC 1,
para 8, per Lord Bingham of Cornhill. Jones JA in the Court of Appeal
F in this case was right however to point out that the case was decided by
the House of Lords on the assumption that Bennett's claims were true: see
2009 JLR 248, at para 23.

65 On 10 March 1994 the Divisional Court, to which the case was
remitted by the House of Lords, did indeed hold that the assumption on
which the House of Lords had proceeded was established by the evidence,
and the order for Bennett's committal was quashed: *R v Horseferry Road*
G *Magistrates' Court, Ex p Bennett (No 2)* [1995] 1 Cr App R 147. Mann LJ
said that Bennett, who gave evidence, was not a person to whom any credit
could be attached and that his belief in the gullibility of the court was
remarkable. Nevertheless, he said that there was one document which was
decisive in Bennett's favour as showing that he came to be in this country in
defiance of extradition procedures in consequence of collusion between the
English police and the South African authorities. This was an internal
H Crown Prosecution Service memorandum dated 4 February 1991 indicating
that the Metropolitan Police had been told that the South African police
were putting Bennett on the flight to New Zealand by way of London. As
Mann LJ saw it, this memorandum contradicted the detective sergeant's
evidence that he did not know that Bennett was being deported by that

46

Warren v Attorney General for Jersey (PC)
Lord Kerr of Tonaghmore JSC

[2012] 1 AC

is not in any circumstances tenable. It is entirely incompatible with the proper discharge of the duties of a police officer. It has now been found that the police in Jersey deceived not only foreign authorities but also their own Chief of Police and the Attorney General. The repetition of such behaviour should not be countenanced.

83 In *R v Latif* [1996] 1 WLR 104, 112H Lord Steyn suggested that the law was settled in relation to what has been described as the second category of cases in which an abuse of process application may be made. That may have been an optimistic forecast, as this case and the recent decision of the Supreme Court in *R v Maxwell* [2011] 1 WLR 1837 demonstrate. Be that as it may, it appears to me that a number of principles have emerged from recent jurisprudence. These may be stated as follows: (vi) the principal purpose of the examination, in the second category of cases, of the question whether proceedings should be stayed is to determine whether this is necessary in order to protect the integrity of the criminal justice system—see *R v Maxwell*, at para 13. This principle has been expressed in various, slightly differing ways in a number of judgments on the subject. Thus, in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G Lord Lowry said that a stay will be granted where a trial would “offend the court’s sense of justice and propriety”. In *R v Latif* Lord Steyn stated, at p 112F, that a stay should be granted where to allow the trial to proceed would “undermine public confidence in the criminal justice system and bring it into disrepute”. In *R v Mullen* [2000] QB 520, 534C–D Rose LJ said that a stay should be granted notwithstanding the certainty of an accused’s guilt where to refuse it would lead to “the degradation of the lawful administration of justice”. I consider that it should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson JSC in *R v Maxwell*—that it should be granted where necessary to protect the integrity of the criminal justice system. (vii) A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. As Lord Steyn observed in *R v Latif*, the various factors that might arise in the range of cases in which this issue may have to be considered are potentially extensive and it is unwise to attempt to list these exhaustively or, as Lord Dyson JSC has said in para 26 of his judgment in this appeal, to rigidly categorise those cases in which a stay will be granted. But where a stay is being considered in order to protect the integrity of the criminal justice system, “the public interest in ensuring that those that are charged with grave crimes should be tried” will always weigh in the balance: Lord Steyn in *R v Latif* at p 113A–B. Lord Steyn mentioned that a possible countervailing factor was that the impression should not be created that the court is giving its sanction to an approach that the end justifies any means. With the emphasis that is given in this and other cases to statements that prosecutorial or police misbehaviour will never be condoned, this may not be as significant a consideration as heretofore. Other factors that will commonly call for evaluation are those referred to in the passage from the book by Professor Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed (2008), quoted by Lord Dyson JSC in para 24 of his judgment but, again, these should not be regarded as exhaustive. (viii) The “but for” factor (ie where it can be shown that the defendant would not have stood trial but for executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be

A

B

C

D

E

F

G

H