

## Essay

# THE LAW AND POLITICS OF THE PINOCHET CASE

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*[T]his sovereign authority which is a State's own right, does not at present have an absolute character, not even in the internal order, due to the international atmosphere reigning in the world. When super-states and international organizations appeared, the field of action of the State's power became more and more limited, due to agreements and treaties that are subscribed in the international arena. Multiple obligations and restrictions that nations contracted with each other and with international organizations, have left them virtually without sovereign liberty.*

Augusto Pinochet Ugarte<sup>1</sup>

### I. INTRODUCTION

On a Friday evening in October 1998, General Augusto Pinochet, the eighty-two year old former general and dictator of Chile, was arrested in London by the Metropolitan Police at the request of a Spanish magistrate. Thus began a saga with profound implications for the substance, enforcement, and public perception of international law. The *Pinochet* case<sup>2</sup> involved—and will have a significant impact

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1. AUGUSTO PINOCHET UGARTE, INTRODUCTION TO GEOPOLITICS 147 (1968). At the time the book was published, Pinochet was teaching at Chile's Army War Academy. This passage was drawn to my attention by James Silver, J.D., M.A., Duke University, 2001.

2. For the purposes of this Essay, “*Pinochet* case” will be used to refer to the whole sequence of the political, diplomatic, and legal proceedings. This Essay also discusses the *Pinochet* case in relation to its individual proceedings in the British courts: Augusto Pinochet Ugarte,

upon—a number of legal areas, including international criminal law, human rights, state immunity, jurisdiction, extradition, and the relationship between international law and domestic legal systems.<sup>3</sup>

The case cannot be fully understood solely from a legal perspective. A variety of non-legal factors shaped both the proceedings and the outcome: domestic politics; international diplomacy; the arms trade; the individual personalities, backgrounds, and self-perceived roles of judges and politicians; the activities of non-governmental organizations, transnational corporations, and the growth of transnational networks between judicial authorities from different countries; and the media and international public opinion. Given the array of legal issues and non-legal factors involved, the *Pinochet* case provides an excellent window into the complicated relationship between international law and politics.<sup>4</sup> This Essay seeks to take advantage of this opportunity, explaining how the existence of legal rules and institutions shaped the options available to judges and politicians involved in this case, and ultimately constrained their behavior.

## II. PINOCHET IN CONTEXT

Pinochet was accused by Spanish magistrate Baltasar Garzon of having, in the decades following his 1973 violent overthrow of the democratically elected government of President Salvador Allende, authorized (or at least knowingly permitted) the torture, disappear-

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[1999] 38 I.L.M. 68 (Q.B. Div'l Ct. 1998) (referred to as "*Divisional Court*" in the text); R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998) (referred to as "*Pinochet I*" in the text) *annulled* by R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No.2), 2 W.L.R. 272 (H.L. 1999) (referred to as "*Pinochet II*" in the text); R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 827 (H.L. 1999) (referred to as "*Pinochet III*" in the text).

3. For a legal analysis of the *Pinochet* case, see generally J. Craig Barker, *The Future of Former Head of State Immunity after ex parte Pinochet*, 48 INT'L & COMP. L. Q. 937 (1999); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999); Michael Byers, *Decisions of British Courts During 1999 Involving Questions of Public International Law*, 70 BRITISH YEARBOOK OF INT'L L. 277, 277-95 (1999); Christine Chinkin, *In Re Pinochet*, 93 AM. J. INT'L L. 703 (1999); Hazel Fox, *The Pinochet Case No. 3*, 48 INT'L & COMP. L. Q. 687 (1999); Colin Warbrick, *Extradition Law Aspects of Pinochet 3*, 48 INT'L & COMP. L. Q. 958 (1999).

4. I focus upon the relationship between law and politics here, in an effort to provide more "real-life" material for an ongoing interdisciplinary discussion about how legal systems, both domestic and international, affect how decision-makers behave. On the relationship between international law and politics, see generally, LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1968); ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999); Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Legalization and World Politics*, 54 INT'L. ORG. 3 (2000); *THE ROLE OF LAW IN INTERNATIONAL POLITICS* (Michael Byers ed., 2000).

ance, and taking as hostage of thousands of people. His victims included not only Chilean citizens, but also citizens of other countries, including the United Kingdom and Spain. His crimes were alleged to have formed part of an international conspiracy to track down and murder opponents of his military regime in Chile, the United States, and elsewhere.<sup>5</sup>

Some of the crimes, most notably the acts of torture, were “crimes under international law”—perpetrators of which may be prosecuted by any state regardless of their nationality, the nationality of their victims, or the country in which the acts were committed.<sup>6</sup> For this reason, at the time of Pinochet’s arrest, there appeared to be no obstacle to his extradition nor any apparent impediment to his prosecution in the United Kingdom.<sup>7</sup> However, Pinochet’s lawyers argued that, as Chilean head of state during the period in which most of the alleged crimes were committed, Pinochet was immune from the jurisdiction of the British courts, including its extradition procedures. By doing so, the lawyers forced British judges, first in the Divisional Court and then in the House of Lords, to choose between two very different views of international law.

According to the traditional view, only states can be relevant actors in international law. States are sovereign and theoretically equal; it follows that one state cannot be impugned before the courts of another and, inexorably, that a head of state (or a former head of state) is entitled to claim absolute immunity from the jurisdiction of national courts, whether in criminal or civil proceedings.<sup>8</sup>

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5. The alleged crimes included the 1976 murder of Orlando Letelier in Washington, D.C. See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984). For details on Chile’s payment of compensation, see J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 55-58 (1998). The U.S. Department of Justice has recently reopened a grand jury investigation into that crime. See Frederic L Kirgis, *Possible Indictment of Pinochet in the United States*, ASIL-INSIGHT (Mar. 2000) <<http://www.asil.org/insigh42.htm>>.

6. For a discussion of universal jurisdiction, see Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145 (1973); Derek Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources*, 53 BRIT. Y.B. INT’L L. 1 (1982); STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 140-41 (1997).

7. Section 134 of the Criminal Justice Act of 1988, c.33, which implemented the 1984 United Nations Torture Convention into British law, affirms the universal jurisdiction of domestic courts to prosecute or extradite those accused of torture.

8. For the traditional doctrine of “absolute” state (or “sovereign”) immunity, see *The Prins Frederick*, 2 Dods. 451, 165 Eng. Rep. 1543 (Adm. 1820); *Compania Naviera Vascongada v. S.S. Cristina*, [1938] App. Cas. 458, 490 (judgment of Lord Atkin). See generally *Schooner Exchange v. McFadden*, 11 U.S. 116 (1812).

Until recently, state immunity presented an almost insurmountable barrier to the effective enforcement of international human rights by national courts, even when those courts might have been otherwise willing to exercise jurisdiction.<sup>9</sup> Under conceptions of international law that had existed for centuries, the idea that a former sovereign could be hauled up before the courts of another state and held accountable for gross violations of human rights was almost inconceivable. Since the worst violations of human rights were often committed (or at least permitted) by heads of state, or other government officials, this had serious consequences for authorities responsible for enforcing international criminal law.

Traditional international law has changed profoundly since the Second World War. An alternative view has emerged, positing that the international community comprises not only states, but individuals, peoples, inter-governmental organizations, non-governmental organizations, and corporations.<sup>10</sup> These entities have emerged as international actors engaged in international discourse and, in some areas, they have been granted important rights, such as the right of individuals not to be tortured.<sup>11</sup>

The new view of international law also goes a crucial step further; individuals are able to enforce their most fundamental rights even against states and state officials. This was clearly established by the Nuremberg and Tokyo Tribunals, which were set up to try alleged

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9. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Nelson v. Saudi Arabia*, 507 U.S. 349 (1993); *Al-Adsani v. Kuwait*, 107 I.L.R. 536 (1996).

10. See, e.g., *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. (April 11) (recognizing the international legal personality of the United Nations); U.N. SECRETARY GENERAL, *THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS*, U.N. Doc. A/CN.4/5 (1949) (describing the Charter's imposition of international legal responsibility on individuals). The principles set out in the Nuremberg Judgment were subsequently affirmed by UN General Assembly Resolution, 95(I), at 188, U.N. Doc A/64/Add.1 (1946). For a discussion of NGOs' role in global human rights arenas, see generally Christine Chinkin, *Human Rights and the Politics of Representation: Is There a Role for International Law?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 131 (Michael Byers ed., 2000).

11. On the right not to be tortured, see International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., U.N. Doc. A/RES/3452 (1975); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/139/51 (1984) (entered into force June 26, 1987), reprinted in 23 I.L.M. 102 (1984); see also NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2d ed. 1999).

war criminals after the Second World War.<sup>12</sup> More recently, the principle that there is no immunity for anyone with respect to crimes under international law has been incorporated into the statutes and decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>13</sup> Moreover, in July 1998, 120 states adopted the Rome Statute of the International Criminal Court with jurisdiction over war crimes and crimes against humanity, including those committed during peacetime.<sup>14</sup> The statute expressly provides that heads of state have no immunity with respect to crimes under international law.<sup>15</sup>

Thus, there is no shortage of substantive content to human rights and international criminal law, nor is most of the substance new. The Universal Declaration on Human Rights, adopted in 1948, set out the obligations owed to individuals by states and state officials under international law, including the obligation not to torture people<sup>16</sup>—the principal crime of which Pinochet was accused. However, the declaration and subsequent human rights treaties failed to provide any mechanism for the international prosecution of people accused of crimes under international law.<sup>17</sup>

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12. See Charter of the International Military Tribunal, Aug. 8, 1945, arts. 6-8. The Charter was subsequently affirmed by U.N. General Assembly Resolution 95(I), U.N. Doc A/64/Add.1, at 188 (1946).

13. See Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at art. 5, U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998); Statute of the International Criminal Tribunal for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994); see also Prosecutor v. Milosevic, No. IT-99-37-I (Int'l Crim. Trib. Former Yugo., Trial Chamber, May 24, 1999); Prosecutor v. Kamanda, No. ICTR 97-23-5 (Int'l Crim. Trib. Rwanda, Sept. 4, 1998).

14. See generally HERMAN A. M. VON HEBEL, REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOR OF ADRIAN BOS (1999); OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1999); ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (1999).

15. See Rome Statute of the International Criminal Court, U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc., art. 27, A/Conf.183/9 (1998) [hereinafter Rome Statute]. It should be noted that there is a possible contradiction between Article 27 and Article 98 of the Rome Statute. Although Article 27 says that nobody, not even a head of state, benefits from immunity before the Court, see *id.*, Article 98 says that a state is not required to surrender an accused if to do so would violate its obligations under international law with respect to state or diplomatic immunity, see *id.*

16. G.A. Res. 17, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810, art. 5 (1948).

17. A number of relatively efficacious treaty-based mechanisms do exist, including the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. OPI/598 (Mar. 1976), the European Court of Human Rights and the Inter-American Commission and Court of Human Rights. See generally A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE

Until recently, national courts provided the only enforcement power over international criminal law.<sup>18</sup> Some human rights treaties stated that the violation of certain rights gave rise to universal jurisdiction on the part of national courts<sup>19</sup> and universal jurisdiction over at least some crimes is widely regarded as existing under customary international law.<sup>20</sup> Numerous countries have implemented these international enforcement powers into their national legal systems, as the United Kingdom did with respect to torture in its Criminal Justice Act of 1988.<sup>21</sup> However, most national courts have been reluctant to apply universal jurisdiction, other than to war crimes committed during the Second World War.<sup>22</sup> As a result, many victims of serious human rights abuses were left with little more than empty words—weak protection in the face of military dictators and their henchmen.

There are several explanations for the reluctance of national courts to apply universal jurisdiction. Judges in national courts are usually not experts on international law and are often reluctant to

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WORLD (4th ed. 1996). However, these mechanisms only provide for complaints against states, and not for the prosecution of individuals. Moreover, the application of these mechanisms all have a limited scope, whether geographically or in terms of the refusal of many states to ratify their constitutive treaties.

18. See RATNER & ABRAMS, *supra* note 6, at 139-61.

19. See generally the 1949 Geneva Conventions on the Laws of War: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For further examples, see the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, Supp. No. 51, at 197, U.N.Doc. A/139/51 (1984) (entered into force June 26, 1987), reprinted in 23 I.L.M. 102 (1984); International Convention Against the Taking of Hostages, opened for signature Dec. 17, 1979, 1316 U.N.T.S. 205.

20. See Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (Jm. D.C. 1961), *aff'd*, 36 I.L.R. 277 (Isr. S. Ct. 1962); RODLEY, *supra* note 11; RATNER & ABRAMS, *supra* note 6.

21. See Criminal Justice Act of 1988, *supra* note 7. See generally FIONA MCKAY, UNIVERSAL JURISDICTION IN EUROPE (June 30, 1999) (writing on behalf of Redress, a charity “seeking reparation for torture survivors”).

22. The courts of some continental European states have begun to exercise universal jurisdiction with respect to crimes committed more recently, for example, during the conflict in the former Yugoslavia. See FIONA MCKAY, UNIVERSAL JURISDICTION IN EUROPE (June 30, 1999). Following the Pinochet case, in early 2000 a court in Senegal indicted Hissene Habre, the former head of state of Chad, on charges of torture. See *An African Pinochet*, N.Y. TIMES, Feb. 11, 2000, at A30.

rely heavily on it when rendering their decisions. In particular, they may not be fully aware of the rapid and profound changes in the international legal system that occurred in the latter half of the twentieth century, especially with respect to human rights and the consequent decline of traditional sovereign prerogatives. An equally important explanation concerns the political implications following from one state's assertion of jurisdiction over the national of another state for crimes having no apparent connection with the first state. Politicians and publics tend to be very attached to traditional concepts of sovereignty and may feel greatly affronted by what—to international lawyers—are legitimate applications of widely accepted rules of international law. As a result, governments, and perhaps judges, will weigh the often ambiguous benefits of enforcing international criminal law in a specific case against the very real costs that may result to their country's political alliances, national security, and trade.

The *Pinochet* case raised precisely these issues. It taxed the imagination and understanding of more than twenty national judges, none of whom were specialists in international law, nor young enough to have studied international law when it was based on anything other than the traditional, state-centric model. The case also raised extremely sensitive political questions concerning the relationship between European powers and their former colonies and the appropriateness, rather than simply the legality, of interfering in the domestic affairs of states undergoing delicate transitions from authoritarianism to democracy. From the perspective of a changed geopolitical situation having new and perhaps far less dangerous imperatives than those that had previously prevailed, the *Pinochet* case called into question the wisdom of re-examining anti-communism actions taken during the Cold War. Lastly, the case threatened to damage an economic relationship of considerable importance, with British companies having invested heavily in Chile, and with Chile being an important market for the British arms industry.

The proceedings in the *Pinochet* case were thus significant in two inexorably intertwined respects, one primarily legal and the other primarily political. First, the proceedings posed, in the most direct terms, a choice between two competing visions of the international legal order. On the one hand, there was the international law of the past whereby a head of state could do what he wished and rely, for the rest of his life, on the fact that he was immune before the courts. On the other hand, there was the international law of the present and

future, in which a former head of state was not immune from claims brought by, or in relation to, egregious wrongs perpetuated on innocent victims. Second, the proceedings were significant because they challenged judges and politicians in the United Kingdom to exercise the universal jurisdiction available to them in a high profile situation of considerable political sensitivity, where the politically expedient decision would—almost certainly—have been to set Pinochet free. The intertwined character of the law and the politics of the *Pinochet* case, and the way in which rules and legal institutions constrained the behavior of politicians and judges, may be best exposed through a chronological account of the arrest and subsequent proceedings.

### III. THE ARREST

The path towards legal proceedings in the *Pinochet* case began with Judge Garzon, the Spanish magistrate, who had developed a file on Pinochet while investigating crimes against Spanish citizens committed by the Argentine military junta between 1976 and 1983. His research unearthed evidence of a conspiracy code-named “Operation Condor” whereby the Argentine and Chilean regimes cooperated in tracking down, torturing, and eliminating their opponents within those countries and abroad. After reading a news report of Pinochet’s presence in London, Garzon’s research enabled him to fax an INTERPOL arrest warrant to the Metropolitan Police without the delay which is usual in such situations—while evidence is gathered, the authorities ponder the situation, and the suspect flees the country.<sup>23</sup>

It was of considerable assistance to Garzon that both Spain and the United Kingdom had ratified the 1957 European Convention on Extradition.<sup>24</sup> The Convention, adopted under the aegis of the Council of Europe, provided for a system of strong judicial cooperation with respect to the transfer of accused persons between different

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23. A recent example of this involved Konrad Kalejs, who was accused of killing thousands of Jews in Latvia during the Second World War. Kalejs, now an Australian citizen, had been deported from the United States and Canada. Informed of his presence in the United Kingdom, British authorities began their own investigation, whereupon Kalejs fled the country. See Vikram Dodd, *War Crime Suspect Flies to Australia: Straw Admits Kalejs Should not have been Allowed into Britain*, GUARDIAN (LONDON), Jan. 7, 2000, available in 2000 WL 2701581. Incidentally, an opportunity to arrest Pinochet had arisen twice before, in the Netherlands and in the U.K.; on both occasions, Pinochet fled before prosecuting authorities made any move to arrest him.

24. *Opened for signature* Dec. 13, 1957, E.T.S. No. 24 <<http://www.coe.fr/eng/legaltxt/24e.htm>>. Spain ratified the Convention in 1982 and the United Kingdom in 1991.

European countries. Indeed, unlike in most extradition situations, the degree of cooperation envisaged was so high that requesting states were not required to produce *prima facie* evidence of the case against the accused.<sup>25</sup>

Upon receiving the INTERPOL arrest warrant from Spain, the Metropolitan Police quickly sought a British warrant from a local stipendiary magistrate, Nicholas Evans.<sup>26</sup> When the police called on Evans late on the evening of Friday, October 16, 1998,<sup>27</sup> Evans immediately wrote out a warrant that the police used to arrest Pinochet later that same evening.

In the weeks and months following the arrest, requests for Pinochet's extradition were received from three other countries: Switzerland, Belgium, and France. These requests confirmed that a strong case existed against Pinochet, that the alleged crimes were crimes under international law, and that Judge Garzon was not acting unreasonably. Were it not for the Spanish magistrate's quick reaction to Pinochet's presence in London, however, the judicial authorities in Switzerland, Belgium, and France would never have had the opportunity to react.

#### IV. THE DIVISIONAL COURT

Pinochet (or at least a cadre of his supporters) responded to his arrest by hiring some of London's leading criminal defense lawyers.<sup>28</sup> They immediately filed a writ of *habeas corpus* (a demand for the release of a wrongfully arrested person) before the Divisional Court (which is sometimes referred to as the "High Court"). They also sought leave for judicial review, alleging that Jack Straw, the Secretary of State for the Home Department, had acted wrongfully by not ordering Pinochet's release. The case was heard by a panel of three

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25. On the law of extradition more generally, see GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* (1998); M. CHERIF BASSIONNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (3d. ed. 1996).

26. This is typical practice for countries party to the European Convention on Extradition.

27. There were rumors that the police first consulted with the British Foreign Office, were told by a lawyer there that Pinochet was not entitled to diplomatic immunity, and relayed this information to Evans. The Foreign Office Legal Adviser was apparently out of the country at the time. While the junior lawyer who dealt with the query was correct in his assessment that there was no *diplomatic* immunity, he overlooked the issue of *state* immunity.

28. The legal profession in the United Kingdom is split between solicitors and barristers. Pinochet hired the solicitors firm of Kingsley Napley. They in turn hired the barristers Clive Nicholls, Q.C., and Clare Montgomery, Q.C., to present the oral arguments.

judges headed by Lord Chief Justice Bingham who, in his previous career as a barrister, had represented a number of foreign governments in state immunity proceedings. The other two judges were relatively junior by comparison, and had no background in international law.

The court quashed the warrant of October 16 on the basis that there was no “double criminality”: the crimes alleged against Pinochet—murder of Spanish citizens in Chile—would not have given jurisdiction to a British court in the analogous situation of British citizens murdered abroad. Double criminality is a basic requirement of extradition law. However, in response to a further request received from Judge Garzon, a second warrant had been issued in the interim. This second warrant focused on alleged crimes of torture, which was important because the United Kingdom, through the adoption of the Criminal Justice Act of 1988, had statutorily provided universal jurisdiction over the crime of torture. Although Pinochet’s lawyers argued that British courts did not have jurisdiction over torture committed abroad before the Act came into force, the judges held that the critical date for the purposes of double criminality was not the date the alleged crimes were committed, but rather the date on which the extradition request was received.<sup>29</sup>

This ruling on double criminality, however, was not conclusive, for the judges quashed the second warrant anyway. They did so on the grounds that, as a former head of state, Pinochet was entitled to traditional, absolute immunity from the jurisdiction of British courts.<sup>30</sup> Yet the judges ruled without hearing the key arguments against immunity. At this stage, Amnesty International and other international human rights organizations had not yet sought leave to intervene in the proceedings. The Crown Prosecution Service, acting for Spain, was represented by Alun Jones, Q.C., an expert in extradition law<sup>31</sup> who knew next to nothing about state immunity. The only party to the case who was aware of the many good (and later, in the House of Lords, decisive) arguments against immunity was the Secretary of State. The “Home Office” had engaged Sir Arthur Watts, Q.C., a former Legal Adviser to the Foreign Office and the author of the only monograph ever published on head of state immunity.<sup>32</sup> However, at

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29. See Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68, 79 (Q.B. Div’l Ct. 1998).

30. See *id.* at 85.

31. See generally ALUN JONES, JONES ON EXTRADITION (1995).

32. See Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 Recueil des Cours 1994-III.

the crucial juncture of the case, James Turner, Q.C., a barrister acting for the Home Office, rose to his feet and told the judges that the Secretary of State did not wish to take a position on the issue of immunity. This left the court, even if it had been otherwise inclined, with little option but to rule in favor of Pinochet.<sup>33</sup>

In the meantime, Amnesty International and other human rights organizations asked John Morris, the Attorney-General for England and Wales, to give his consent for a private prosecution in the United Kingdom (such consent is required by the torture provisions of the Criminal Justice Act).<sup>34</sup> He refused, citing concerns about immunity and the application of the Act to crimes committed before that statute had come into being.<sup>35</sup>

Both the British Government's refusal to take a position on the immunity issue and its refusal to allow a private prosecution stand in stark contrast to positions adopted by that same government in international negotiations. Only three months earlier, at the Rome Conference on a Permanent International Criminal Court, the British Government had committed itself to making it impossible for even *current* heads of state to claim such immunity before domestic or international courts.<sup>36</sup> Although the United Kingdom played an instrumental role in the negotiation of the Rome Statute, before it ratifies the statute it will probably have to amend its legislation so as to deny immunity from criminal jurisdiction to *all* heads of state—not just former heads of state like Pinochet—accused of crimes under international law.<sup>37</sup>

Moreover, the Rome Statute adopted an approach to international jurisdiction called “complementarity,” whereby the application of universal jurisdiction by national courts will remain the primary means of enforcement for international criminal law, with the Inter-

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33. See *Pinochet Ugarte*, 38 I.L.M. at 77-78.

34. See, e.g., Jamie Wilson & Amelia Gentleman, *Pinochet Wins His High Court Battle; He May be Responsible for 4,000 Deaths, But He Isn't Going to be Put on Trial Here*, GUARDIAN (LONDON), Oct. 29, 1998, available in 1998 WL 18674128; see also Criminal Justice Act of 1988, ch. 33, §135 (Eng.).

35. See, e.g., Geoffrey Bindman, *False Immunity: Whatever Hoffmann did Wrong, it is Absurd to Say Pinochet has Diplomatic Privileges; We Should Still Proceed Against Him in the New Year*, GUARDIAN (LONDON), Dec. 29, 1998, available in 1998 WL 24896659.

36. See Rome Statute, *supra* note 15, art. 27. See also, however, discussion *supra* note 15.

37. See State Immunity Act of 1978, §§ 14 & 20 (Eng.).

national Criminal Court providing a venue for only the most high profile—or domestically problematic—of cases.<sup>38</sup>

The Home Secretary's refusal to adopt a position on immunity in the Divisional Court and the Attorney General's refusal to consent to a private prosecution, strongly suggest that the British Government would have preferred to have seen Pinochet returned to Chile. In his public statements, however, Jack Straw was careful to insist that the matter was one for the courts, and not for politicians.<sup>39</sup> The Government had undoubtedly been advised that the chances of the courts ruling against Pinochet were extremely slim, and concluded that the potential for political damage could dramatically be reduced by having it seem that the law was entirely responsible for what, in some quarters (including the grassroots of the Labour Party), would have been an extremely unpopular decision.<sup>40</sup> For this reason, they would not have been at all concerned when the Crown Prosecution Service, at the request of Judge Garzon, appealed the case to the highest court in the United Kingdom: the House of Lords.

#### V. PINOCHET I: STATE IMMUNITY

The House of Lords is both the highest court *and* the second chamber of the British Parliament. However, only twelve members of the House of Lords sit in what is officially known as the "Judicial Appeals Committee." These "Law Lords" are professional judges drawn, in most cases, from the Court of Appeal. One might expect, therefore, that the case would not have changed significantly on appeal. However, four factors distinguished the appeal in the House of Lords from the proceedings in the Divisional Court: (1) the personal background of the judges; (2) the involvement of counsel specializing in international law; (3) the significant length of time taken to hear the case; and (4) an enormous amount of media attention.

By the time the *Pinochet* case came to the House of Lords, it was the sort of case that the English legal system seeks to resolve very quickly. Because they involve the detention of an individual who has not yet been tried, extradition cases normally go straight from the Divisional Court to the House of Lords, skipping the Court of Appeal.

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38. See Rome Statute, *supra* note 15, arts. 89-102. On complementarity more generally and some of the problems that may arise see Madeline Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. INT'L L. 349 (1997).

39. See, e.g., Rory Carroll et al., *Pinochet decision for Straw*, GUARDIAN (LONDON), Oct. 19, 1998, available in 1998 WL 18672006.

40. See Andrew Parker, *Ruling Cheers Labour Party*, FIN. TIMES, Dec. 10, 1998, at 6.

Pinochet, moreover, was not just a detained individual who had not yet been tried: he had also been granted immunity by the Divisional Court—and his detention was causing enormous political controversy, both in the United Kingdom and abroad.

The House of Lords responded by postponing a hearing in a refugee case that was about to begin, and reassigning that panel of judges to the *Pinochet* case.<sup>41</sup> Although it is not entirely clear how individual Law Lords are assigned to panels, a degree of self-selection does occur, with refugee cases attracting a somewhat different cross-section of judges than, for example, commercial law cases. The panel reassigned to hear the *Pinochet* case thus included several of the more progressive judges on the House of Lords, as well as two of the four judges most knowledgeable about—and involved in—issues of international law and human rights.

The presiding judge, Lord Slynn, was Chairman of the Executive Council of the International Law Association and a former Advocate-General at the European Court of Justice. He was widely regarded as less conservative than most of his colleagues and had written several important dissents in favor of individual rights in refugee and extradition cases.<sup>42</sup> Lord Hoffmann was a Jewish South African who had moved to England as a Rhodes Scholar and become an Oxford Fellow before taking up a career at the Bar. Although widely regarded as the most capable member of the bench, he was also considered somewhat unpredictable, being progressive on human rights while conservative in other areas such as conflicts of law. He was also, as it later emerged, a director of Amnesty International Charity Limited, the research and educational branch of Amnesty International. Lord Steyn, another South African Rhodes Scholar turned English barrister and then judge, came from an Afrikaners background. Like Hoffmann, he had left South Africa in part because of his political convictions, and had seen an oppressive government in operation there. The fourth judge, Lord Nicholls, though something of an unknown factor, differed from the other Law Lords in one important re-

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41. The postponed case was heard in February 1999, with Lord Hoffmann rendering a landmark judgment for the majority, in favor of a Pakistani woman accused of adultery and facing death by stoning if she was returned to Pakistan. *See* *R v. Immigration Appeal Tribunal and another, ex parte Shah*, 2 All E.R. 545 (H.L. 1999). It was Lord Hoffmann's first judgment after his 1998 *Pinochet I* decision. *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 3 W.L.R. 1456 (H.L. 1998) *annulled by* *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)*, 2 W.L.R. 272 (H.L. 1999).

42. *See, e.g.*, "T" v. Secretary of State for the Home Department, 2 W.L.R. 706, 2 All E.R. 865 (1996).

spect. While all of them had been educated at Oxford or Cambridge, he had risen from more humble beginnings to graduate from the University of Liverpool. The fifth judge, Lord Lloyd, an arch-conservative educated at Eaton and Oxford, was thus—on the basis of his background—the only member of the panel clearly inclined to rule in favor of Pinochet.<sup>43</sup>

In principle, the most senior of the Law Lords determines the composition of panels for individual cases. In practice, this task is delegated to one of the “clerks” assigned to the Judicial Appeals Committee, who consults with the various judges as necessary. At the time the *Pinochet* case reached the House of Lords, the senior judge was Lord Browne-Wilkinson. It is unclear whether either Browne-Wilkinson or the clerk thought about the possible implications of using the refugee law panel for the *Pinochet* case. Perhaps they thought it inappropriate to consider such factors. Perhaps they did consider the implications and assumed, nonetheless, that the unanimous decision of the Divisional Court would be upheld. In any event, Browne-Wilkinson, who chose not to participate in *Pinochet I*,<sup>44</sup> displayed evident discomfort with the result during the subsequent proceedings (over which he presided) in *Pinochet II*<sup>45</sup> and *Pinochet III*.<sup>46</sup> This suggests that the first panel’s decision was not what he had expected at the time that panel’s composition was determined.

Another important difference from the proceedings in the Divisional Court was the active involvement of counsel specializing in public international law. The Crown Prosecution Service, having learned from its failure at first instance, engaged Professor Christopher Greenwood of the London School of Economics to deal with the state immunity issue on its behalf. In addition, a coalition of victims and human rights organizations—including Amnesty International, the Medical Foundation for the Care of Victims of Torture, and the Redress Trust—had sought and been granted leave to present oral arguments. To represent them, they engaged Professor Ian Brownlie, Q.C., of Oxford University, the world’s most experienced practitioner

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43. See Frances Gibb, *Five Were Chosen on Seniority and Availability*, TIMES (LONDON), Nov. 26, 1998, available in 1998 WL 4878870.

44. R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998).

45. R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 272 (H.L. 1999).

46. R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 827 (H.L. 1999).

of public international law. Consequently, the arguments against immunity were clearly and fully put before the court.<sup>47</sup>

As a result of the inclusion of specialized counsel, and the fuller range of arguments, the hearings before the House of Lords took considerably longer than the hearings before the Divisional Court. This lengthening of the hearings may also have reflected a desire on the part of the judges not only to do justice, but to be seen to be doing justice, in light of a fourth factor: an enormous amount of media attention. October and November 1998 were slow months for international news. There was a lull in the Monica Lewinsky scandal, with the impeachment of President Clinton having not yet begun. The United States had bombed Sudan and Afghanistan in August; the next series of military strikes—against Iraq—would not begin until December. The crisis in Kosovo had not yet escalated; there were no major election campaigns underway.

There is no question that the Law Lords felt the eyes of the world upon them. The entrance to the Houses of Parliament, where the Judicial Appeals Committee heard the case (in a small and dingy meeting room) was besieged by hundreds of journalists for the full two weeks of the hearings. This unprecedented amount of attention would not have been welcomed by a court that, in many respects, is a constitutional relic from centuries past. Among other things, it raised questions about the process by which Law Lords are appointed, about the fact that they are so clearly unrepresentative of modern British society, and about their ability to take on a much more important role in managing social change following, on November 9, 1998, the incorporation of the European Convention of Human Rights into British law.<sup>48</sup> Add to this the fact that the *Pinochet* case was being heard in the lead up to the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights,<sup>49</sup> on December 10, 1998, and it becomes hardly surprising that three of the five judges were prepared to consider—and apply—recent developments in international human rights and international criminal law.

On November 25, 1998, Lords Nicholls, Steyn, and Hoffmann held that Pinochet had no immunity from the jurisdiction of British courts with respect to his alleged crimes under international law—and

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47. Human Rights Watch sought to intervene independently of the coalition, but was granted leave only to submit written arguments.

48. See Human Rights Act of 1998 (Eng.).

49. G.A. Res. 17, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

thus no immunity from extradition.<sup>50</sup> The judgment, coincidentally, was handed down on Pinochet's eighty-third birthday, although it was celebrated as a birthday gift for international human rights. The judgment indicated that at least one particularly influential national court was prepared to deny immunity—and recognize and apply universal jurisdiction—with respect to serious human rights violations committed after the Second World War.

The majority decided the case on simple, if not analytically rigorous grounds, holding that a head of state who ordered or committed torture was not, when so doing, acting as a head of state. Lord Steyn wrote:

[T]he development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, 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. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.<sup>51</sup>

The judgment was of fundamental importance. It signaled that the most basic human rights are enforceable against anyone, regardless of conflicting rules of international law that might otherwise apply. Although no other national court of final appeal had ever gone this far, the authority and influence of the Law Lords is such that the decision seemed destined to be studied closely, and in all likelihood followed by other courts around the world.

## VI. THE HOME SECRETARY

Following the Law Lords' ruling against immunity, the focus of attention shifted to the responsible cabinet minister: Jack Straw. As Secretary of State for the Home Department, he was required by the Extradition Act 1989 to make a quasi-judicial decision, either to allow the extradition process to continue, or to release Pinochet.<sup>52</sup> The governments of Chile and the United States, in particular, exerted considerable pressure on him to choose the second option.<sup>53</sup> Yet to do so

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50. See the Law Lords' *Pinochet I* decision, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456; see also Michael Byers, *The Right Rule for Humanity*, TIMES (LONDON), Nov. 26, 1998, at 24.

51. See *ex parte* Pinochet, 3 W.L.R. at 1506.

52. See Extradition Act of 1989, ch. 33, part XII, sched. 158 (1994) (Eng.).

53. See Ewen Macaskill et al., *US Urges Pinochet Return Quiet Pressure by Washington Adds to Dilemma for Straw*, GUARDIAN (LONDON), Nov. 20, 1998, available in 1998 WL

would have placed the United Kingdom in violation of international law, including its treaty obligations under the Torture Convention and the European Convention on Extradition.<sup>54</sup> Moreover, the Home Secretary might well have found his exercise of discretion subjected to judicial review in the British courts.<sup>55</sup> Most importantly, releasing Pinochet on discretionary grounds would have put Straw—and the entire British Government—in direct conflict with the wave of favorable public opinion that had greeted the decision of the House of Lords, both domestically and abroad. At this point, for a governing party that was explicitly committed to an “ethical foreign policy”<sup>56</sup> and whose grassroots remained firmly committed to socialist ideals, there was in reality no scope for exercising the discretion that was available under domestic law. On December 9, 1998, Straw decided, as he had publicly insisted all along, that Pinochet’s extradition was a judicial matter, and not a political one.<sup>57</sup>

## VII. *PINOCHET II*: APPEARANCE OF BIAS

Following Jack Straw’s decision to allow the extradition process to continue, Pinochet was required to appear before a magistrate. It seemed inevitable that he would one day face justice in Spain. At this point, his lawyers played their trump card. It was widely known in London legal circles that Lord Hoffmann’s wife worked for Amnesty International. Less widely known—but much more important—was

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18680301. The United States government was apparently concerned that a trial involving Pinochet might reveal the true extent of CIA involvement in the overthrow of Salvador Allende, and perhaps in the atrocities that followed. *See id.*

54. *See* Convention Against Torture, *supra* note 11, art. 5; European Convention on Extradition, *supra* note 24, art. 1 (“The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.”).

55. In fact, Amnesty International and the other human rights organizations started proceedings in the Divisional Court *in anticipation* of the Home Secretary’s decision, seeking an order that would have kept Pinochet in the country until a review of the decision could be made. Their request was denied on the basis that it was premature. *See* Jaime Wilson et al., *Straw Rules Pinochet Extradition Can Go Ahead: You Can Hide, General, But You Can’t Run*, *GUARDIAN* (LONDON), Dec. 10, 1998, *available in* 1998 WL 24894533.

56. *See* Robin Cook, Speech by the Foreign Secretary, Mr. Robin Cook, at the Launch of the FCO Mission Statement, Locarno Suite, FCO, London (May 12, 1997) <[www.fco.gov.uk/news/speechtext.asp?892](http://www.fco.gov.uk/news/speechtext.asp?892)>.

57. H.C. HANSARD, col. 213-17 (Dec. 9, 1998) <<http://www.parliament.the-stationery-office.co.uk/>>; *TIMES* (LONDON), Dec. 10, 1998, *available in* 1998 WL 23399842 (containing excerpts of letter, which explains the Secretary of State’s reasons for allowing the extradition to proceed).

the fact that Hoffmann himself served as a director of Amnesty International Charity Limited, the organization's research and educational branch. Knowledge of the connections contributed a trump card because Amnesty's International Secretariat, along with a number of other human rights organizations and several of Pinochet's victims, had been granted the right to make oral representations just a few short days before the hearings in the House of Lords began.

It was at this point that Lord Hoffmann should have disclosed his connections with Amnesty International. Had he done so, it is unlikely that anyone would have objected to his participating in the case. Instead, he wrongly assumed, either that it was sufficient that his connections were widely known, or that his reputation as an outstandingly rigorous and objective judge somehow made him immune from any possible allegations of bias, or that the pressure to hear the case quickly somehow justified his silence.

Pinochet's lawyers were well aware that they did not have to demonstrate the existence of actual bias. They needed only to demonstrate the appearance of bias, and for this the legal link between Hoffmann (as a director) and Amnesty International Charity Limited (as a company) was critical. The appearance of bias resulting from this link meant that the *Pinochet I* judgment of November 25, 1998<sup>58</sup> had to be overturned.<sup>59</sup> Every person, including Pinochet, has the right to due process of law.

The Law Lords sit as the highest court in the United Kingdom. Never before had one of them been accused of the appearance of bias, and no procedure existed for an appeal of this kind to be heard. Fortunately, the British constitution is not a written document, but rather a collection of mostly unwritten—and therefore inherently flexible—customs, conventions, and rules.<sup>60</sup> It is also based on a long tradition of the rule of law. It was this tradition, and the maturity and inherent flexibility of the British constitution, which made it possible for the Law Lords to fashion a new procedure and form a new panel of five judges to hear arguments concerning the appearance of bias. By doing so, they modified the British constitution for the better, rec-

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58. R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998).

59. The *Pinochet I* decision, *id.*, was annulled by *Pinochet II*, R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 272 (H.L. 1999).

60. See generally COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION (3d ed. 1995); RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT (3d ed. 1999).

ognizing that even Law Lords are not above the legal system they head.

However, the decision to form a new panel and hear the complaint—and the subsequent finding of an appearance of bias—meant that all of the arguments for and against immunity had to be heard again; the initial decision was void. Pinochet's lawyers now had a second chance to make their case: this time to a panel of seven Law Lords.

### VIII. *PINOCHET III*: STATE IMMUNITY AND DOUBLE CRIMINALITY

The Judicial Appeals Committee has twelve active members, although sometimes retired Law Lords or other senior members of the judiciary are called upon to fill out panels. A seven-judge panel was constituted to re-hear the *Pinochet* case, so as to lend greater authority to the new decision in this highly unusual situation. Six of the seven judges were full-time Law Lords who had not served in *Pinochet I* (although four of them had served in *Pinochet II*). The seventh judge was Lord Goff, a recent retiree who had heard several previous state immunity cases.<sup>61</sup> On the whole, the new panel appeared to be somewhat more conservative than the initial panel of five. Among the “conservatives” were Lords Goff, Saville, and Hutton, the latter from Northern Ireland and a strong opponent of terrorism.

An additional party was added to the proceedings when the Government of Chile was granted leave to intervene. Chile was represented by Lawrence Collins, Q.C., one of the United Kingdom's leading experts on jurisdiction and the conflict of laws.<sup>62</sup> In part because of the addition of another party, and in part because the lawyers on all sides had had additional time to research and prepare their arguments, the hearings in *Pinochet III*<sup>63</sup> lasted a full three weeks. This was a record for the House of Lords: another anomaly in a highly anomalous case.

Public perception of the court would have weighed heavily on the minds of the seven judges, not only in terms of the overwhelmingly positive domestic and international reaction to the judgment of

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61. See, e.g., *Kuwait Airways Corp. v. Iraqi Airways Co. & Republic of Iraq*, [1995] 1 W.L.R. 1147 (H.L. 1995).

62. See DICEY AND MORRIS ON THE CONFLICT OF LAWS (Lawrence Collins ed., 13th ed. 2000).

63. *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 W.L.R. 827 (H.L. 1999).

November 25, 1998, but also in terms of the court's internal consistency. To overrule the decision of the initial panel would have been to suggest that justice was only luck of the draw, that different panels of judges on the same court in the same case could—and would—render completely different rulings. At a time when major constitutional changes were already being made, including the devolution of power to Scotland and Wales, the incorporation of the European Convention on Human Rights and the elimination of hereditary membership in the House of Lords (as the second chamber of Parliament), the last thing the Law Lords wanted was to suggest that the Judicial Appeals Committee was itself in need of reform.<sup>64</sup>

The Law Lords were also aware that the Home Secretary had already exercised his discretion in favor of a continuation of the extradition process. This had two consequences. First, it indicated to the judges that the executive branch was not firmly opposed to the extradition. Second, it meant that responsibility for making the decision now rested squarely upon the court. The judges—and not Jack Straw—would be regarded as responsible for whatever happened to Pinochet.

In what may have been a coincidence of timing, but could not have been better planned, the Law Lords handed down their judgment on March 24, 1999—the same day that NATO aircraft began dropping bombs on the Federal Republic of Yugoslavia. The story was lost in the media frenzy over the Kosovo War.

Even if the judgment had been subjected to full public scrutiny, the court had carefully protected itself against criticism. Although a majority of six upheld the decision denying immunity in *Pinochet I*, five of the judges decided the issue on grounds that were somewhat different from those applied by the initial panel. Instead of basing their decision on customary international law, they relied primarily on the Torture Convention and the Criminal Justice Act 1988. This approach, limiting the denial of immunity to those instances where universal jurisdiction had specifically been accepted by way of treaty and statute, was inherently more conservative than that of the first panel. Only one judge, Lord Millett, relied extensively on customary international law, while another, Lord Goff, wrote a dissenting judgment that upheld immunity.

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64. On recent and proposed changes to the House of Lords, see LORD WAKEHAM, A HOUSE FOR THE FUTURE: ROYAL COMMISSION REPORT, 2000, <<http://www.official-documents.co.uk/document/cm45/4534/contents.htm>>; John Vincent, *All That Matters is What Tony Wants*, 22-6 LONDON REV. BOOKS 11 (Mar. 16, 2000).

The judges also re-introduced the issue of double criminality into the case.<sup>65</sup> The Divisional Court had decided, with no apparent difficulty, that the date of the extradition request was the date at which a British court had to have had jurisdiction over analogous crimes, and thus worded the issue on appeal accordingly.<sup>66</sup> The first panel of Law Lords had agreed with the Divisional Court on this point and quickly dismissed the efforts of Pinochet's lawyers to move beyond the issue on appeal.<sup>67</sup>

However, the Crown Prosecution Service, acting on behalf of the Spanish magistrate, made a serious tactical mistake in *Pinochet III*. Alun Jones, Q.C., raised, as his lead argument, the issue of acts of torture committed or ordered by Pinochet prior to the September 11, 1973 coup, as well as the issue of torture committed after the coup but before Pinochet was appointed head of state.<sup>68</sup> Jones' reasoning was simple: even under traditional international law, a former head of state could not have immunity with respect to acts of torture committed *before* he became head of state.

Faced with this argument, Pinochet's lawyers fought to convince the judges that they had to look again at the issue of double criminality, and pointed to the considerable length of time between September 1973 and the receipt of the arrest warrant in October 1998. The Law Lords, ignoring the limited scope of the issue on appeal, allowed Pinochet's lawyers to present detailed arguments on this point—but did so only after the Crown Prosecution Service and the interveners had made their principal arguments, all of which, of course, focused on the issue of immunity.

The crucial issue (in terms of the extradition of Pinochet, though not for international human rights more broadly), had thus become whether, at the time that the alleged crimes had been committed, the British courts had jurisdiction over acts of torture committed abroad. Lord Brown-Wilkinson's approach to the issue is representative of that taken by six of the seven Law Lords: he assumed that universal

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65. See *supra* text accompanying note 29.

66. The Divisional Court had certified "that a point of law of general public importance is involved in the Court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was Head of State." Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68, 86 (Q.B. Div'1 Ct. 1998).

67. See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 3 W.L.R. 1456 at 1462.

68. See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 W.L.R. 827, 836 (H.L. 1999).

jurisdiction could only be provided by way of treaty, and not customary international law—even if customary law had achieved the status of *jus cogens*. The following passage, written in the context of his discussion of state immunity, makes this assumption clear:

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. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.<sup>69</sup>

In terms of its understanding of the relationship between customary international law and treaties, this reasoning is clearly flawed—not least because it misses much of the point of *jus cogens* rules: they override and are superior to other rules, which suggests that a *jus cogens* rule without a treaty would be just as effective in overriding an immunity rule as a *jus cogens* rule with a treaty.<sup>70</sup> More important, however, was the fact that by relying solely on the Torture Convention as a basis for universal jurisdiction, the judges left all but one of the alleged acts of torture in the arrest warrant outside the scope of double criminality. In recognition of this (and clearly signaling their own intentions) the Law Lords recommended that the Home Secretary reconsider his authorization of the extradition process. Despite not having directly overruled the judgment of November 25, 1998, the second panel of judges, with the exception of Lord Millett—and possibly Lord Hutton—clearly desired that Pinochet be allowed to leave for Chile. Like the Home Secretary, however, the judges were not prepared to take on the responsibility for that decision themselves, at a time when public opinion—both domestic and international—was clearly and overwhelmingly in favor of a contrary result.

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69. See *id.* at 847.

70. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). See also LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW (1988); STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT (1992); Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. OF INT'L L. 211 (1997).

I mention Lord Hutton as a possible exception because of an episode that took place during the hearings—an episode that reinforces the importance of the background of each and every individual actor in situations such as these. One would have expected Lord Hutton, as an arch-conservative from Northern Ireland, to have ruled in favor of Pinochet. Indeed, during the hearings he initially appeared bored and uninterested—until one day, Alun Jones, Q.C., arguing for the Crown Prosecution Service, mentioned the word “terrorism.” At this point, Lord Hutton sat bolt upright and asked for an elaboration. Jones explained that Pinochet and other military officers had plotted and staged a coup against a democratically elected government, and that the formal extradition request included several charges of terrorism. From that point onwards, counsel for the human rights organizations, at least, were convinced that Hutton had switched sides—a conviction that was born out, in part, by his siding with the majority against immunity, even if the terrorism charges themselves were held not to ground jurisdiction for other reasons.

#### IX. UNFIT TO STAND TRIAL

Following the judgment in *Pinochet III*, Jack Straw was again faced with the question of whether to grant authority for the extradition to proceed. The fact that he did so, on April 14, 1999, is testimony again to the influence of international and domestic public opinion, and to the constraining effect of his previous assertions—that the extradition was a judicial and not a political issue—on his subsequent behavior.

An extradition hearing took place in the Bow Street Magistrates Court, with Deputy Chief Stipendiary Magistrate Ronald Bartle considering not only the few charges that had survived the March 24, 1999 judgment in *Pinochet III*, but also a number of new charges subsequently filed by Judge Garzon. All of the new charges concerned acts of torture committed after 1988, and were thus permissible under the Law Lords’ restrictive interpretation of double criminality. On October 8, 1999, the magistrate ruled that Pinochet could indeed be extradited to Spain, and committed him on thirty-four charges of torture and one charge of conspiracy to commit torture.<sup>71</sup>

In response to this decision the Chilean Government requested, on October 14, 1999, that the Home Secretary consider releasing Pi-

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71. See Jamie Wilson et al., *Cheers and Tears as Court Rules Pinochet can be Extradited for Torture Trial*, GUARDIAN (LONDON), Oct. 9, 1999, available in 1999 WL 25737759.

nochet on medical grounds. Straw responded by arranging for a medical examination by four prominent British doctors. The examination took place on January 5, 2000 and established that Pinochet was unfit to stand trial—though the report presented to Straw was not released to the press or, more importantly, to the foreign judicial authorities requesting Pinochet’s extradition. This, it was explained, was because of medical confidentiality. Instead, Straw merely declared that, on the basis of what he had seen, he was “minded” to order the release of Pinochet.<sup>72</sup>

Human rights organizations and the Belgian government (one of the countries that, in addition to Spain, had an arrest warrant outstanding against Pinochet) challenged Straw’s decision not to release the report. This challenge was successful; the Divisional Court ruled on February 15, 2000 that the report had to be shared—under strict confidentiality—with the judicial authorities in each of the requesting states. Despite efforts to prevent the report’s content from becoming public knowledge, by February 16, 2000, it had been leaked to the media. It was now apparent that Pinochet was indeed very ill, that he was suffering from extensive brain damage, that his memory had been severely affected, and that he would be incapable of sufficiently following the process of a trial so as to instruct his lawyers.<sup>73</sup> At this point, the way was clear for Straw to do what he had wanted to do all along: to call off the extradition and send Pinochet back to Chile. When this happened, on March 2, 2000, it met with hardly any criticism, even from those who had been most strongly opposed to Pinochet’s release.

## X. CONCLUSION: THE ROLE OF LAW AND LEGAL INSTITUTIONS

This Essay takes a broad view of the *Pinochet* case, examining the role of a range of actors extending well beyond the judges and lawyers who are normally associated with legal developments of this kind. In doing so, it exposes that legal and political actors are motivated by a variety of often-conflicting factors and interests that include much more than a simple desire to “apply” the law. For exam-

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72. See H.C. HANSARD, col. 279 (Jan. 12, 2000) <<http://www.parliament.the-stationery-office.co.uk/>>; Nicholas Watt & Jamie Wilson, *Pinochet Failed Senility Test: Straw Left With ‘No Choice’ After Team of Doctors Declared Former Dictator Mentally Incapable*, GUARDIAN (LONDON), Jan. 13, 2000, available in 2000 WL 2703118.

73. See Jose Luis De La Serna, *Deterioro Cerebral Importante*, EL MUNDO, Feb. 16, 2000 <<http://www.el-mundo.es/2000/02/16/internacional/16N0048.html>>.

ple, the British government was clearly caught between an expressed desire to uphold international criminal law and protect human rights, and an unexpressed desire to avoid the political and economic risks associated with having such a controversial series of events unfold on British soil.

The Chilean and Spanish governments were caught in similar binds. According to some rumors, many members of the Chilean government were secretly pleased that Pinochet had been arrested overseas and thus removed from the domestic political scene. Indeed, there are those who attribute the victory of Socialist candidate Ricardo Lagos in the January 16, 2000 presidential election to Pinochet's absence from Chile.<sup>74</sup> There is a sense that, thanks to the arrest, the country was finally able to close the chapter on the Pinochet years. The announcement, by President Lagos immediately after his election, that immunity from prosecution in Chile would no longer be accorded to Pinochet, is but one example of the positive effect that the situation has had on the development of Chilean democracy.<sup>75</sup> Nevertheless, throughout the case, and especially during the hearings in *Pinochet III*, the Chilean government felt compelled, for domestic political reasons, to claim the sovereign right to have Pinochet tried in Chile, and not abroad.

The Spanish government clearly had mixed feelings about proceedings of this kind against the former leader of a former Spanish colony—and a country with which Spain maintains important cultural and economic links. These mixed feelings were perhaps most apparent when Spain decided against joining Belgium and the human rights organizations in challenging Jack Straw's decision not to release the medical report.<sup>76</sup> However, like the British government, the Spanish government was constrained by the fact that the investigation and extradition request constituted a judicial and not a political process.

A variety of other actors added to the complex picture presented in the *Pinochet* case. First, there were the human rights organizations, whose efforts to apply and develop international criminal law were clearly in fulfillment of their own mandates, but who also benefited enormously—in terms of fundraising and membership—from

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74. See Clifford Krauss, *In Chile's Vote Today, Candidates Converge in Center*, N.Y. TIMES, Jan. 16, 2000, §1, at 6.

75. See Clifford Krauss, *Man in the News: Ricardo Lagos Escobar; A Chilean Socialist in the Clinton-Blair Mold*, N.Y. TIMES, Jan. 18, 2000, at A3.

76. See Warren Hoge, *Pinochet Foes Are Granted An Appeal*, N.Y. TIMES, Feb. 9, 2000, at A9.

their close involvement in such a high profile case.<sup>77</sup> These organizations, with their transnational networks of activists and their connections with judicial authorities in different countries, were critical in bringing the various strands of the case together: of accused, of victims, of willing prosecutor, and of available jurisdiction.<sup>78</sup> They had also been crucial in establishing some of the legal institutions that figured prominently in the case, most notably the Torture Convention.<sup>79</sup> Second, there were the journalists and their employers, who saw the drama in the story and seized upon it to attract and maintain audience interest in what would otherwise have been a slow period for news. Lastly, something of a more disturbing—and much less noticeable—role was played by those transnational corporations who helped fund Pinochet's legal defense<sup>80</sup> and whose involvement bore a striking resemblance to the role of other corporations (most notably ITT) in Pinochet's rise to power in 1973.<sup>81</sup>

The existence and involvement of these multiple actors presents a complexity that challenges any attempt to understand the full dimensions of the *Pinochet* case. On the one hand, the complexity demonstrates that multiple factors were at work, that legal rules and institutions were only part of the picture, and that politics were also intrinsically involved. On the other hand, and contrary to what some might have assumed, the arrest and detention of Pinochet was not strictly about politics. Law and politics were interacting constantly throughout this period, constraining some actors, and empowering others. The constraining effects of the law were most apparent upon the governments of Chile and the United Kingdom, as well as upon the judges in *Pinochet III*.

In terms of empowerment, the law was of greatest assistance to Pinochet's individual victims, and to the human rights organizations

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77. For a sense of the importance of the Pinochet case to the two largest international human rights organizations see Amnesty International's website <<http://www.amnesty.org.uk/news/pinochet/background.html>> (containing links to background information on Pinochet and the latest and archived news and reports) and Human Rights Watch's website <<http://www.hrw.org/hrw/campaigns/chile98/>> (containing news briefs and links to further dispatches).

78. See Anne-Marie Slaughter, *Governing the Global Economy through Global Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS*, *supra* note 4.

79. See RODLEY, *supra* note 11, at 20-21.

80. On the funding of Pinochet's legal team, see, e.g., Jamie Wilson & Burhan Wazir, *Pinochet Challenges Law Lord Lawyers Allege Bias in Ruling*, *GUARDIAN* (LONDON), Dec. 5, 1998, available in 1998 WL 18681270.

81. See generally Intelligence Activities: Senate Resolution 21, Hearings Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities: Vol. 7, Covert Action, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 158-60 (1975).

that took up their cause – both on its own merits, and as a means of further developing the law. The significance of their success extends far beyond providing an essential sense of redress for Pinochet’s victims. The development of international human rights and the more recent growth of an “international civil society” reflect an international system that is slowly but surely embracing the rule of law. Only in a world with generally accepted rules and institutions is there space for individuals and human rights groups to flourish, to challenge the prerogatives of state sovereignty (along with its cynical politics and reliance on military and economic power), with moral authority and the slow but sure evolution of binding rules and effective judicial processes.

There are two great ironies in the *Pinochet* case. One is that Pinochet, as head of state, would have been the person who signed Chile’s ratification of the 1984 Torture Convention. The other is that Pinochet himself, as early as 1968, had recognized the legal developments that eventually led to his downfall.<sup>82</sup>

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82. See UGARTE, *supra* note 1.