"Although in a minority of one, Lord Goff was correct in the Pinochet case": discuss

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"A written instrument like the Convention records not just an agreement between states but the limits of that agreement": Lord Sumption, The Limits of Law

The Question

1. The central question which this essay addresses is best characterised as follows:

> Lord Goff held in *Pinochet (No.3)*[1] that the Senator was entitled to immunity *ratione materiae* because;
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> (i) international law required an express waiver of that immunity to be made before it could be inapplicable; and,
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> (ii) no such waiver was ever made.
>
> Was his Lordship correct to so hold?

2. It is the contention of this essay that his Lordship was correct – and unanswerably so.

Preliminary matters

3. First, before the introductory section, a point of clarification is necessary. This piece opens with a quotation from Lord Sumption, speaking extra-judicially.[2] His Lordship was speaking about the European Convention on Human Rights and not, therefore, on the Torture Convention which is relevant for present purposes. Nevertheless, it is particularly appropriate to begin with those words, uttered by an eminent jurist (and a judicial successor to Lord Goff) 16 years after the Appellate Committee handed down

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[11] R v Bow Street Magistrates Court, Ex p. Pinochet (No.3) [2000] 1 AC 147; hereinafter, Pinochet (No.3)

[2] Lord Sumption, The Limits of Law, Bar Council Law Reform Lecture, 15 November 2012: hereinafter, Sumption

judgment in *Pinochet (No.3),* because they encapsulate the only institutionally appropriate way for a domestic court to approach the question of what an agreement between states means.

4. In his lecture, Lord Sumption goes on to reference the Vienna Convention of 1969 on the Law of Treaties,[3] specifically its requirement that every treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms, having regard to its object and purpose. Lord Sumption explains that this method of interpretation is very different than that undertaken by judges when adjudicating upon the common law which;

> *"may within broad limits be updated and reformulated by the courts which made it in the first place. But very different considerations apply to a written instrument like the Convention which records not just an agreement between the states but the limits of that agreement. The function of a court dealing with such an instrument is essentially interpretative and not creative".*[4]

5. His Lordship's conclusions about what the European Court of Human Rights has been doing, in reading the treaty which it is charged with interpreting in the manner in which it has, hold an eerie resonance when applied to the decision of the Appellate Committee in 1999. It may be said that the decision of their Lordships' House;

> *"goes well beyond interpretation, and well beyond the language, object or purpose of the instrument. In practice, it seeks to give effect to the kind of Convention that the Court conceives that the parties might have agreed today*".[5]

6. The outcome with respect to the European Convention is, Lord Sumption stated, the granting of some rights which the signatories did not appear to grant. For our purposes the decision of the House in Pinochet is different only insofar as it is opposite in manifestation: the outcome with respect to the Torture Convention was the removal of a right which the signatories did not appear to remove.

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[3] The "1969 Vienna Convention"

[4] Sumption, 8

[5] Ibid.

Introduction

7. As the preliminary section has foreshadowed, at bottom,[6] the argument of this essay is that the House of Lords made a decision which was wrong as a matter of institutional propriety: and the question in *Pinochet (No.3)* was as much about what it was institutionally proper for their Lordships' House to do as it was about anything else. Needless to say, none of this is to allege bad faith on their Lordships' behalf, but rather simply to draw attention to the fact that by adopting the wrong interpretive approach their Lordships stepped outside the House's rightful institutional bounds as a domestic court. By contrast, in adopting the correct interpretive approach, Lord Goff remained firmly within them thus facilitating the correct conclusion.

8. Four propositions are central to the argument which follows:

> (i) The Vienna Convention on the Law of Treaties 1969 requires each treaty to be interpreted in accordance with the ordinary meaning to be given to its terms and the ordinary meaning to be attributed to silence is exactly that.
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> (ii) The Vienna Convention on Diplomatic Relations 1961 requires that the waiver of diplomatic immunity "must always be express".
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> (iii) The Torture Convention is silent on the question of waiver of immunity *ratione materiae* and, consequently, is express on the point that it is not waived.[7]
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> (iv) Defects with the wording or grammar or syntax of an international treaty cannot be remedied by a domestic court based upon a determination taken about the intentions of the contracting parties, at least not insofar as this would violate the provisions of another, governing international treaty; i.e. in this case at least not insofar as doing so would contradict proposition (ii).

9. First, the legal principles governing the question before the House in Pinochet (No.3) shall be set out. Secondly, the speech of Lord Goff will be analysed. This second stage will be used to set up the proposition that his Lordship's conclusion is, in the

[6] To borrow a turn of phrase from Lord Goff; see, for example, *Spiliada Maritime Corporation v Cansulex Ltd*. [1987] 1 AC 460, 480

[7] At its weakest it is simply not express on affirming that states have waived their rights. The outcome is precisely the same.

words of Professor John Hopkins, "unanswerable".[8] Thirdly, and finally, the unassailability of Lord Goff's position will be established by showing that the reasoning of the rest of the Law Lords does not quite meet the fundamental point.

The Governing Law: Immunity from the jurisdiction of the English Courts

10. The State Immunity Act 1978 "does not apply to criminal proceedings" (s16(4)). However, s20(1) of that act provides the following: *"subject to any necessary modifications the Diplomatic Privileges Act 1964 shall apply to (a) a sovereign or other head of state"*.

11. The Diplomatic Privileges Act 1964 is, *inter alia,* a vehicle for the incorporation of several articles of the Vienna Convention on Diplomatic Relations 1961.[9] These appear in Schedule 1 and, as insofar as is relevant for present purposes, this provides;

    A. 29(1): The person of a diplomatic agent shall be inviolable

    A. 31(1): A diplomatic agent shall enjoy an immunity from the criminal jurisdiction of the receiving state.

    A. 39(2): When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease when he leaves the country...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.

    A. 32(1): The immunity from jurisdiction of a diplomatic agent...may be waived by the sending State

    A. 32(2): Waiver must always be express

12. The immunities to which these statutory provisions refer are immunity *ratione personae* and immunity *ratione materiae.* These are the only two methods by which an individual can obtain state immunity. They are very different immunities: the former is based upon the official governmental position of an individual whilst the latter is based upon the nature of acts performed. Senator Pinochet had ceased to be

[8] John Hopkins, Former Head of Foreign State – extradition – Immunity, 1999 Cambridge Law Journal 461, 464; hereinafter, Hopkins

[9] The "1961 Convention"

head of state when the case was under consideration so he could only benefit, if at all, from immunity *ratione materiae*.[10]

13. The question of whether Senator Pinochet was possessed of this immunity itself turned on the following question: was his conduct[11] "*performed in the exercise of his [official] functions as head of state?"*[12]

The speech of Lord Goff

14. The Appellants had submitted that *"when an offence of torture is committed by an official within the meaning of section 134 of the Criminal Justice Act 1988 and article 1 of the Torture Convention, no immunity ratione materiae can attach in respect of that act".*[13]

15. In other words, the submission was: by authority of the Torture Convention, contracting parties agreed to preclude reliance on the concept of immunity *ratione materiae* with respect to proceedings brought against their public officials *where such proceedings concerned acts of torture contrary to the Torture Convention*.[14]

16. As Lord Goff put it, this meant that *"the crucial question relate[d] to the availability of state immunity".*[15] Lord Goff's broad enquiry is best characterised as involving a two stage assessment. At stage one the relevant question was: how does state immunity come to be lost? At stage two the relevant question is best put as: was the Appellants' submission compatible with the answer given at stage one?

Stage one: Waiver of immunity by Treaty must be express

17. Relying on *Oppenheim's International Law*, Lord Goff reasoned that in addition to submitting expressly to the jurisdiction of a court, a state may waive its immunity by implication. However, the only circumstances which could constitute implied waiver were;

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[10] Hopkins, 463

[11] After 1988

[12] Pinochet (No.3), at 210 per Lord Goff

[13] Pinochet (No.3), at 214 per Lord Goff.

[14] Pinochet (No.3), at 213 per Lord Goff

[15] Pinochet (No.3), at 213 per Lord Goff

> "*actual submission by a state to the jurisdiction of a court or tribunal by instituting or intervening in proceedings, or by taking a step in proceedings."*[16]

18. Additionally, his Lordship placed reliance on the *Report of the International Law Commission on the Jurisdictional Immunities of States and their Property*. This specified that a state could not rely on state immunity if it had expressly consented to the exercise of jurisdiction via a *"declaration before the court or by written communication in a specific proceeding"*.[17] Furthermore, it went on to state that any theory of implied consent existing as an exception to the general principles of immunity;

> *"should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception".*[18]

19. From these passages can be derived the following two propositions. First, implied consent to jurisdiction is to be taken not as an exception to immunity in its own right but, rather, only as an explanation for why another exception engages in particular circumstances. And, secondly, that the only circumstance of the implied waiver of immunity is actual submission to a court. Reasoning from this basis, in combination with the 1961 Vienna Convention, Lord Goff concluded that in a treaty concluded between states, the waiver of immunity must always be express.[19]

20. These propositions make perfect and, more importantly, necessary sense: with respect to the first, it would be an abuse of the process of any court for a party, at once, to voluntarily appear before it during proceedings and also to deny that it was subject to the coercive powers of that court. In essence, the outcome would be that a state party could appear before a court declaring that it would be happy to see its rights vindicated if the proceedings satisfied it but that the court had no power to

[16] Pinochet (No.3), at 215 per Lord Goff

[17] Ibid.

[18] Pinochet (No.3), at 215-216 per Lord Goff

[19] Pinochet (No.3), at 216 per Lord Goff; at 217 for UK Statutory position

vindicate rights if it lost.[20] In that regard, the second proposition is illuminating: it is merely an extension of the recognised exception of prior consent to the jurisdiction of the forum to say that a party should be able to consent to the exercise of precisely the same jurisdiction by appearing before the court, or taking a step in the proceedings. The key point which justifies such an extension is that both prior agreement and actual submission require the taking of a definitive step performing the same function: seizing control of the matter and categorically eschewing all doubt about the party's intention.[21]

Stage Two: the Appellants' Submission Incompatible with Stage One

21. It is that final point which establishes that 'implied submission in a treaty' cannot be an extension of the ground of express submission in a treaty. Therefore, the submission of the Appellants simply cannot be characterised as an extension of a recognised exception.

22. That observation raises the following question: in place of express waiver by treaty, can a state perform the same function by remaining silent on the point? Even in the abstract, it is not at all clear how this wording can be extended to include 'implied'; which, after all, is the natural opposite of express. Indeed, it is submitted that such an argument simply cannot be correct when international law provides, in Article 32(2) of the 1961 Vienna Convention, that the waiver of immunity *must always be express.*

23. A number of points affirm this conclusion. First, the general principle of treaty interpretation: *ut res magit valeat quam pereat*. As will be seen, the other Law Lords appeared to have this principle in mind in striving to deny the availability of the immunity, essentially reasoning that the Torture Convention would be denuded of its desired purpose if an implied waiver was not read in.[22] However, only Lord Goff applies the principle correctly. The Torture Convention would not have had its provisions rendered nugatory under the Goff approach. It would, for example, still

[20] By analogy, consider a footballer who joins a match despite not being listed on the team sheet. He subsequently plays claiming his entitlement to score goals if he proves capable whilst simultaneously denying his amenability to being sent off if he breaks the rules of the game which he has consented to play. Such a situation is, plainly, ludicrous.

[21] Indeed, such submission is perhaps not best characterised as 'implied' at all, given that taking either of those steps will require definitive action and express engagement. In this sense, 'affirmative consent' may be the better term.

[22] See paragraphs 26-32 below

appear to have prevented state parties setting up new international tribunals possessed of the power to regard torture as something to which immunity *ratione materiae* could attach. In fact, the reasoning of the rest of the Committee leads rationally to this conclusion: that the effect of the Torture Convention is that, outside of the pre-existing scope of the immunity, it can no longer be claimed in novel situations. This conclusion is not to leave the convention with so vestigial an extent as to render its purpose defeated, as some of their other Lordships seemed to think.

24. Secondly, Article 32(2) of the 1961 Vienna Convention is itself a general norm of interpretation and is essentially rendered otiose by the majority's approach. No longer does the governing *'always'* provision mean what it says. The – as previously was commonly understood - absolute nature of the provision meant that stepping away from it, even on one occasion, relegated it from a provision of *principle* to one of *presumption*. Its fundamental character was changed. This, arguably, is the clinching point which shows the other Law Lords were wrong. At bottom, the reasoning of their Lordship's leads to the outcome that not only was there an implied waiver of an immunity on which the state parties were silent in the Torture Convention, but that this also impliedly amended (or at least abridged) the express wording of another Convention. To acknowledge this conclusion is to reveal outcome driven jurisprudence at its most profound.

25. Furthermore there is Lord Goff's observation that;

> *"it is surprising that an important argument of this character, if valid, should previously have been overlooked by the fourteen counsel (including three distinguished Professors of International Law)...[the argument] receives no support from the literature on the subject".*[23]

The other speeches

26. None of these concerns were satisfactorily addressed by the rest of the Appellate Committee. Painting their Lordships' views with a broad brush at this point still allows the important part of the picture to be seen. In essence, although reasoning in various ways to reach this conclusion in domestic law, the other Law Lords determined that;

[23] Pinochet (No.3), at 214 per Lord Goff

"since the authorisation of the infliction of torture is contrary to the ius cogens, no immunity may attach to it ratione materiae in English law".[24]

27. In so reasoning, Professor John Hopkins has questioned the reliance which the court put on the statements of Sir Arthur Watts.[25] Sir Arthur was used by their Lordships to support the twin propositions that; first, that it was contrary to notions of justice that responsibility for international crimes attached only to the state and not to individuals; and, secondly, that individuals are internationally accountable for them. Yet, as Professor Hopkins pointed out, and as was recognised by their Lordships, Watts' was only looking at situations where the international community created international tribunals which *expressly* made the head of state subject to the tribunals jurisdiction.[26]

28. Focussing on Lord Browne-Wilkinson's view illustrates the flaws in the House's reasoning. His Lordship reasoned that the Torture Convention created a worldwide jurisdiction where courts were *"authorised and required"*[27] to take jurisdiction internationally, which "provide[d] what was missing" previously viz., jurisdiction over torture offences outside of international tribunals. To this extent, this is fine. However, Lord Browne-Wilkinson[28] then found that because international law outlawed torture, it could not be an official function to which the immunity in question could ever again attach in respect of acts committed after 1988.[29] Therefore, Senator Pinochet did not have the immunity available to him.

29. Working on a blank canvass, such the establishment of a new international tribunal, this argument has potent force. It proceeds as follows: states have agreed to proscribe torture; therefore they have agreed not to recognise any immunity in a new space (i.e. under any new jurisdictional power) for torture; and they have achieved

[24] Professor Hopkins quoting Lord Browne-Wilkinson. Professor Hopkins further notes that Lords Hope, Hutton and Saville reasoned in this vein, whilst Lord Millett and Phillips went even further saying that the immunity could never have attached to torture; Hopkins, 463

[25] Ibid.

[26] Pinochet (No.3), at 204 per Lord Browne-Wilkinson

[27] Ibid.

[28] Hopkins 262

[29] Pinochet (No.3), at 205 per Lord Browne-Wilkinson

this in the realm of the old immunity *ratione materiae* by denying it the colour of a state function.

30. Yet, apart from Lord Millett, all of their Lordships were seemingly agreed that prior to the coming into force of the Torture Convention, the immunity would have attached to such acts. Lord Browne-Wilkinson sought to extend this reasoning to domestic jurisdiction saying that if the extension was not granted there could be no case outside Chile where an effective prosecution for this crime could be made unless Chile waived its immunity. Therefore, so as not to render the Convention "*abortive*" the Convention had to be interpreted to protect its purpose and thus leave no safe haven for torturers - which necessitated denying the immunity.[30]

31. Yet, the problem for this line of reasoning is twofold: domestic tribunals are bound by the rule of jurisdiction that such a waiver *must always be express* and the wording of the Convention does not go as far as his Lordship takes its purpose. The Convention did not state that the immunity was waived; therefore, for the purposes of domestic jurisdiction, the immunity still existed because the only possible method of removing it for the purposes of domestic jurisdiction had not been carried out.

Conclusion

32. Interpretation of treaties is interpretive not creative.[31] It is not the role of domestic courts to improve upon conventions agreed between states by implying words which the states did not use to take away a right which the states did not expressly address: *a fortiori* where this involves, essentially, re-writing two conventions and determining their relationship with one another. For a *domestic* court, possessed of no special power to direct the courts of other contracting parties on the meaning of conventions, to take such a step is institutionally inappropriate. Only Lord Goff's reasoning addresses this matter satisfactorily and, therefore avoids slipping into this erroneous outcome. His Lordship, though in a minority of one, is therefore correct: unanswerably so.

[30] Pinochet (No.3), at 204 per Lord Browne-Wilkinson

[31] Sumption, 8