Pinochet hearing hinges on permissibility of torture

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Former Chilean dictator Augusto Pinochet's defence team made an explicit call for torture to be recognised as a legitimate function of a head of state. Focusing her argument against Pinochet's extradition on his claim to sovereign immunity, Clare Montgomery told the Law Lords that only Chile could mount a prosecution. "We would contend that where torture is committed within the context of the military enforcing some internal security policy ... it still falls within the definition of sovereign or government functions. And sovereign or public acts are entitled to immunity."

"When an outside nation tries to prosecute, it is acting under the laws of its own courts, not as a representative of the international community," she went on. Prosecution lawyers have consistently argued that the International Convention Against Torture accepted by Chile, Britain and Spain--the nation seeking Pinochet's extradition--makes torture an international crime. It does not recognise immunity and gives all nations the right, and even a duty, to intervene or prosecute.

Pinochet's lawyers not only oppose this on the grounds that it is an infringement of national sovereignty, but Montgomery even questioned whether torture and hostage-taking could be considered international crimes. "They are crimes that give rise to international concern, which is not the same thing." International crimes must be linked to armed conflict, she said.

Montgomery backed up her chilling defence of the state's right to carry out torture by asserting that the offences allegedly committed by Pinochet before the coup were not extraditable. Chile, she said, only ratified the international convention outlawing torture in 1987, and its national sovereignty could not therefore be abused by other countries seeking to prosecute its officials for torture before that.

This was in answer to the recent shift in course by the prosecution lawyers. They now argue that the general is not immune from prosecution under British law because he committed many crimes prior to assuming the position of head of state, in the run-up to and during the September 11, 1973 coup. The prosecution pointed out that head of the military junta and head of state were not synonymous and the question of immunity only arose "from the moment he [Pinochet] became head of state". Pinochet did not formally become head of state until nine months after the coup. On Monday, the day the defence began its presentation, five former Chilean sailors emphasised this point at a news conference. They told how they were seized and tortured by fellow naval officers involved in the planned coup that brought Pinochet to power. The 5 were among 62 naval officers who tried to inform senior Chilean politicians of the coup plot.

It was in response to this argument that the Law Lords requested confirmation from the Foreign Office as to precisely when Pinochet was recognised as a head of state by the British government. Though not formally released to the public, the Foreign Office's response was leaked to the Associated Press. It stated that the Foreign Office did not recognise Pinochet as Chilean head of state after he seized power in September 1973, but did recognised his government 11 days later. This leaves the issue open to differing interpretation by the Law Lords. The Foreign Office goes on to explain that, at the time Pinochet seized power, there was "no practice of according separate or express recognition to heads of state.... The new government was recognised by Her Majesty's Government on September 22 the same year. In January 1974, Queen Elizabeth sent Pinochet a note calling him the 'President of the Governing Council of

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Chile'."

What is revealing is the basis on which the Foreign Office justified the British government's decision to extend recognition to Pinochet's junta. Its letter said, "At the time, Her Majesty's Government still adhered to the policy (abandoned in 1980) of according recognition to new governments which came to power unconstitutionally, provided that they met certain conditions."

Primary amongst these was that the new regime had *effective control* --a criteria that could only serve to sanction and even encourage actions taken to suppress opposition to the rule of governments such as Pinochet's junta.

Montgomery's recent line of argument is not new. It was accepted as the basis for the original High Court ruling rejecting Spain's extradition request in October last year, that is now the subject of Pinochet's appeal.

Amnesty International, in its submission to the Law Lords arguing for extradition, begins by opposing this decision given by Lord Chief Justice Bingham of Cornhill that rejected criminal jurisdiction over Pinochet by either Spain or the United Kingdom. Bingham concluded that, under English law, a former head of state of a foreign country was "entitled to immunity as a former sovereign from the criminal and civil process of the English courts".

Amnesty notes that the two other High Court judges who heard the case, Justices Collins and Richards, agreed with Bingham that this was true with respect to systematic murder, torture, 'disappearance', illegal detention and forcible transfer committed outside the United Kingdom while he was head of state (*Judgement*, page 30).

Justice Collins specifically rejected the argument that such crimes could never be part of the sovereign functions of a head of state: "Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to look very far back in history to see examples of that sort of thing having happened. There is in my judgement no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists" (*Judgement, Opinion of Justice Collins*, page 34).

In the latest hearing, Lord Chief Justice Nicolas Browne-Wilkinson declared, "I believe this case will turn on the torture convention almost alone." Proceedings are expected to conclude on Thursday, though a decision will not be made for some time after.

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