PART III: CUSTOMARY INTERNATIONAL LAW AND STATUTES

A. The Statutory Construction Argument.

The U.K. courts did not abstain from deciding Pinochet's habeas claim. The Law Lords reached the merits and held that, at least with respect to charges of torture and conspiracy to commit torture committed after 1988, he was not entitled to former head of state immunity from prosecution or extradition. The terms of the Extradition Act controlled the matter from that point forward. It is worthwhile to return to the schematic of the extradition process first presented earlier in this article. There I noted that the statutory extradition process is complex but can be described as having four stages after a provisional warrant is issued:[389]

1. *Authority to Proceed.* The Home Secretary's preliminary determination that extradition proceedings should commence.[390] (As discussed in Part I, the Home Secretary issued authority to proceed against Pinochet on December 9, 1998, following the *First Law Lords' Judgment* and again on April 14, 1999, following the *Final Law Lords' Judgment.*[391])

2. *Committal.* A magistrate court's determination "that the evidence would be sufficient to warrant . . . trial if the extradition crime had taken place within the jurisdiction of the court."[392] (As discussed in Part I, Pinochet was ordered committed by Magistrate Bartle on October 8, 1999.[393]) If a committal order is made, the person subject to the order has a right to apply for habeas corpus.[394] (The *Pinochet* proceedings were at this point when they were terminated by Straw's decision to allow Pinochet to return to Chile.)

3. *Order for Return.* The Home Secretary's determination that the alleged offender should be extradited.[395]

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389. As noted at the outset of Part I-B, the Extradition Act authorizes a "provisional warrant" to be issued in advance of any determination by the government to proceed with extradition. Extradition Act, 1989, § 8(1)(b), 17 Halsbury's Statutes at 696. *See also supra* note 44.

390. Extradition Act § 7(4), 17 Halsbury's Statutes at 694. *See* In re an Application for Judicial Review re: Augusto Pinochet Ugarte, E.W.J. No. 3123 CO/1786/99 (Q.B. Divl. Ct. May 27, 1999) ("The [section] 7 procedure is no more than a very coarse-meshed net (my words), whereby the Secretary of State is called upon to decide whether to issue his authority to proceed on limited material, namely the request and the supporting particulars.").

Where (as in Pinochet) a provisional warrant has been issued, the Home Secretary "may in any case, and shall if he decides not to issue an authority to proceed . . ., by order cancel the warrant and . . . discharge [the accused] from custody." Extradition Act, 1989, § 8(4), 17 Halsbury's Statutes at 697.

391. *See* Part I.C.3 and I.D.

392. Extradition Act § 9.

393. *See* discussion *supra* Part I.D.

394. Extradition Act § 11.

395. Extradition Act § 12.

4. *Judicial Review.* A court's determination of an appeal from an order of return.[396]

I emphasized in Part II.E that the Law Lords were never called on to review a decision at any of these stages of *Pinochet.* That is, assuming that that statutory extradition process had unfolded in the same way even had the courts abstained on Pinochet's initial sovereign immunity claim, the Law Lords would never have had to decide the question—or suffered the Hoffmann embarrassment. But had the court been called upon to decide Pinochet's sovereign immunity claim in a request for habeas corpus following an order of committal or in a request for judicial review following an order of return, how should it have gone about deciding the claim? That is the subject of this Part III.

The discussion in Part I of the *Divisional Court Judgment*[397] and *Final Law Lords' Judgment*[398] described the two issues that Pinochet's claim presented: (1) whether the conduct with which he was charged constituted "extradition crimes" under the Extradition Act and, if so, (2) whether he was entitled to immunity from prosecution and extradition for those charges. On the basis that at least some of the conduct charged did constitute extradition crimes, all of the Law Lords sitting in the first and in the final judgments reached the immunity issue. Pinochet argued that he was provided immunity both by statute and by customary international law. My focus will be on his statutory claim.

The meaning of the statutory immunity provision required a careful reading of interrelated sections of the State Immunity Act[399] and Diplomatic Privileges Act.[400] All but one of the eleven Law Lords believed it should be read as providing that a former head of state enjoyed "immunity from the criminal jurisdiction of the United Kingdom with respect to his official acts performed in the exercise of his functions as head of state."[401] The statutory interpretation question was thus reduced to whether the extradition crimes with which Pinochet was charged constituted "official acts performed in the exercise of his functions as head of state."[402]

The principal argument advanced by Spain was that, as a matter of customary international law, a former head of state was not entitled to immunity from prosecution or extradition for the international crimes of

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396. Extradition Act § 13.

397. *See* discussion *supra* Part I.C.1.

398. *See supra* Part I.C. 5.

399. State Immunity Act, §§ 1, 14, 20(1).

400. Diplomatic Privileges Act, § 2(1), incorporating by reference arts. 29 & 39(2) of the Vienna Convention on Diplomatic Relations, 10 Halsbury's Statutes at 682 & 687. *See supra* note 73.

401. First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn). Only Lord Phillips disagreed, believing the immunity provision only covered acts performed in the United Kingdom. Final Law Lords' Judgment, *supra* note 4, at 192 (Lord Phillips).

402. First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn).

torture, hostage-taking, and murder. Furthermore, Spain argued, these principles of customary international law took precedence over, or at least dictated the proper interpretation of, the immunity provided by the former head of state immunity provision of the State Immunity Act.

To give these principles of customary international law precedence over, or allow them to dictate the proper interpretation of, relevant statutory provisions would be in tension with the separation of powers notion of legislative supremacy in law-making. My claim, which I refer to as my statutory construction argument, is that the separation of powers value of democracy counseled in favor of deciding Pinochet's entitlement to immunity based on the language of the relevant statutes, not customary international law. This is because customary international law does not enjoy the political legitimacy of being adopted through a democratic political processes. I also contend that the approach of those Law Lords in *Pinochet* who found Pinochet was not entitled to immunity as a matter of statutory construction (without relying on customary international law) was consistent with separation of powers values because it relied on Parliamentary enactments.

B. Customary International Law in the United Kingdom.

My claim is an extremely broad one and I acknowledge that it requires relegating customary international law to a lesser position in U.K. law than it currently occupies. As I shall discuss, customary international law is incorporated into U.K. domestic common law. Since that is so, few would argue that it ought to be available for consultation when interpreting the meaning of statutes since it can be assumed that Parliament was aware of the common law when legislating. (It is true that the U.K. courts have held that as the rules of customary international law change, U.K. law changes with them.[403] But Parliament is presumably mindful of this principle as well.) Although my statutory construction argument is that separation of powers counsels against the use of customary international law to interpret the former head of state immunity provision of the State Immunity Act, I acknowledge that those Law Lords who employed customary international law to decide Pinochet's sovereign immunity claim did so consistent with U.K. law.

The proposition that customary international law is part of U.K. common law is acknowledged in both the speech of Lord Lloyd in favor of Pinochet's position and the speech of Lord Millett against it. Lord Lloyd said:

> [T]he common-law incorporates the rules of customary international law. The matter is put thus in Oppenheim's International Law 9th edition 1992, page 57:

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403. *See* Trendtex Trading Co. v. Cent. Bank of Nigeria, 1 Q.B. 529, 554 (Eng. C.A. 1977), discussed *infra* in this Part III.B.

> "The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."[404]

Lord Millett made the same point without elaboration: "Customary international law is part of the common-law . . . ."[405]

The willingness of most of the Law Lords to employ customary international law in their analysis of Pinochet's sovereign immunity claim is consistent with a long tradition of U.K. courts treating customary international law as U.K. common law. In 1977, Lord Justice Denning set forth the history of this proposition in an important international commercial law (and sovereign immunity) case, *Trendtex Trading Corp.*:

> The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut* (1736), in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C. J. in *Triquet v. Beth* (1764):
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> "Lord Talbot declared a clear opinion – 'That the law of nations in its full extent was part of the law of England, . . . that the law of nations was to be collected from the practice of different nations and the authority of writers.'" . . .
>
> That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that . . . "the law of nations, according to the decisions of our greatest judges, is part of the law of England."[406]

Lord Alverstone's judgment in a 1905 case gives some flavor for the rationale underlying this principle:

> [I]nternational law forms part of the law of England. . . . [W]hatever has received the common consent of civilized nations must have received the assent of our country, and that

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404. First Law Lords' Judgment, *supra* note 2, at 923 (Lord Lloyd).

405. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

406. *Trendtex Trading*, 1 Q.B. at 553 (citations omitted; ellipses in original) (Denning, M.R.)

> to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.[407]

Not only does the United Kingdom recognize customary international law as part of its domestic common law but also changes in customary international law are automatically incorporated into it. This was established in *Trendtex Trading*, a case involving a claim on a letter of credit issued by the National Bank of Nigeria.[408] The Bank argued that as an instrumentality of the country of Nigeria, it was entitled to sovereign immunity. Both traditional international law and (importantly for purposes of this litigation) relevant English precedent would have recognized the Bank's claim to immunity. But in the intervening years since that precedent, international law had changed to recognize that state instrumentalities engaged in commercial activities were not entitled to sovereign immunity.[409]

It was clear that customary international law was part of U.K. common law. But were rules of customary international law automatically incorporated into U.K. law? Or were these rules not part of U.K. law until they were adopted by judicial decision, Act of Parliament, or long-established custom? If the first, when the rules of international law changed, English law would change with them. But if the second, English law would not change; precedent would bind it.[410]

Admitting that he had previously subscribed to the second approach,[411] Lord Denning changed his view:

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407. West Rand Gold Mining Co. v. R., 2 K.B. 391, 406 (1905) (Alverstone, L.C.J.). Lord Alverstone conditioned this principle as follows:

> But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations.

Id.

408. *Trendtex Trading*, 1 Q.B. at 529.

409. *Trendtex Trading*, 1 Q.B. at 555-56 (Denning, M.R.) (citing Alfred Dunhill of London Inc. v. Republic of Cuba, 425 U.S. 682 (1976) ("immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions").

410. *Trendtex Trading*, 1 Q.B. at 553 (Denning, M.R.).

411. *Id.* at 554 (Denning, M.R.) (citing R. v. Sec'y of State for the Home Dep't, Ex parte Thakrar Q.B. 684,701 (Eng. C.A. 1974) (Denning, M.R.)).

> Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.[412]

Finding that the change in customary international law had been incorporated into English common law and that the Bank had been engaged in commercial or proprietary actions in issuing the letter of credit, the court found that the Bank was not entitled to immunity.[413]

C. Using Customary International Law to Decide the Availability of Former Head of State Immunity In Pinochet.

Consistent with the principle that customary international law is part of U.K. common law, eight of the eleven speeches in the two *Pinochet* judgments made extensive reference to customary international law in analyzing Pinochet's entitlement to former head of state immunity. (The remaining three Law Lords analyzed the claim more narrowly, focusing only on the relationship between the former head of state immunity provision of the State Immunity Act and the Torture Convention. Their analysis is discussed in Part III.E below.)

Five of the Law Lords started their analysis with the statutory former head of state immunity provision but used customary international law to interpret it. One Law Lord analyzed the statutory former head of state immunity provision and customary international law as parallel bodies of law, to be analyzed separately. Because he found that both had the same rationale, in the end there is little substantive difference between his approach and that of the prior five.

Two Law Lords used customary international law alone to analyze Pinochet's immunity claim, one because he believed that the statute was "subsumed" by customary international law, and the other because he believed that the statute was not relevant to the circumstances. These positions are summarized in the accompanying table and then described.

412. *Trendtex Trading*, 1 Q.B. at 554 (Denning, M.R.).
413. *Trendtex Trading*, 1 Q.B. at 561 (Denning, M.R.).

Rough Typography of Law Lords' Use of Customary International Law in Analyzing Pinochet's Former Head Of State Immunity Claim (with Notation of Their Votes on the Claim)

I=Pinochet Immune on All Charges;
NI=Pinochet Not Immune on at Least One Charge

	First Law Lords' Judgment	Final Law Lords' Judgment
Used customary international law to interpret statutory former head of state immunity provision	Lord Slynn—I Lord Nicholls—NI [Lord Hoffmann—NI]* Lord Steyn—NI	Lord Hope—NI Lord Hutton—NI
Treated customary international law and statutory former head of state immunity provision as parallel with separate analysis of each	Lord Lloyd—I	
Used customary international law exclusively because statutory former head of state immunity provision was "subsumed" by customary international law		Lord Millett—NI
Used customary international law exclusively because statutory former head of state immunity provision applied only to extra-territorial offenses		Lord Phillips—NI
Treated issue solely as measuring the impact of the adoption of the Torture Convention on statutory former head of state immunity		Lord Browne-Wilkinson—NI Lord Goff—I Lord Saville—NI

* Lord Hoffmann concurred in the reasoning of Lord Nicholls without further explanation.

It is perhaps testament to the indeterminacy of law that among both those Law Lords who relied on customary international law and those who relied on statutory construction to decide Pinochet's former head of state immunity claim, there were those who found in his favor and those who found against.

1. Five Law Lords Used Customary International Law to Interpret the Statutory Former Head of State Immunity Provision.

Lord Slynn.

Lord Slynn's approach to the relationship between statute and customary international law was to use the statutory former head of state immunity provision as the "starting point" for analyzing Pinochet's claim but to interpret the statute by reference to customary international law. Similarly, for Lord Slynn the question of whether the language of the extra-territorial torture provision of the Criminal Justice Act abrogated former head of state immunity could only be decided by reference to customary international law.

Lord Slynn started his analysis by discussing the interrelationship of the Diplomatic Privileges Act and State Immunity Act provisions[414] and identified the central question presented by the statute as whether the conduct with which Pinochet was charged constituted official acts in the exercise of a head of state's functions.[415] He concluded that under the language of the statute, Pinochet would be entitled to immunity.[416]

But Lord Slynn said that it was not sufficient to answer the question based on the language of the statute alone. He felt he was required to interpret the statutory immunity provision "against the background of those principles of public international law as are generally recognized by the family of nations."[417] He found that at the time the statutory immunity provision was adopted, customary international law would have provided Pinochet with the immunity he sought.[418] And because U.K. law is bound by changes in customary international law,[419] he also examined subsequent developments to determine if the principle of immunity had changed. His study of various international conventions and tribunal charters[420] indicated that, while there

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414. *See supra* notes 73.

415. First Law Lords' Judgment, *supra* note 2, at 908 (Lord Slynn).

416. While acknowledging that international law does not recognize that it is one of the specific functions of a head of state to commit torture, Lord Slynn said immunity in respect of criminal acts would have little content if it did not apply where a head of state committed an illegal act. *Id.* at 908 (Lord Slynn).

417. First Law Lords' Judgment, *supra* note 2, at 908 (Lord Slynn) (quoting Alcom Ltd. v. Republic of Columbia, [1984] A.C. 580, 597 (1984) (Lord Diplock)).

418. First Law Lords' Judgment, *supra* note 2, at 911 (Lord Slynn). In reaching this conclusion, Lord Slynn examined the treatises and cases discussed by Lord Chief Justice Bingham in the Divisional Court Judgment to the same effect.

419. This principle, established in *Trendtex Trading*, is discussed in Part III.B.

420. First Law Lords' Judgment, *supra* note 2, at 912-13 (Lord Slynn) (discussing the Hostage Convention, *supra* note 7; the Genocide Convention of 1948, *supra* note 6; the Nuremberg Tribunal, *supra* note 85; the Former Yugoslavia Tribunal, *supra* note 86; the Rwanda Tribunal, *supra* note 87; and the Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf/183/9 (1998) [hereinafter International Criminal Court Statute]).

had been some movement towards the recognition of crimes against international law is to be seen

> also in the decisions of national courts . . . [i]t does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor [was] there any jus cogens in respect of such breaches of international law which require that a claim of sovereign immunity, itself a well-established principle of international law, should be overridden.[421]

Still within the realm of U.K. domestic law's incorporation of customary international law, Lord Slynn found it necessary to examine a related problem: whether the recognition of certain acts as international crimes had any effect on the immunity provided former heads of state in both the State Immunity Act and in customary international law. While finding some authority for this proposition,[422] he concluded that a national judge must proceed cautiously in finding that sovereign immunity has been abrogated. "Immunity, it must be remembered, reflects the particular relationship between states by which they recognize the status and role of each others head and former head of state."[423] To exercise that caution, Lord Slynn said he would require the following to be present before abrogating former head of state immunity:

> 1. There must be a provision in an international convention to which both the country asserting, and the country being asked to refuse, sovereign immunity are parties.
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> 2. The convention must clearly define a crime against international law and require or empower a country to prevent or prosecute the crime (a) whether or not committed in its jurisdiction and (b) whether or not committed by one of its nationals.
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> 3. The convention must make it clear either (a) that a national court has jurisdiction to try a crime alleged against a former head of state or (b) that having been a head of state is

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421. First Law Lords' Judgment, *supra* note 2, at 913 (Lord Slynn). A "jus cogens" norm, referred to by Lord Slynn, is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 344 (1980).

422. First Law Lords' Judgment, *supra* note 2, at 914 (Lord Slynn).

423. *Id.* at 915 (Lord Slynn).

> no defense and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him.[424]

Lord Slynn then applied these principles to the crimes with which Pinochet was charged, most importantly torture. The Torture Convention outlaws torture committed or authorized by a public official or person acting in an official capacity.[425] It provides that, if the offender is not extradited, the offender must be prosecuted in the jurisdiction where found.[426] Chile was a party to the convention and as previously discussed,[427] the United Kingdom incorporated the convention into domestic law in 1988.[428]

Lord Slynn concluded that the reference to "a public official or person acting in that capacity" in the Torture Convention and Criminal Justice Act is not sufficient to overcome former head of state immunity. "As a matter of ordinary usage," he said, "it can obviously be argued that" it does.[429] But again looking beyond the language of the statute to customary international law, Lord Slynn argued that the international conventions and tribunal charters of the last half-century have made "specific provisions in respect of heads of state as well as provisions covering officials. . . . [I]f States wish to exclude the long established immunity of former heads of state in respect of allegations of specific crimes, or generally, then they must do so in clear terms."[430]

To summarize, Lord Slynn's analysis of whether Pinochet was entitled to immunity started with the statutory immunity provision and found that both under its terms and interpreting it as a matter of customary international law, former head of state immunity was viable. He also recognized that the immunity would not be available in respect of certain international crimes where the conventions establishing those crimes clearly abrogate former head of state immunity. But he concluded that while the language of the Torture Convention and the Criminal Justice Act suggests that immunity is not available in respect of torture, viewed from the proper perspective of customary international law, the language was not clear enough to overcome "the long established immunity of former heads of state."[431]

Lord Nicholls.

Lord Nicholls's approach to the interrelationship of statute and customary international law resembled Lord Slynn's—though he reached the

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424. *Id.*
425. Torture Convention, *supra* note 8.
426. *Id.*
427. *See supra* Part I.C.5.
428. Criminal Justice Act 1988 § 134, 12 Halsbury's Statutes at 1079.
429. As we shall see, this is precisely the position taken by Lord Browne-Wilkinson and Lord Saville in the *Final Law Lords' Judgment.* *See* discussion *infra* Part III.E.
430. *Id.*
431. *Id.*

opposite result. He too interpreted former head of state immunity provision of the State Immunity Act using customary international law. To Lord Nicholls, the answer to the question of whether under the statute acts of hostage-taking and torture with which Pinochet was charged were done in the exercise of his functions as head of state was found in international law:

> International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.[432]

Lord Nicholls's rationale for this proposition was essentially that the Nuremberg tribunal and several United Nations resolutions put heads of state on notice that they were subject to personal liability if they "participated in acts regarded by international law as crimes against humanity"—crimes which included hostage-taking and torture.[433]

Lord Steyn.

Lord Steyn also approached the interrelationship of statute and customary international law by starting with the statutory former head of state immunity provision and using customary international law to interpret.[434] Zeroing in on the "official acts performed in the exercise of his functions as head of state" requirement of the statute, Lord Steyn takes the position that "it is not sufficient that official acts are involved; the acts must also have been performed by the defendant in the exercise of his functions as head of state."[435] Unlike even Lord Nicholls, Lord Steyn is unwilling to accept the difficulty in drawing the line between acts to which immunity attaches and acts to which it does not. To say that such a line cannot be drawn inexorably led, in Lord Steyn's view, to the conclusion "that when Hitler ordered the 'final solution,'

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432. First Law Lords' Judgment, *supra* note 2, at 939-40 (Lord Nicholls).

433. *Id.* at 940 (Lord Nicholls). Lord Nicholls made no attempt to address Pinochet's argument to the effect that the very creation of the Nuremberg and other international tribunals demonstrates that under customary international law former heads of state "cannot be tried in the ordinary courts of other states." *Id.* at 913 (Lord Slynn), 930 (Lord Lloyd).

434. *Id.* at 944 (Lord Steyn). Indeed, for him any former head of state immunity under customary international law had been overridden by the former head of state immunity provision of the State Immunity Act. *Id.* at 946.

435. *Id.*

his act must be regarded as an official act deriving from the exercise of his functions as head of state."[436]

Lord Steyn invoked customary international law to draw the line between what is and what is not an official act performed in the exercise of the functions of a head of state and concluded as follows:

> [T]he development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d'etat [perpetrated by Pinochet in Chile], and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. . . .
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> . . . .
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> The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a head of state.[437]

Lord Steyn concluded "that as a matter of construction of the relevant statutory provisions the charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state."[438] But as described above, his "construction of the relevant provisions" used principles of customary international law to interpret the meaning of "acts performed in the exercise of the functions of a head of state."

Lord Hope.

Lord Hope also approached the interrelationship of statute and customary international law by starting with the statutory former head of state immunity provision and then using customary international law to interpret whether "acts of the kind alleged in this case . . . were acts done in the exercise of the state's authority."[439] He found protected "all acts which the head of state has performed in the exercise of the functions of government."[440] As to whether some such acts are outside the protection of former head of state immunity, Lord Hope associated himself with Lord Slynn's view in the *First Law Lords' Judgment.* That is, former head of state immunity continues to exist except in regard to (1) crimes in respect of which international tribunals have been convened under terms that specify that heads of state have no immunity, or (2) international crimes where the international conventions

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436. *Id.*
437. First Law Lords' Judgment, *supra* note 2, at 945-46 (Lord Steyn).
438. *Id.* at 946 (Lord Steyn).
439. Final Law Lords' Judgment, *supra* note 4, at 146 (Lord Hope).
440. *Id.* at 147 (Lord Hope).

establishing those crimes contain certain provisions including clearly abrogating former head of state immunity.[441]

As discussed above, Lord Slynn concluded that the language of the Torture Convention was not clear enough to abrogate former head of state immunity. Lord Hope revisited this issue, asking "whether the effect of the Torture Convention was to remove [former head of state immunity] by necessary implication."[442] He first observed that the Convention only applies to torture "inflicted by or at the instigation of or with the consent or acquiescence of the public official or other person acting in an official capacity." He thinks that it "would be a strange result" if the Convention could not be applied to "the person primarily responsible" for the torture but only their underlings.[443] On the other hand, he found no discussion of head of state and former head of state immunity in the history of the drafting of the Convention. Therefore, he concluded that immunity was not intended to be affected by the Convention.

Before coming to this conclusion, Lord Hope's reasoning takes a surprising turn from that of Lord Slynn's. He looked to the fact that Chile itself was a party to the Convention and to what he finds to be widespread agreement by 1988 that "the prohibition against official torture had achieved the status of the jus cogens norm."[444] While he says that the Torture Convention itself did not deprive former heads of state of their immunity, he does find that "the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention [were] so strong as to override any objection by it on the ground of [former head of state] immunity . . . to the exercise of the jurisdiction" by the United Kingdom over the crimes of which Pinochet was accused.[445] To Lord Hope, former head of state immunity is not available for large-scale torture—"inhuman acts of a very serious nature," "widespread or systematic attack against any civilian population"—that is, torture "of such a kind or on such a scale as to amount to an international crime."[446]

Lord Hutton.

Lord Hutton's analysis is quite similar to Lord Steyn's. Starting with the statutory former head of state immunity provision, he looked to principles of customary international law to determine whether the acts alleged against Pinochet were in the performance of his functions as a head of state. After

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441. *Id.* at 147-48 (Lord Hope) (quoting First Law Lords' Judgment, *supra* note 2, at 915 (Lord Slynn)).

442. *Id.* at 148 (Lord Hope).

443. *Id.* at 149 (Lord Hope).

444. Final Law Lords' Judgment, *supra* note 4, at 149 (Lord Hope).

445. *Id.* at 152 (Lord Hope).

446. *Id.* at 151 (Lord Hope).

distinguishing a number of cases that affirmed immunity as not being on point,[447] he found that a number of international studies and tribunals stood for the proposition that head of state immunity had been abrogated for certain international crimes.[448] "Since the end of World War II," Lord Hutton argued, "there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring justice to a person who commits such crimes." Torture has been recognized as such a crime in the Torture Convention signed by the United Kingdom, Spain, and Chile. Because of this, Lord Hutton concludes, "acts of torture cannot be regarded as functions of a head of state under international law."

Thus, Lord Hutton held against Pinochet because he interpreted the statutory former head of state immunity provision based on customary international law to preclude acts of torture from constituting acts in the performance of the function of a head of state.

2. *Lord Lloyd Treated Customary International Law and Statutory Former Head of State Immunity Provision as Parallel with Separate Analysis of Each.*

While Lord Slynn used the relevant statutes as his starting point and then interpreted them based on his understanding of customary international law, Lord Lloyd treated the relevant statutes and customary international law as parallel bodies of law, to be analyzed separately. Because he found both had similar rationale, there is little substantive difference between his approach and Lord Slynn's.

Strictly speaking, the two separate bodies of law Lord Lloyd analyzed were common law and statutory law. Starting on the foundation that U.K. common law incorporated the rules of customary international law, Lord

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447. Al-Adsani vs. Gov't of Kuwait, 107 I.L.R. 536 (Eng. C.A. 1996) (distinguishable because the case involved civil liability); Siderman de Blake vs. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (distinguishable because case involved civil liability); Marcos & Marcos v. Fed. Dept. of Police, 102 I.L.R. 198, 203-04 (Switz. Fed. Trib. 1989) (distinguishable because of express waiver by the State of the Philippines); In re Former Syrian Ambassador to the German Democratic Republic, 115 I.L.R. 596 (F.R.G. Const'l Ct. 1997) (former head of state immunity sought by Pinochet distinguishable from diplomatic immunity at issue in this case).

448. Lord Hutton cites the Report of the International Law Commission to the United Nations General Assembly, *reprinted in* 2 Y.B. INT'L L. COMM'N (1950) (codifying "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal," U.N.G.A. Resolution 95(I) (Dec. 11, 1946)); International Law Commission, Draft Code of Offenses Against Peace and Security of Mankind, 28 July 1954, U.N. Doc. A/2673 (1954); Rwanda Tribunal, *supra* note 87; Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, art. 18, U.N. Doc. A/51/10 (1996); International Criminal Court Statute, *supra* note 422.

Lloyd explored whether Pinochet was entitled to immunity. To him, the writings of scholars and decided cases stood for the proposition that a country was entitled to expect that its former head of state would not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head.[449]

In deciding whether the conduct of which Pinochet was accused fell within these "categories of acts," Lord Lloyd found it critical to determine whether Pinochet was acting in his private capacity in committing the alleged crimes or whether he was acting in a sovereign capacity as head of state. He noted that the Spanish arrest warrant alleged that Pinochet organized the commission of crimes as the head of the government and carried out those crimes through the use of the police and secret service. In Lord Lloyd's view, the inevitable conclusion was that Pinochet was acting in a sovereign capacity and not a personal or private capacity.[450]

Lord Lloyd turned to two arguments made by Spain. First, in response to its contention that the crimes alleged against Pinochet were so horrific that an exception needed to be made to the ordinary rule of customary international law, Lord Lloyd pointed to the difficulty in distinguishing between less serious governmental acts for which immunity would be available and more serious governmental acts for which it would not.[451] Second, in response to Spain's contention that there should be an exception from the general rule of immunity for the crimes of hostage-taking and torture which have been made the subject of international conventions, Lord Lloyd responded that neither convention provides that constitutionally responsible rulers are subject to punishment for these crimes.[452] The absence of such a provision was significant to him because such a provision was included in the international convention govern-

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449. First Law Lords' Judgment, *supra* note 2, at 923 (Lord Lloyd). Lord Lloyd cites the following authorities: Sir Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recueil des Cours 89 (1994-III); SATOW'S GUIDE TO DIPLOMATIC PRACTICE ¶ 2.2 (Lord Gore-Booth ed., 5th ed. 1979); Oppenheim's INTERNATIONAL LAW ¶ 456 (9th ed. 1992). He also calls attention to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 464 (1987), disagreeing with the interpretation of it given by Professor Brownlie.

Lord Lloyd cites the following cases: Duke of Brunswick v. King of Hanover, 6 Beav. 1 (1844), 2 H.L. Cas. 1 (1848); Hatch v. Baez, 7 Hun. 596 (N.Y. 1876); Underhill v. Hernandez, 168 U.S. 250 (1897); *contra* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

Of particular interest to Lord Lloyd was the U.S. case of Hilao v. Marcos, 25 F.3d 1467 (9th Cir. 1994), which he described as the closest case to finding official acts committed by head of state subject to suit or prosecution after he left office. Although there was no formal waiver of immunity in the case, he said the government of the Philippines made plain its view that the claim should proceed.

450. First Law Lords' Judgment, *supra* note 2, at 927 (Lord Lloyd).

451. *Id.* at 928 (Lord Lloyd). In making this point, he cited the analyses in the Divisional Court Judgment of Lord Chief Justice Bingham and Justice Collins. *Id.*

452. *Id.* at 928 (Lord Lloyd).

ing genocide[453] and Parliament did not adopt that provision when otherwise ratifying the convention against genocide.

Lord Lloyd also examined "the widespread adoption of amnesties," finding no contention that they were contrary to international law for failure to prosecute the beneficiaries,[454] and international tribunals, finding that their very existence demonstrates that former heads of state "cannot be tried in the ordinary courts of other states."[455]

Finding that Pinochet is entitled to immunity as former head of state in respect of crimes alleged against him based on principles of customary international law, Lord Lloyd turns to the former head of state immunity provision of the State Immunity Act. In this analysis, he concludes that the only relevant question is whether Pinochet's accused conduct constituted official acts performed in the exercise of his functions as head of state. Lord Lloyd finds that they were, for the same reasons he concluded they were as a matter of customary international law.

Lord Lloyd's approach to the interrelationship of statute and customary international law as parallel bodies of law informed by the same rationale is well illustrated by his conclusion:

> So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.[456]

3. Lord Millett Used Customary International Law Exclusively Because the Statutory Former Head of State Immunity Provision Was "Subsumed" by Customary International Law.

Lord Millett looked almost exclusively to customary international law to answer the question of whether the extradition crimes with which Pinochet was charged constituted "official acts in the exercise of his functions as head of state." He did not consider it necessary to parse the former head of state immunity provision in the State Immunity Act too closely "for any narrow statutory immunity is subsumed in the wider immunity in respect of other

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453. *Id.* Article IV of the Genocide Convention provides: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 6.

454. First Law Lords' Judgment, *supra* note 2, at 929-30 (Lord Lloyd). *See* discussion *supra* Part II.A.

455. First Law Lords' Judgment, *supra* note 2, at 930 (Lord Lloyd).

456. *Id.* at 933 (Lord Lloyd).

official or governmental acts under customary international law."[457] And once outside the realm of statute, Lord Millett examined whether the doctrine of state immunity protected conduct that was prohibited by international law.[458]

He took the position that even before the end of World War II, it was questionable "whether conduct contrary to the peremptory norms of international law attracted state immunity from the jurisdiction of national courts."[459] But this was largely an academic matter in 1946, he said, "since the criminal jurisdiction of such courts was generally restricted to offenses committed within the territory of the foreign state or elsewhere by the nationals of that state."[460]

With such developments as the Nuremberg trials, the adoption of the Universal Declaration of Human Rights in 1948,[461] the Israeli Supreme Court decision authorizing the Eichmann prosecution in 1962,[462] and the adoption of the International Covenant on Civil and Political Rights of 1966,[463] "[w]ar crimes had been replaced by crimes against humanity."[464] The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community."[465] This history lead Lord Millett to conclude that "the systematic use of torture on a large scale and as an instrument of state policy" had become a crime prohibited by international law. He said that this had occurred before 1973, though he gave no support for that date.[466]

In Lord Millett's view, customary international law authorizes "universal jurisdiction,"[467] extra-territorial jurisdiction by any country, in respect of

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457. Final Law Lords' Judgment, *supra* note 4, at 172 (Lord Millett).

458. *Id.*

459. *Id.*

460. *Id.* at 173 (Lord Millett).

461. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

462. Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 (Jm. 1961), *aff'd*, 36 I.L.R. 277 (S. Cr. 1962) (Isr.).

463. International Covenant on Civil and Political Rights 1966, Dec. 16, 1966, 999 U.N.T.S. 171 (1976).

464. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

465. *Id.*

466. *Id.* at 178 (Lord Millett). This finding allowed Lord Millett to find the "double criminality" requirement of the Extradition Act satisfied with respect to all of the torture counts. See discussion *supra* I.C.1 and I.C.5 for a discussion of the double criminality requirement.

467. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett). Lord Millett defines "universal jurisdiction" as "extra-territorial jurisdiction by any country." *Id.* The RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987) provides further guidance on the meaning of universal jurisdiction: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ." A comment to this section discusses "universal jurisdiction" as follows:

> [I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified

international crimes that satisfy two criteria. "First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order."[468] And because customary international law is part of U.K. common law, Lord Millett argued that U.K. courts "have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."[469]

Lord Millett concluded his analysis by contending that any immunity provided by statute was not relevant because it subsumed any immunity that might exist under customary international law. And he found that customary international law provided no immunity from charges of torture because that would be inconsistent with having established torture as an international crime. As such, Lord Millett would have held that customary international law provided the U.K. courts extra-territorial jurisdiction over the "systematic use of torture on a large scale and as an instrument of state policy" at any time after 1973 and that no former head of state immunity was available.[470]

4. Lord Phillips Used Customary International Law Exclusively Because the Statutory Former Head of State Immunity Provision Was Not Relevant to the Circumstances.

Lord Phillips acknowledged a duty to reconcile the statutory former head of state immunity provision with customary international law. But he did so in a manner unique to the Law Lords speaking in the two *Pinochet* judgments. In his view, the immunity provision applied only to acts performed in the United Kingdom, i.e., it had no extra-territorial application.[471]

Lord Phillips's analysis of customary international law was similarly unique. He acknowledges that former head of state immunity exists for civil proceedings.[472] But he finds nothing in custom (the primary source of inter-

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> offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.

Id. § 404 comment a.

468. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett). *See also* discussion *supra* note 320 of "jus cogens" norms.

469. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

470. *Id.* at 178 (Lord Millett).

471. *Id.* at 191-92 (Lord Phillips). As noted, none of the other Law Lords took this position and Lord Steyn specifically repudiated it. *See* First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn). However, given that former head of state immunity predated the development of any of the concepts of extra-territorial jurisdiction, Lord Phillips's contention has some force. I am grateful to Professor Michael Straubel for this insight.

472. Final Law Lords' Judgment, *supra* note 4, at 182 (Lord Phillips) (citing Hatch v. Baez, 7 Hun. 596 (N.Y. 1876)).

national law), judicial decisions, or the writings of authors on international law to provide a foundation for former head of state immunity in respect of criminal proceedings.

"In the latter part of this century," Lord Phillips says, "there has been developing recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur." Observing that "this is an area where international law is on the move," he argues that

> [t]here are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. . . . In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.[473]

This analysis leads Lord Phillips to conclude that former head of state immunity is not available in respect of international crimes. More specifically, he would hold that because torture is prohibited by international law and that the prohibition of torture has the character of jus cogens, the Torture Convention is incompatible with the applicability of former head of state immunity.[474]

Lord Phillips's conclusions, then, were that the statutory former head of state immunity provision was not available to Pinochet because in Lord Phillips's view it did not extend to extra-territorial conduct, and there was no immunity provided by customary international law to former heads of state in respect of international crimes such as torture.[475]

5. Summary.

Consistent with the strong tradition that U.K. common law incorporates customary international law, eight of the eleven Law Lords who spoke in the two *Pinochet* judgments employed customary international law in reaching their decisions on whether or not Pinochet was entitled to former head of state immunity. Five of those Law Lords used customary international law to interpret whether the conduct with which Pinochet was charged constituted official acts in the exercise of a head of state's functions within the meaning of the statutory former head of state immunity provision of the State Immunity Act. Three of those five—Lord Nicholls, Lord Steyn, and Lord Hutton— used

473. *Id.* at 188 (Lord Phillips).
474. *Id.* at 190 (Lord Phillips).
475. *Id.* at 192 (Lord Phillips).

a relatively superficial analysis of international tribunals and other similar developments in customary international law from the end of World War II to conclude that former head of state immunity was not available in respect of charges of torture. The other two—Lord Slynn and Lord Hope— used a more sophisticated analysis of those developments, identifying the extent, if any, that each explicitly abrogated sovereign immunity. From his analysis, Lord Slynn concluded that there was nothing in customary international law that abrogated statutory former head of state immunity in respect of the crimes with which Pinochet was charged. Lord Hope, however, found that former head of state immunity did not protect torture "of such a kind or on such a scale as to amount to an international crime."[476]

The other three Law Lords who looked to customary international law, for somewhat different reasons, the question was almost exclusively one of customary international law. For Lord Millett, statutory former head of state immunity was "subsumed" by customary international law. For Lord Phillips, statutory former head of state immunity was inapplicable to extra-territorial offenses. Lord Lloyd analyzed Pinochet's claim of common law immunity first and then applied the same rationale to statutory immunity.

D. Rethinking Customary International Law as Domestic Common Law.

My statutory construction argument claims that the Law Lords should not have employed customary international law to analyze and resolve Pinochet's statutory former head of state immunity provision claim. However, I cannot deny that the eight speeches just described were firmly grounded in the U.K. tradition of incorporating customary international law into U.K. common law, a tradition dating back to Lord Mansfield and Sir William Blackstone. To develop my argument, I need to take four more steps. First, I will examine the fact that the courts in the United States have, like their counterparts in the United Kingdom, treated customary international law as part of U.S. common law. Second, I will describe and adopt the position of two American scholars who contend that such treatment is unconstitutional as a violation of separation of powers. Third, I will unpack this separation of powers argument in an effort to show that, irrespective of the constitutional law issue involved, judges in the United Kingdom should employ the values that animate the principle of separation of powers as well. Finally, I will examine with approval, the speeches of three of the Law Lords in the *Final Law Lords' Judgment* who used statutory construction only to decide Pinochet's former head of state immunity claim.

476. *Id.* at 246 (Lord Phillips).

Customary International Law in the United States.

A review of several authorities suggests that customary international law holds a similar position in the United States to that in the United Kingdom, i.e., that customary international law is U.S. common law, or, more precisely, customary international law is federal common law. In fact, many of these authorities cite U.K. cases for this proposition.

A useful starting point is *Sabbatino*. As discussed in Part II,[477] a claimant to sugar expropriated by Cuba sought to collect the proceeds of the sale of that sugar in New York. To employ the act of state doctrine, Justice Harlan was required to explain why customary international law and not New York law applied. Justice Harlan stated:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Prof. Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers where *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.[478]

This passage seems to hold that *Erie* did not prevent federal common law from including customary international law. But is that the same as saying that customary international law is federal common law?

Perhaps the leading case is the holding in *Filartiga v. Pena-Irala*.[479] The *Filartiga* plaintiffs alleged that the defendant, while a police chief in Paraguay, had tortured and killed their son and brother. The question was whether the U.S. court had jurisdiction to hear the claim. The defendant argued that even if his conduct violated international law, the claim could not be heard in federal court because it did not "arise[] under . . . the laws of the United States . . ." as required by Article III of the Constitution.[480] But Judge Kaufman looked to the role of customary international law in both the United Kingdom and the United States:

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477. *See* discussion *supra* Part II.C of "Act of State" as a Separation of Powers Doctrine.
478. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).
479. Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
480. U.S. CONST. art. III § 2, cl. 1.

> The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. . . .
>
> During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263-64 (1st ed. 1765-69); 4 *id.* at 67. . . .
>
> It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England.[481]

At the same time that *Filartiga* and similar cases[482] were being decided, the American Law Institute was re-writing the Restatement of the Foreign Relations Law of the United States. The First Tentative Draft appeared in 1980 and, unlike the previous version, enunciated that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States."[483] In the introductory note to this section, the commentators said:

> International law was part of the law of England and, as such, of the American colonies. With independence, it became part of the law of each of the thirteen States. When the United States became a state it became subject to international law. From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done. Customary international law as developed to that time was law of the United States when it became a state.

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481. *Filartiga*, 630 F.2d at 886.
482. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
483. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 (1987).

> Customary law that has developed since the United States became a state is incorporated into United States law as of the time it matures into international law.[484]

Taking on whatever ambiguity may have attached to the discussion of *Erie* in *Sabbatino*, the commentators continued:

> *Erie R. R. Co. v. Tompkins* held that, in suits based on diversity of citizenship jurisdiction, a federal court was bound to apply the common law as determined by the courts of the State in which the federal court sat. On that basis, some thought that the federal courts must also follow State court determinations of customary international law. However, a different view has prevailed. It is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over State law by Article VI of the Constitution. Hence, determinations of international law by the Supreme Court of the United States, like its interpretations of international agreements, are binding on the States. Also, cases "arising under" customary international law arise under "the laws" of the United States. They are within the Judicial Power of the United States (Article III, Section 2) and the jurisdiction of the federal courts (28 U.S.C. §§ 1257, 1331).[485]

The Bradley & Goldsmith Critique.

To the extent that the Restatement restates U.S. law, customary international law appears to be incorporated into domestic U.S. law every bit as much as in the United Kingdom. But two scholars argue that while that might be "the modern position" of scholarship and jurisprudence, customary international law should not have the status of federal common law.

Professors Curtis A. Bradley and Jack L. Goldsmith acknowledge that the concept of customary international law as federal common law—what they call the "modern position"—appears to be well entrenched in American jurisprudence. "During the last twenty years, almost every federal court that has considered the modern position has endorsed it. Indeed, several courts have

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484. RESTATEMENT (THIRD) OF FOREIGN RELATIONS CHAPTER 2, introductory note (cross-reference omitted).

485. *Id.* (citations and cross references omitted).

referred to it as 'settled.' The modern position also has the overwhelming approval of the academy."[486]

These scholars have identified a number of serious implications of the modern position in the course of arguing that customary international law should not have the status of federal common law. They contend that, in the absence of treaty or statute, both separation of powers and *Erie*[487] dictate that customary international law is at most state common law.[488] This contention has provoked lively debate.[489] Much of the criticism of their argument is directed at the claim that federalism under *Erie* dictates that customary international law is state law. (The sarcastic title of Professor Koh's article, *Is International Law Really State Law?*, gives a sense of the tone of the debate.) But Professor Koh also makes a strong argument against the separation of powers rationale, demonstrating that common law-making need not intrude upon executive or legislative foreign relations prerogatives.[490] This criticism of the Bradley and Goldsmith project rings true to me. While Bradley and Goldsmith are right to object to "free-wheeling coordinate lawmaking power" exercised by courts,[491] Koh ably demonstrates that the use of customary international law by courts is not inevitably freewheeling nor lawmaking.

Yet embedded in Bradley and Goldsmith's separation of powers argument is a more modest point, a point with which I perceive little disagreement on the part of Professor Koh or the other critics. The point is that the notion of customary international law *where the political branches have acted* is an unconstitutional violation of separation of powers:

> At the level of separation of powers, it is difficult to see how the federal common law of foreign relations could authorize federal courts to bind the federal political branches to judicial interpretations of [customary international law]. *Sabbatino* recognizes that courts can make law in certain contexts involving foreign affairs. But the Court in *Sabbatino* made

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486. Bradley & Goldsmith, *supra* note 20, at 817.

487. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) ("There is no federal general common law.").

488. Bradley & Goldsmith, *supra* note 20, at 857.

489. *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). For Bradley & Goldsmith's replies to these criticisms, see generally Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 327-30 (1997).

490. Koh, *supra* note 489, at 1843-44.

491. Bradley & Goldsmith, *supra* note 20, at 816-17.

> law *in the face of political branch silence*, and the law it made flowed from a recognition of both political branch hegemony and relative judicial incompetence in foreign affairs. *Sabbatino's* federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field.[492]

Bradley and Goldsmith's point is that the use of customary international law in the United States in the absence of political branch silence, i.e., where the political branches have acted, is unconstitutional because it violates separation of powers. As I have repeatedly emphasized, it is not my argument that U.K. law should conform to U.S. constitutional law. But if we unpack the Bradley and Goldsmith point, I think we see more than just U.S. constitutional norms at stake.

First, Bradley and Goldsmith highlight "relative judicial incompetence" in foreign affairs. This is, of course, a characteristic of the United Kingdom as well as the United States. Indeed, this was the principal theme of Lord Wilberforce's speech in *Buttes Gas*.[493]

Second, Bradley and Goldsmith point out "political branch hegemony" in foreign affairs. Again, the United Kingdom also allocates both power over foreign affairs and law-making power in a manner similar to the United States. Lord Wilberforce spoke in *Buttes Gas* of the determination of certain "inter-state issues" and "issues of international law" as beyond the limits of the judicial function.[494] And several of the Law Lords in the *First Law Lords' Judgment* indicated that they thought the foreign relations issues in the case were for the executive branch to resolve.[495]

Key to the Bradley and Goldsmith point is their observation that "*Sabbatino* made law in the face of political branch silence."[496] Again, the United Kingdom is no different from the United States in viewing common law as displaced by statutory law. Indeed, as discussed above, one of the Law

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492. *Id.* at 861 (emphasis supplied).

493. *See supra* Part II.C.

494. *See supra* Part II.C.

495. Bradley & Goldsmith, *supra* note 20, at 861. First Law Lords' Judgment, *supra* note 2, at 918 (Lord Slynn), 934-35 (Lord Lloyd), 946 (Lord Steyn). *See* discussion *supra* Part II.B.

496. Their principal critics appear to acknowledge this point. *See* Neuman, *supra* note 491, at 376 (acknowledging that "contrary norms found in the Constitution, federal statutes or treaties, or valid presidential acts . . . supersede the applicability of . . . particular rule[s] [of customary international law].").

Indeed, Professor Koh criticizes Bradley and Goldsmith for not being true to the point they make. He says that they endorse an approach that would cause courts to construe more narrowly than Congress intended statutes enacted to incorporate into domestic U.S. law international human rights norms. *See* Koh, *supra* note 489, at 1845-46.

Lord's speeches explicitly recognized that any judicial use of customary international law was "subject to the overriding effect of statute law."[497]

My broad point is that while Bradley and Goldsmith criticize as unconstitutional U.S. courts giving customary international law precedence over statutory law, the values that animate the constitutional principle at stake, separation of powers, also inform U.K. jurisprudence. No more in the United Kingdom than in the United States are courts justified in exercising "free-wheeling coordinate lawmaking power . . . in the foreign affairs field."[498] To honor these values, U.K. courts should—in a situation like this where Parliament has acted to provide statutory former head of state immunity—decide the question presented on the basis of the statute as enacted.

E. Lord Browne-Wilkinson, Lord Goff, and Lord Saville Decided the Availability of Former Head of State Immunity Solely by Measuring the Impact of Parliament's Adoption of the Torture Convention.

Three of the Law Lords in the *Final Law Lords' Judgment*—Lord Browne-Wilkinson, Lord Goff, and Lord Saville—did analyze Pinochet's former head of state immunity claim using an approach similar to that which I advocate. They each began with the statutory former head of state immunity provision, noted its force, and looked to—but only to—the Torture Convention as a possible source for abrogating the statutory provision. I say this approach is similar to the one I advocate because the Torture Convention, as a treaty ratified by the United Kingdom and its substantive criminal provision enacted into the Criminal Justice Act, is domestic U.K. law. As such, reconciling the provisions of the Torture Convention (and the torture provisions of the Criminal Justice Act) is the equivalent of statutory construction.

Lord Browne-Wilkinson.

Lord Browne-Wilkinson was of the view that the statutory former head of state immunity provision protected Pinochet in respect of "acts done by him as head of state as part of his official functions."[499] And as to whether the "alleged organization of state torture (if proved) would constitute an act committed by Senator Pinochet as part of his official function as head of state,"[500] Lord Browne-Wilkinson looked to the Torture Convention for an answer:

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497. First Law Lords' Judgment, *supra* note 2, at 157 (Lord Lloyd) (quoting OPPENHEIM'S INTERNATIONAL LAW 57 (9th ed. 1992)). *See* discussion *supra* Part II.B.

498. Bradley & Goldsmith, *supra* note 20, at 861.

499. Final Law Lords' Judgment, *supra* note 4, at 113 (Lord Browne-Wilkinson).

500. *Id.* at 112.

> I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts.[501]

But to Lord Browne-Wilkinson, the Torture Convention provided several reasons for concluding that the implementation of torture cannot be a state function. First, he pointed out, it provided worldwide universal jurisdiction.[502] Second, it required all member states to ban and outlaw torture. Third, because an essential feature of the international crime of torture is that it must be committed "by or with the acquiescence of a public official or other person acting in an official capacity," all defendants in torture cases will be state officials. The intent of this provision, Lord Browne-Wilkinson said, cannot be to exempt from liability the person most responsible for torture while inferiors who carried out orders are liable.[503]

Lord Browne-Wilkinson concluded that "all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.[504]

Lord Goff.

Lord Goff was the only vote for Pinochet in the *Final Law Lords' Judgment.* In his view, the State Immunity Act

> Provide[s] the sole source of English law on this topic. This is because the long title to the Act provides, inter alia, that the Act is "to make new provision with regard to the immunities and privileges of heads of state."[505]

Lord Goff made the same point as Lord Slynn and Lord Hope about the various international tribunals that had been convened to address torture—that they were "all concerned with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts."[506] This led him to the conclusion that, "if state

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501. *Id.* at 114 (Lord Browne-Wilkinson).
502. *Id.*
503. *Id.* at 114-15 (Lord Browne-Wilkinson).
504. *Id.* at 115 (Lord Browne-Wilkinson).
505. *Id.* at 118 (Lord Goff).
506. *Id.* at 121 (Lord Goff).

immunity in respect of crimes of torture has been excluded at all in the present case, this can only have been done by the Torture Convention itself."[507]

Lord Goff's analysis of the Torture Convention was careful and persuasive. He first argued that a state's waiver of its immunity by treaty must be express and that there was nothing in the Torture Convention or otherwise to suggest that Chile had waived its immunity.[508] But Lord Goff recognized that the Torture Convention was not being invoked to suggest waiver on Chile's part but rather for the proposition that "torture does not form part of the functions of public officials or others acting in an official capacity . . . ." He quite rightly observed that such a proposition can only be derived from the Torture Convention by implication and made several arguments why such an implication should be rejected. First, he said, nothing in the negotiating history of the Convention suggests that any waiver of state immunity was considered. Second, he continued, there were a number of reasons why parties to the Torture Convention might have been unwilling to relinquish state immunity, including allowing former heads of state to travel abroad without worry of being subjected to "unfounded allegations emanating from states of a different political persuasion."[509] Lord Goff concluded that the implication that the Torture Convention abrogated former head of state immunity should "be rejected not only as contrary to principle and authority, but also as contrary to common sense."[510]

Lord Saville.

Lord Saville employed essentially the same analysis as Lord Browne-Wilkinson with perhaps an even tighter statutory construction methodology. He took the position that because of the operation of the former head of state immunity provision of the Extradition Act, Pinochet was immune from extradition "unless there exists, by agreement or otherwise, any relevant qualification or exception to the general rule of immunity. . ."[511] To Lord Saville, the only possible relevant qualification or exception was to be found in the Torture Convention. He said:

> It is important to bear in mind that the Convention applies (and *only* applies) to any act of torture "inflicted by or at the instigation of war with the consent or acquiescence of a public official or other person acting in an official capacity.'
> . . .

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507. *Id.*

508. *Id.* at 123-24 (Lord Goff) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

509. *Id.* at 127-30 (Lord Goff).

510. *Id.* at 130 (Lord Goff).

511. *Id.* at 168 (Lord Saville).

> To my mind it must follow in turn that a head of state, who for state purposes resorts to torture, would be a person acting in an official capacity within the meaning of this Convention. He would indeed to my mind be a prime example of an official torturer.[512]

Lord Saville thought that it was impossible that immunity could exist consistently with the terms of the Torture Convention, at least for countries that had ratified the Torture Convention. Lord Saville commented that each state agreed that one can exercise jurisdiction "over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."[513]

Chile, Spain, and the United Kingdom had been parties to the Torture Convention since at least December 8, 1988, Lord Saville noted, and so those countries in his view must be considered to agree that former head of state immunity could be invoked in cases of alleged official torture.[514]

Lord Saville appeared to be replying to Lord Goff when he concluded by saying, "I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms."[515]

F. Conclusion.

The organization and operation of democracy in both the United Kingdom and the United States reflects certain common values. One is that the judiciary does not have the competence of the executive or the legislature in the realm of foreign affairs. A second is that the law-making function is derivative of the electorate and, although the judiciary has a law-finding function, it is subject to the law-making authority of the legislature. These values underpin the constitutional doctrine of separation of powers in the United States but should also guide, in my view, judicial decision-making in the United Kingdom.

Courts in the United Kingdom and the United States have for many years treated customary international law as a part of domestic common law. In the absence of statute, such decision-making is unremarkable. But in the face of statute, its justification vanishes under the considerations of "political branch hegemony and relative judicial incompetence in foreign affairs."[516] Courts in

512. *Id.* at 169.
513. *Id.*
514. *Id.*
515. *Id.*
516. Bradley & Goldsmith, *supra* note 20, at 861.

such circumstances have no "free-wheeling coordinate lawmaking power ... in the field of foreign affairs."[517]

In my view, the approach of eight of the Law Lords in the two Pinochet judgments came close to being exercises of "free-wheeling ... lawmaking power." They employed arguments from propositions of customary international law never before incorporated in U.K. law to support the conclusion that Pinochet was or was not entitled to former head of state immunity. In doing so, they went well outside the bounds of any legislation or treaty enacted by Parliament.

I find the approaches of Lords Browne-Wilkinson, Goff, and Saville more congenial. They struggled to make sense of the former head of state immunity provision adopted by Parliament in light of a treaty (the Torture Convention) and another statute (the torture provisions of the Criminal Justice Act) without straying far afield into customary international law. They attempted to give meaning to the enactments of the legislature, not make law themselves. It is an approach that reflects the very same values that animate the principle of separation of powers.

CONCLUSION

Beyond my broad abstention and statutory construction claims, I have tried in this article to illustrate several themes about this most extraordinary episode in world legal history, including the following:

(1) The United Kingdom's court of last resort, the Appellate Committee of the House of Lords, rendered three opinions in *Pinochet*, two on the merits of his claim to sovereign immunity as a former head of state. The House of Lords vacated its first decision when it found that one of the judges who participated in it had an impermissible conflict of interest. As such, it is an important case on judicial bias and disqualification. When the House of Lords issued its second decision on the merits, it again found that Pinochet was not entitled to former head of state immunity but for very different (and much more narrow) reasons. As such, it is an important case on appellate procedure.

(2) *Pinochet* required construction of the "double criminality" requirement of the Extradition Act, required the Home Secretary to make important determinations under §§ 7 and 12 of the Extradition Act, and required a magistrate's court to make an important determination under § 9 of the Act. As such, it is an important case on extradition law.

(3) *Pinochet* implicated important foreign relations considerations: acquiescence by the U.K. government to Chilean government behavior under Pinochet; opposing positions taken by two U.K. allies (Chile and Spain); extraterritorial recognition of domestic reconciliation amnesties. As such, it is an important case on foreign and diplomatic relations.

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517. *Id.*