RECENT DEVELOPMENT

A KING NO MORE: THE IMPACT OF THE *PINOCHET* DECISION ON THE DOCTRINE OF HEAD OF STATE IMMUNITY

I. INTRODUCTION

In a precedent setting decision in March 1999, the British House of Lords rejected the head of state immunity claims of former Chilean leader Augusto Pinochet for alleged acts of torture committed during his dictatorial reign in Chile. The case began in the fall of 1998 when Spain requested Pinochet's extradition from Britain to prosecute him for genocide, torture, and the disappearances of thousands of people.[1] To many around the world, the decision represented a major human rights victory and signaled a sea change in the enforcement of international human rights law. The international system, once based on notions of sovereignty and the horizontal equality of all states, was giving way to a more vertical structure where all states were subject to a hierarchy of fundamental human rights norms.[2] With the prospect of domestic courts taking a more active role in enforcing these fundamental norms, the chances of egregious human rights abuses going unpunished would be diminished.

The *Pinochet* decision also represented a dramatic shift in the doctrine of head of state immunity. This centuries-old doctrine once gave heads of state absolute immunity from prosecution for acts committed while serving as head of state. The immunity even shielded them from prosecution after they left office.[3] Over the last century, however, the doctrine has eroded as courts removed commercial and private transactions from its protection.[4] The *Pinochet* decision may further erode this doctrine, making the immunity unavailable for certain types of criminal actions.[5]

The unavailability of this immunity for gross human rights violations will remove an important roadblock in the "globalization" of human rights

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1. Jonathan I. Charney, Editorial Comment, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 452 (1999).

2. *See* Christine M. Chinkin, In re Pinochet, 93 AM. J. INT'L L. 690, 711 (1999).

3. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 314 (1999).

4. *See* Hazel Fox, Current Development, *The First* Pinochet *Case: Immunity of a Former Head of State*, 48 INT'L. & COMP. L.Q. 207, 211 (1999).

5. *See id.*

enforcement.[6] Thus, the *Pinochet* decision sends a strong message to heads of state who would use their power to commit human rights abuses. Prosecutions of gross violations are no longer limited to the state where they occur or the nationality of the majority of the victims,[7] and violators can no longer use immunity as a shield to protect themselves from criminal responsibility.

Part II of this paper will trace the development of head of state immunity and its status before the *Pinochet* decision in the House of Lords. Part III will provide a background for the crimes that General Pinochet allegedly committed during his dictatorial reign in Chile. Part IV will briefly explain the grounds for the Spanish extradition request which set the stage for the House of Lords decision. Part V will detail the House of Lords decision holding that Pinochet did not have immunity as a former head of state from prosecution for crimes under international law. Finally, Part VI will briefly explain the possible ramifications of this decision on the doctrine of head of state immunity and the future of human rights litigation.

II. THE HISTORY OF HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

Head of state immunity is a doctrine grounded in customary international law which grants a head of state immunity from prosecution in a foreign state's courts with respect to official acts taken by the head of state while in power.[8] Historically courts linked head of state immunity with the doctrine of sovereign immunity[9] because the head of state was once thought of as the personification of the state.[10] The roots of sovereign immunity are grounded in the notion that one sovereign could not sit in judgment of another sovereign because they had equal standing with each other.[11] Today, the rationale often cited for recognizing head of state immunity is the doctrine of

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6. *See* Chinkin, *supra* note 2, at 711.

7. *See id.*

8. Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1055 (1995).

9. Under the doctrine of sovereign immunity, "a foreign state is presumptively immune from the jurisdiction of [foreign] courts . . ." Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (discussing sovereign immunity as defined by the Foreign Sovereign Immunities Act of 1976).

10. *See* Joseph W. Dellapenna, *Has the Time Come to Revise the Foreign Sovereign Immunities Act?* 88 AM. SOC'Y. INT'L. L. PRAC. 509, 512 (1994) (as reported by Mark S. Zaid, *Sovereign Immunity: A Comparative Perspective*, 88 AM. SOC'Y INT'L L. PROC. 509, 512 (1994)). The famous remark of King Louis XIV of France, *"L'etat, c'est moi"* (I am the state), best represents this notion of the state and the head of state being thought of as one and the same. *Id. See also* George, *supra* note 8, at 1056.

11. Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 19, 52 (1994).

comity.[12] It is in the state's best interests to safeguard the immunity of a foreign head of state so that other states will afford equivalent protection to its own head of state while abroad.[13]

As the twentieth century saw the world's great empires crumble, the idea of the sovereign being the personification of the state fell into disuse.[14] As notions of state and sovereign changed, the rationale for giving a head of state absolute immunity also changed.[15] As a result, various doctrines have emerged with respect to the concept of head of state immunity.[16] For example, states have relied on sovereign immunity,[17] diplomatic immunity,[18] and the Act of State Doctrine[19] when granting head of state immunity.[20] Each of these doctrines encompasses a varying degree of immunity, sometimes with overlap.[21] Due to the emergence of new rationales and exceptions, the prevailing customary international law standard for head of state immunity remains in a state of flux.[22]

Most exceptions to the general rule of absolute head of state immunity

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12. *See* George, *supra* note 8, at 1061. *See also id.* at 1061 n.75 (citing *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (indicating that immunity is "founded on the need for mutual respect and comity among foreign states"); *In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1110 (4th Cir. 1987) (stating that "the rationale of head of state immunity is to promote comity among nations"); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) ("Head of state immunity is also supported by the doctrine of comity . . .")).

13. *See* George, *supra* note 8, at 1061. Comity ensures that "leaders can perform their duties without being subject to detention, arrest, or embarrassment in a foreign country's legal system." *Id.* at 1061 n.76 (citing *In re Grand Jury Proceedings*, 817 F.2d at 1110).

14. *See* Dellapenna, *supra* note 10, at 513.

15. *See* Watts, *supra* note 11, at 52.

16. *See id.* at 54.

17. Britain grants a hybrid version of restrictive immunity that is grounded in both sovereign and diplomatic immunity. *See* Mallory, *infra* note 20, at 177.

18. Diplomatic immunity is the doctrine that gives diplomats immunity from lawsuits in host countries grants. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240, 500 U.N.T.S. 95, 112. France, for example, bases its head of state immunity on the sovereign's status as a government official. This is more or less similar to diplomatic immunity. *See* Mallory, *infra* note 20, at 177.

19. The Act of State Doctrine bars a state from reviewing the official acts of a foreign government. *See* George, supra note 8, at 1056 n.38 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987)). The United States follows this doctrine, and it prevents U.S. courts from reviewing acts of a foreign government. However, it affords little protection to heads of state since courts have limited its application. *See* George, *supra* note 8, at 1056 n.38 (citing Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("finding that the Act of State Doctrine precluded an action against ex-Philippine President Marcos who was acting in his official capacity as head-of-state")).

20. *See* Jerrold L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986).

21. *See id.*

22. *See id.*

arise in the field of civil and administrative jurisdiction.[23] The trend in the law has been to exempt from immunity a head of state's commercial transactions and other acts of a purely private character.[24] Thus, an informal distinction has arisen between a head of state's official conduct and conduct undertaken in his personal capacity.[25] Courts will afford immunity to public or official acts (*jure imperii*),[26] but not to private or personal acts (*jure gestionis*).[27]

The distinction, however, between official acts and personal acts is sometimes far from clear.[28] For example, a head of state's conduct can be unlawful or criminal.[29] The concern then turns to whether such acts should qualify as official acts or whether they should be considered performed in personal capacity.[30] Under one view, unlawful or criminal acts are simply common crimes committed in a personal capacity, not official acts warranting immunity.[31] However, it is equally possible for a head of state to commit a crime while using the machinery of his office to carry out his functions as head of state.[32] According to this view, if the criminal act was carried out under the color of public authority, the head of state would be immune from jurisdiction regardless of the legality of the act under the laws of his own state.[33]

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23. Watts, *supra* note 11, at 54.

24. *See id.* at 55. Britain, for example, follows a restrictive theory of head of state immunity. *See* Mallory, *supra* note 20, at 177 n.35. English common law originally recognized absolute immunity for heads of state. *See id.* (citing Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State, [1952] 2 Q.B. 390 (C.A.)). The passage of the State Immunity Act of 1978 changed this. See State Immunity Act 1978, July 20, 1978; 17 I.L.M. 1123 [hereinafter "Immunity Act"] for a reprinted version of the Act. The Act curtailed the immunity of heads of state with respect to proceedings dealing with private commercial transactions and torts. *See* Mallory, *supra* note 20, at 177 n.35.

25. *See* Watts, *supra* note 11, at 55.

26. The Second Circuit provides a good definition of what acts are included in *jure imperii*. *Jure imperii* are limited to (1) internal administrative acts, (2) legislative acts, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, and (5) acts involving public loans. *See* George, *supra* note 8, at 1057 n.50 (citing Victory Transportation, Inc. v. Comisaria Gen. De Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965)).

27. *See* George, *supra* note 8, at 1057 n.50 (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976)). The International Law Commission adopted the distinction between official and personal conduct in its 1991 Draft Articles on Jurisdictional Immunities of States and Their Property. *See* Draft Articles on Jurisdictional Immunities of States and Their Property, 30 I.L.M. 1554, 1565 (1991); Britain also adopted the distinction in its State Immunity Act of 1978. *See* Immunity Act, *supra* note 24; Watts, *supra* note 11, at 55.

28. *See* Watts, *supra* note 11, at 55.

29. *Id.* at 56.

30. *See id.*

31. *See id.* at 56 (citing Jimenez v. Aristeguieta, 33 I.L.R. 353 (1962)).

32. *See id.*

33. *See* Watts, *supra* note 11, at 56-57. The test for determining whether such conduct is public or private is "whether the conduct was engaged in under color of or in ostensible exercise of the Head

The problem of distinguishing between official and private conduct does not arise for those states that have adhered to the view of absolute immunity.[34] For example, Russia has granted a broad degree of immunity to heads of state and has consistently claimed absolute immunity in foreign courts.[35] The United States also seems to follow a view of absolute immunity.[36] However, the modern trend in the law indicates that a head of state will not enjoy immunity in civil and administrative proceedings with

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of State's public authority." Watts, *supra* note 11, at 56. The International Law Commission adopted the test in its draft articles on State Responsibility. *See Art. 10 of the ILC's Draft Articles on State Responsibility*, [1975] 2 Y.B. Int'l L. Comm'n 59, art. 10, U.N.Doc:A/10010/Rev.1. The test has typically been used in cases of state responsibility for unauthorized acts of state officials or military personnel. *See* Watts, *supra* note 11, at 56 n.90.

34. *See* Watts, *supra* note 11, at 57.

35. *See* Mallory, *supra* note 20, at 178. According to the Russian theory of absolute immunity, a state possesses jurisdictional immunity. This means that one state is not subject to the jurisdiction of another state. A foreign state cannot be sued in court as a respondent without its consent. A state's jurisdictional immunity includes:

a) jurisdictional immunity in the narrow sense of the word—one state's nonjurisdiction from another's courts;

b) immunity from preliminary security for a suit;

c) immunity from compulsory enforcement of judicial decisions.

Id. at 178 n.39.

36. *See* Watts, *supra* note 11, at 57. The state of the law as to the immunity of heads of state is currently unsettled. George, *supra* note 8, at 1052. In 1976, Congress passed the Foreign Sovereign Immunities Act. *Id.* at 1051. The Act embodied a restrictive theory of immunity, mandating that "immunity would attach only to inherently governmental or public acts of a state." *Id.* The Act, however, was silent with regards to the immunity of heads of state. *Id.*

United States courts have taken divergent approaches to head of state immunity claims. *Id.* at 1064. On one side, we have the absolute immunity view advocated by the U.S. State Department. This view is represented by the *Lafontant v. Aristide* case. *See* George, *supra* note 8, at 1065-66 (citing Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994)). The plaintiff in this case sought monetary compensation for the killing of her husband by Haitian soldiers. *Id.* at 1065. The soldiers were allegedly acting under the orders of President Jean Bertrand Aristide. *Id.* The State Department intervened, suggesting that Aristide be given immunity because of his status as the Haitian head of state. *Id.* The court promptly dismissed the action. *Id.* For other cases following the *Aristide* rationale, see George, *supra* note 8, at 1066-67 (citing Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd sub. nom* Kodic v. Daradzic, 70 F.3d 232 (2d 1995); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994)).

The other view is one of restrictive immunity for heads of state under an expansive interpretation of the Foreign Sovereign Immunities Act ("FSIA"). *See* George, *supra* note 8, at 1070. Under this interpretation, sovereign immunity under the FSIA extends to heads of state as well as to states. *Id.* Accordingly, individuals acting in an official capacity cannot be sued. *Id.* In *In re Estate of Marcos*, a suit was brought against the former President Marcos of the Philippines by the families of people who allegedly had been tortured and executed under his authority. *See* George, *supra* note 8, at 1074 (citing *In re* Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994)). The estate's principal argument was that Marcos's actions were non-justiciable because they were official or public acts. *Id.* The court concluded that FSIA immunity did not apply because Marcos's human rights violations did not qualify as official acts of a head of state. *Id.* The court reasoned that because Marcos's acts were not taken with any official mandate, they were not the acts of an agency or instrumentality of a foreign state within the meaning of the FSIA. *Id.* at 1074-75. By analyzing the FSIA's potential applicability to Marcos, the court implied that the FSIA could apply to certain situations. *Id.* at 1075.

respect to acts that are essentially private in character.[37]

On the other hand, head of state immunity is still absolute with respect to criminal proceedings initiated in the domestic legal systems of other states.[38] Absolute immunity also extends to former heads of state so long as the acts which are subject to criminal prosecution were official acts performed in the head of state's public capacity.[39] This immunity is qualified when a head of state commits certain international wrongs of a serious nature, such as war crimes and genocide.[40] Nonetheless, head of state immunity has endured as a viable doctrine due to the lack of consensus on what acts constitute international crimes and the inability of national courts to prosecute such crimes.[41] However, General Pinochet's actions while ruler of Chile, and a Spanish judge's attempt to hold him accountable, have suddenly changed the head of state immunity equation.

III. HUMAN RIGHTS VIOLATIONS COMMITTED BY THE PINOCHET REGIME

In September of 1970, Salvador Allende, a Socialist candidate, was elected to power in Chile by winning a closely contested election.[42] The United States opposed the Allende regime and the CIA was ordered to find means to depose him.[43] The CIA then established close ties with other military leaders in South America, and the United States levied economic sanctions aimed primarily at much of the middle class in Chile.[44]

External factors, such as the United States' embargo, and internal factors,

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37. *See* Watts, *supra* note 11, at 55.

38. *See id.* at 54. *See also id.* at 54 n.82 (citing *Re* Honecker, 80 I.L.R. 365 (F.R.G. Fed. Sup. Ct. (Second Criminal Chamber (1984)); *id.* at 57 n.91 (citing Duke of Brunswick v. King of Hanover, 2 H.L.C. 1 (1848) (holding that a foreign sovereign cannot be held responsible in another country for a sovereign act done in his own country regardless of whether the act was right or wrong)).

39. *See id.* at 89.

40. *See id.* at 54. A head of state's criminal responsibility for certain international crimes has been expressed in the following instruments: Article 7 of the Charter of the International Military Tribunal at Nuremberg (1946), Article 6 of the Charter of the International Military Tribunal for the Far East (1946), Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948), Article 3 of the UN Draft Code of Offenses against the Peace and Security of Mankind (1954), Article III of the Convention on the Suppression and Punishment of the Crime of Apartheid, Article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia (1993), Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (1994), Article 27 of the Statute of the International Criminal Court (1998). AMNESTY INTERNATIONAL, UNITED KINGDOM: THE PINOCHET CASE—UNIVERSAL JURISDICTION AND THE ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY 29, 31 (1999).

41. *See* Regina v. Bartle, 37 I.L.M. 1302, 1312 (1998).

42. Nehal Bhuta, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499, 504 (1999).

43. *Id.* at 505.

44. *Id.* at 505-06.

such as an active political opposition that deadlocked the government, created the conditions for General Pinochet's military coup against the Allende government in September of 1973.[45] The military junta under Pinochet quickly established control over all branches of government.[46] Furthermore, Pinochet took extensive measures to silence any opposition by banning and dismissing political and local governing entities and curtailing civil liberties.[47] Finally, Pinochet imposed a general state of emergency which forced the Chilean people to live under martial law until 1978.[48]

Many of the Pinochet regime's human rights violations occurred during the first few months after Pinochet took power, from September to December of 1973.[49] During that period, 13,500 people were arrested and possibly 1,500 were killed.[50] The regime established detention camps throughout Chile and torture soon became commonplace with respect to arrests and detentions.[51] In addition, the regime carried out political executions against former members of the Allende government and anyone else deemed to be a danger.[52]

Shortly after the coup, Pinochet took over the newly created position of President and Commander in Chief of the Republic, concentrating most of the government's powers in him.[53] In 1974, Pinochet created the National Intelligence Directorate (DINA) to plan and execute operations against insurgent elements in the population.[54] The DINA was primarily responsible for the repressive activities carried out from 1974 to 1977.[55] DINA's tactics were aimed at quelling the activities of subversives through abduction, torture, and execution.[56]

Pinochet also established cooperative ventures with the security forces of other dictatorships in the area to exchange information about and coordinate operations against Communist and Marxist subversives.[57] "Operation Condor" was the name given to the joint venture with Argentina, Bolivia,

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45. *See id.* at 506.
46. *Id.*
47. *See id.* at 506-07.
48. Bhuta, *supra* note 42, at 507.
49. *See id.*
50. *See id.*
51. See *id. See also* REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1992) at 128-32 [hereinafter COMMISSION REPORT].
52. Bhuta, *supra* note 42, at 507; *see also* COMMISSION REPORT, *supra* note 51, at 641.
53. *See* Bhuta, *supra* note 42, at 507.
54. *See id.*
55. *See id. See also* COMMISSION REPORT, *supra* note 51, at 629.
56. *See* Bhuta, *supra* note 42, at 507.
57. *See id.*

Paraguay, Uruguay, and Brazil.[58] In addition to dealing with Communists and Marxists, Operation Condor created special forces from member countries to eliminate terrorists and subversives in countries outside the joint venture.[59] For example, through Operation Condor, DINA directed the assassination of former members of the ousted Allende government that had fled to other countries.[60]

Human rights violations decreased significantly from 1977 to 1980 when Pinochet dissolved the DINA and lifted the state of emergency.[61] However, after 1980 DINA's successor, the National Centre for Information (CNI), also engaged in repressive activity in response to terrorist attacks by leftist groups.[62] Detention, torture, and disappearance of government opponents again became commonplace.[63] The CNI also employed excessive force in putting down mass protests and demonstrations that erupted after an economic crisis in 1983.[64] This repression did not go unnoticed, and the Inter-American Commission for Human Rights summarily condemned the Pinochet regime in 1985.[65] The Commission concluded that the Pinochet regime had used all known means generally considered illegal under international law to eliminate all opposition to his government.[66]

In 1981, a new constitution was drafted to allow a transition from the military government of Pinochet to a democratically elected government.[67] In 1988, the people of Chile had an opportunity to vote for Pinochet as president, validating military rule for another eight years.[68] However, the people rejected Pinochet and paved the way for the military to turn power over to a freely-elected government.[69]

Pinochet finally stepped down in March of 1990.[70] Attempts to bring him to justice for his actions, however, met with little success due to amnesty

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58. *Id.*

59. *See id.* at 508.

60. *See id*. For example, former Minister of Defense Orlando Letelier was assassinated by a car bomb in Washington, D.C. on September 21, 1976. *Id.*

61. See Bhuta, *supra* note 42, at 508.

62. *Id.*

63. *See id.*

64. *Id.*

65. *Id.*

66. *Id. See also Inter-American Commission on Human Rights: Report on the Status of Human Rights in Chile*, 14 I.L.M. 115, 115 (1975). The report documents practices such as disappearances, summary executions of individuals and groups of defenseless persons, executions without legal safeguards, torture, and arbitrary, indiscriminate violence against persons partaking in public demonstrations or protests. *Id.*

67. *See* Bhuta, *supra* note 42, at 509.

68. *Id.*

69. *See id.*

70. *Id.*

laws passed during his regime.[71] The Chilean courts have consistently upheld these laws to prevent the prosecution of human rights violations,[72] despite the widespread view that international law requires Chile to prosecute such conduct.[73] Military courts loyal to Pinochet have also thwarted the effort to prosecute human rights violations by asserting jurisdiction over officers accused of such conduct.[74] Finally, Pinochet himself enjoys immunity by virtue of his position as "Senator-for-Life," which he assumed after stepping down as Commander in Chief in March of 1998.[75]

The carnage that Pinochet left behind in Chile is well documented. The

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71. Decree Law No. 2191 was passed in April of 1978 and granted amnesty to any individual who had committed criminal actions between September 11, 1973 and March 10, 1978 (the period of the official state of emergency in Chile). AMNESTY INTERNATIONAL, *supra* note 40, at 5.

72. In 1990, the Supreme Court of Chile upheld the 1978 amnesty law as constitutionally valid. *Id.* It was argued that the amnesty laws were constitutionally invalid because international law required the diligent prosecution of certain conduct that violated international human rights law. Bhuta, *supra* note 42, at 510 n.74. The Court dismissed these arguments as invalid despite amendments enacted in 1988 which obligated the Chilean government to act in accordance with its obligations under international human rights treaties ratified by Chile. *See id.* The relevant international conventions cited before the Supreme Court to which Chile is a party are the following: Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* August 12, 1949, 75 U.N.T.S. 31 (entered into force October 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* August 12, 1949, 75 U.N.T.S. 85 (entered into force October 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* August 12, 1949, 75 U.N.T.S. 135 (entered into force October 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* August 12, 1949, 75 U.N.T.S. 287 (entered into force October 21, 1949); Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* December 9, 1948, 78 U.N.T.S. 277 (entered into force January 12, 1951). *See* Bhuta, *supra* note 42, at 510 n.74.

73. For example, the Inter-American Commission on Human Rights held that despite the amnesty law, Chile's failure to investigate and prosecute cases of disappearance, summary execution, and torture violated Chile's duties and obligations under the American Convention on Human Rights. *See* Bhuta, *supra* note 42, at 510 n.74 (citing case [36/96], Inter-Am. C.H.R. [157-83], OEA/Ser. L./V./II.95 (1996). The Human Rights Committee, a body charged with monitoring and enforcing the International Covenant on Civil and Political Rights ("ICCPR"), also held that Chile's amnesty law was a violation of its obligations under international human rights law. *See* AMNESTY INTERNATIONAL, *supra* note 39, at 5. *See also id.* at 5 (citing Hugo Rodriguez, Communication No. 322/1988 (July 19, 1994), U.N. Doc. CCPR/C/51/D/322/1988).

74. *See* Bhuta, *supra* note 42, at 510. Military courts staffed by former and currently serving members of the armed forces are deeply loyal to Pinochet and are not disposed to convict members of the armed forces accused of human rights violations under the Pinochet regime. *Id. See also id.* at 510 n.78 (citing Inter-American Commission on Human Rights, *Report on the Status of Human Rights in Chile*, 14 I.L.M. 115, 115 (1975)); Nigel Rodley, *Report on Visit by the Special Rapporteur to Chile*, Special Rappoteur on the Question of Torture of the United Nations Commission on Human Rights, at 62, 68, 74, 76 U.N. Doc. E/CN.4/1996/35/Add.2 (1996).

75. *See* AMNESTY INTERNATIONAL, *supra* note 40, at 6. *See also* Bhuta, *supra* note 42, at 510-11. The immunity can only be rescinded by a decision of the Supreme Court. *See* Bhuta, *supra* note 42, at 511 (citing Penal Procedure Code (Chile) arts. 611-18). That immunity is unlikely to be rescinded in the near future considering the Supreme Court's long history of siding with Pinochet and the military government. *Id. See also* COMMISION REPORT, *supra* note 51, at 135-36.

Chilean National Commission on Truth and Reconciliation[76] concluded that over 2,000 people were killed in violation of their human rights.[77] In the Commission's final report,[78] the government of Chile officially acknowledged over 3,000 cases of human rights abuses.[79] Independent investigations by private non-governmental organizations have placed the figure even higher, recording over 11,500 human rights abuses.[80] Although efforts to bring Pinochet to justice in Chile have been unsuccessful, the victims' families and human rights organizations hold Pinochet accountable, refusing to be deterred by the amnesty laws.[81] In September 1998, their perseverance paid off as a golden opportunity to hold Pinochet responsible finally emerged.

IV. SPANISH JUDICIAL PROCEEDINGS TO EXTRADITE PINOCHET

In March and July of 1996, the Progressive Union of Prosecutors of Spain, together with private organizations,[82] filed criminal proceedings in Spanish courts charging Argentine and Chilean military officers with the "disappearances of Spanish citizens in both countries."[83] The complaint also

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76. The Commission was established by President Patricio Aylwin under Supreme Decree 335 of April 1990. *See* AMNESTY INTERNATIONAL, *supra* note 40, at 4.

77. Bhuta, *supra* note 42, at 508. *See also* COMMISSION REPORT, *supra* note 51, at app. 2. Approximately fifty percent of the deaths that were deemed human rights violations are broken down as follows: (1) 59 people sentenced to death by military courts; (2) 101 people killed attempting to escape prison; (3) 93 people killed during protests and demonstrations; (4) 815 people killed by execution or torture. Bhuta, *supra* note 42, at 508. Disappearances attributable to the State accounted for over forty-five percent of the human rights violations (957 people). *Id.* Of the victims, over forty-five percent had no political affiliations. *Id.*

78. The Reparation and Reconciliation Corporation, established by President Aylwin in 1992 as the successor to the Truth and Reconciliation Commission, issued the final report in 1996. AMNESTY INTERNATIONAL, *supra* note 40, at 4.

79. The final breakdown of the violations are as follows: 2,095 summary executions and deaths by torture and 1,102 disappearances for a total of 3,197 human rights violations. AMNESTY INTERNATIONAL, *supra* note 40, at 4.

80. Bhuta, *supra* note 42, at 509. The Chilean non-governmental organization Comite Nacional de Defensa de los Derechos del Pueblo documented some 11,536 human rights violations between 1984-88. These violations included 163 murders, 446 instances of torture, and 1,927 arbitrary arrests. Bhuta, *supra* note 42, at 509, 509 n.64 (citing JAMES PETRAS, FERNANDO LEIVA, AND HENRY VELTMEYER, DEMOCRACY AND POVERTY IN CHILE: THE LIMITS TO ELECTORAL POLITICS (1994) 21).

81. *See* Bhuta, *supra* note 42, at 511.

82. Spanish law allows private citizens and organizations to initiate criminal proceedings without the approval of the prosecutor's office and regardless of whether or not the complaining party is a victim of the crime. *See* Bhuta, *supra* note 42, at 511. The United Left, a Spanish political party, and the Argentine Association for Human Rights in Madrid initiated the actions against the Argentinian military officers. The Salvador Allende Foundation and the Chilean Group of Relatives of Detained and Disappeared People initiated the actions against the Chilean military officers. *See* Carassco & Fernandez, *infra* note 83, at 691 n.8.

83. Maria del Carmen Marquez Carrasco & Joaquin Alcaide Fernandez, In re Pinochet, 93 AM. J.

included allegations of genocide, terrorism, and crimes against humanity.[84] In June 1996, Judge Baltazar Garzon held that the Court had jurisdiction to investigate the allegations in the complaint.[85] On September 22, 1998, Pinochet traveled to the United Kingdom to undergo back surgery.[86] Upon hearing of Pinochet's presence in the United Kingdom, Judge Garzon requested Scotland Yard to arrest Pinochet pursuant to international arrest warrants[87] issued for the purpose of extraditing him and bringing him back to Spain.[88] On October 16, 1998, Pinochet was arrested and detained at a hospital in London where he was recovering from surgery.[89]

The Spanish Public Prosecutor[90] appealed Judge Garzon's finding of jurisdiction, and the Criminal Division of the Spanish National Court considered the question.[91] The Court unanimously held that Spain had jurisdiction to try crimes of genocide, terrorism, and torture committed abroad by the Argentine and Chilean defendants.[92] Although the acts committed by Pinochet took place in Chile and most of the victims were not Spanish citizens, the Court relied on the principle of universal jurisdiction[93]

INT'L L. 690, 691 (1999). More than 300 Spanish citizens were killed by the military regimes of Argentina and Chile. *See* Bhuta, *supra* note 42, at 511.

84. Bhuta, *supra* note 42, at 512.

85. Carrasco & Fernandez, *supra* note 83, at 691. Initially, the proceedings against Argentine and Chilean military officers were under separate judges. Judge Garcia-Castellon had previously accepted the case with respect to the allegations against Chilean military officers in February of 1997. In September of 1998, he held that he had jurisdiction to investigate the case. After Pinochet was arrested pursuant to Judge Garzon's warrant, Judge Garcia-Castellon ordered the cases combined and consolidated under the supervision of Judge Garzon. *Id.* at 692. *See also* Bhuta, *supra* note 42, at 512.

86. Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2133 (1999).

87. The first international arrest warrant issued on October 16, 1998 charged Pinochet with the murder of Spanish citizens in Chile between 1973 and 1983. *See* Bradley & Goldsmith, *supra* note 86, at 2133. The second international warrant issued by Judge Garzon on October 22, 1998, charged Pinochet with "acts of torture, hostage taking, and other conduct committed primarily . . . against Chilean citizens in Chile." *Id.*

88. *See* Carrasco & Fernandez, *supra* note 83, at 692. Judge Garzon issued the order in response to a request by the United Left Party to question Pinochet concerning his role in Operation Condor in which Argentine and Chilean military officers were charged with the abduction and disappearance of Spanish citizens. *Id.*

89. Bhuta, *supra* note 42, at 513.

90. The Public Prosecutor's Office is not designed to adhere to the policies and views of the government. Its duty is to promote justice in an impartial manner by defending citizens' rights and the public interest as established by law. Therefore, with respect to criminal proceedings, the office is not only required to bring criminal and civial actions, but is also required to oppose proceedings brought by others when appropriate. *See* Carrasco & Fernandez, *supra* note 83, at 690 n.4.

91. *See* Bhuta, *supra* note 42, at 512.

92. *See* Carrasco & Fernandez, *supra* note 83, at 690.

93. Generally, international law requires that a nation exerting jurisdiction outside its territory must have some connection with the illegal conduct or the person charged with such conduct. Universal jurisdiction, however, recognizes that certain types of conduct or crimes can be regulated by

as a basis for requesting his extradition.[94] Under Spanish law, courts can exercise criminal jurisdiction over genocide,[95] terrorism,[96] torture,[97] and any other crime regulated by international treaties—even if committed by foreign citizens abroad.[98] The Court also noted that Spain had a legitimate interest in

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any nation. *See* Bradley & Goldsmith, *supra* note 86, at 2133. *See generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). The theory behind this type of jurisdiction is that all nations have an interest in punishing such conduct because people who engage in such conduct are *"hostis humani generis"* or "enemies of all mankind." Bradley and Goldsmith, *supra* note 86, at 2133-34. *See also* Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 416-17 (1988).

94. Carrasco & Fernandez, *supra* note 83, at 690-91.

95. The crime of genocide became part of the Spanish penal code in 1971. The substantive elements of the crime were incorporated from the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (hereinafter "Genocide Convention"). Spain ratified the Genocide Convention in 1968. The Public Prosecutor first argued that Article VI of the Genocide Convention gave exclusive jurisdiction over genocide to the state where the crime took place or an international tribunal. The Court rejected the Prosecutor's arguments, holding that Article VI only imposes an obligation to prosecute on states where genocide has taken place. Spanish claims to jurisdiction were subsidiary. Because neither Chile nor an international tribunal was willing to try the crime, Spanish courts were not hindered from asserting jurisdiction. *See* Carrasco & Fernandez, *supra* note 83, at 693.

The Public Prosecutor also argued that the alleged acts committed by Pinochet could not constitute genocide because the acts were "not intended to destroy any national, ethnic, racial or religious group." The Prosecution based its argument on the definition contained in the Genocide Convention. However, the definition in the Spanish Criminal Code was amended in 1983 by replacing the word "social" with "racial." Relying on this definition, the Court held that the "national" or "social group" that Pinochet was trying to eliminate consisted of all people who were opposed to the regime. For the Court, a "national group" did not necessarily mean people of the same nation. It might simply be a group of humans defined by common characteristics. Thus, such a group could include Spanish citizens. According to the Court, Pinochet's alleged acts were aimed at destroying in whole or in part a distinct national group, *i.e.* a group that opposed the regime or was considered unsuitable to the regime in establishing the new order. Carrasco & Fernandez, *supra* note 83, at 693.

The Court's interpretation of a national group, however, deviates from the generally recognized definition. Genocide has been limited to acts aimed at destroying a "national, ethnic, racial or religious group." *Id.* at 695. Political groups were not included in the definition and subsequent international practice in the form of the Yugoslav and Rwandan criminal tribunals has not expanded this notion. The group described by the Court as falling within the genocide definition better fits the category of political group. The acts committed by Pinochet are better characterized as crimes against humanity, which are also subject to universal jurisdiction under international law. *See id.* at 694-95.

96. "Spanish law contained no definition of terrorism for the exercise of universal jurisdiction." *Id.* at 693. The Prosecutor argued that Spanish courts only have jurisdiction over acts of terrorism committed against the Spanish public order. The Court rejected this notion and held that the intention to destabilize the national order required for the crime of terrorism was the national order of the country where the acts of terrorism took place. *See* Carrasco & Fernandez, *supra* note 83, at 693-94.

97. With respect to the claims for torture, the Court held that it was unnecessary to find an independent basis for jurisdiction because torture fell under the larger crimes of genocide and terrorism. *See* Carrasco and Fernandez, *supra* note 83, at 694.

98. Article 23 (4) of Spain's Organic Law of Judicial Power provides in pertinent part:

> In addition Spanish Courts have jurisdiction over acts committed abroad by Spanish subjects or foreigners abroad if those acts are likely to be considered, according to the Spanish criminal legislation, as any of the following crimes:
> (a) genocide,

exerting jurisdiction, considering that over 550 Spanish citizens disappeared or were killed by the military regimes of Argentina and Chile.[99] As a result of the Court's ruling, the Spanish government officially transmitted its request to the British government for the extradition of Pinochet.[100]

V. BRITISH JUDICIAL PROCEEDINGS CONSIDERING THE EXTRADITION OF PINOCHET

A. Queen's Bench Division Decision

Pinochet challenged his arrest and sought habeas corpus relief in the Divisional Court of the Queen's Bench Division.[101] The Court dismissed the first international arrest warrant, which cited the murder of Spanish citizens in Chile, on the grounds that it did not amount to an extraditable crime under British law.[102] The Court held, however, that the second international arrest

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(b) terrorism,
(c) piracy and unlawful seizure of aircraft . . .
(d) and any other which according to international treaties or conventions must be prosecuted in Spain.

Id. at 692 n.14 (quoting Article 23(4) of the Ley Organica del Poder Judicial (L.A.P.J. 1985)).

99. *See* Carrasco & Fernandez, *supra* note 83, at 691.

100. *See id.* at 692.

101. Bradley & Goldsmith, *supra* note 86, at 2136; Chinkin, *supra* note 2, at 704.

102. *See In re* Pinochet, 38 I.L.M. 68, 77 (1999). A request for extradition under the United Kingdom's Extradition Act of 1989 may only be considered if the alleged crimes committed by the defendant are extradition crimes. An extradition crime is defined in section 2(1) of the Act as the following:

(a) conduct in the territory of a foreign state . . . which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, . . . is so punishable under that law;
(b) an extra-territorial offense against the law of a foreign state . . . which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment . . . .

In re Pinochet, 38 I.L.M. at 72 (quoting Sections 2(1)(a) and 2(1)(b) of the Extradition Act of 1989). Because the international arrest warrant cited the murder of Spanish citizens in Chile, the extradition request fell under Section 2(1)(b) of the Act. However, before an extradition request could proceed under Section 2(1)(b), conditions in either Section 2(2) or 2(3) needed to be satisfied. They are as follows:

[2(2)] The condition mentioned . . . above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.
. . . .
[2(3)] (a) that the foreign state . . . bases its jurisdiction on the nationality of the offender;
(b) that the conduct constituting the offence occurred outside the United Kingdom; and
(c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment.

In re Pinochet, 38 I.L.M. at 72 (citing Sections 2(2) and 2(3)(a)-(c) of the Extradition Act of 1989).

warrant[103] issued by Judge Garzon did cite valid extradition crimes under British Law.[104] Accordingly, the United Kingdom could claim extra-territorial jurisdiction over offenses committed abroad that were listed in the warrant.[105]

The decisive issue before the Court was the head of state immunity argument posited by Pinochet's lawyers. With respect to this argument, the Court held that Pinochet was entitled to immunity as a former head of state from criminal and civil proceedings in the United Kingdom.[106] The Court reasoned that the State Immunity Act of 1978 conferred immunity on Pinochet for acts performed in his official capacity.[107] The Court further

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The international arrest warrant could not be predicated on Section 2(3) because Spain was not basing its jurisdiction on the nationality of Pinochet, a Chilean citizen, but on the nationality of the victims. Thus, the Court held that all the conditions in Section 2(3) were not satisfied. *See id.* at. 77. The Court further held that the warrant did not satisfy Section 2(2) because Britain could not claim extra-territorial jurisdiction over an offense involving the murder of a British national by a non-national outside the United Kingdom. *See id.*

103. The second warrant alleged the following five offenses: (1) that between January of 1988 and December of 1992, Pinochet "intentionally inflicted severe pain or suffering" in the performance of his official, public duties; (2) Pinochet conspired to commit such crimes between those dates; (3) that between January 1, 1982 and January 31, 1992, Pinochet ordered the detention of hostages; (4) between those dates Pinochet conspired to commit such crime; and (5) that between January 1976 and December 1992, Pinochet conspired to commit murder in a Convention country. *In re Pinochet*, 38 I.L.M. at 77.

104. *See id.* at 79. The actions in counts one and two of the warrant were proscribed by Section 134 of the Criminal Justice Act of 1988. The actions relating to hostage taking in counts three and four were prohibited by Section 1 of the Taking of Hostages Act of 1982. Finally, conspiracy to commit murder, alleged in the fifth count, was regulated by Section 4 of the Suppression of Terrorism Act of 1978. It would be a criminal offense to commit certain acts in countries that signed the Convention if those acts would also be offenses in the United Kingdom. *Id.*

105. *Id.*

106. *Id.* at 85.

107. *Id.* at. 82. The Court relied on the following sections of the State Immunity Act of 1978 to confer immunity on Pinochet:

> [Section] 1: A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> [Section] 14(1) . . . The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to –
>
> (a) a sovereign or other head of state in his public capacity; . . .
>
> Section 20(1) . . . Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act of 1964 shall apply to -- (a) a sovereign or other head of State.

In re Pinochet, 38 I.L.M. at 80 (quoting Sections 1, 14(1), and 20(1) of the State Immunity Act of 1978). The Court then looked to the following provisions of the Vienna Convention on Diplomatic Relations, which is incorporated into the aforementioned Diplomatic Privileges Act of 1964 in Section 20(1) of the State Immunity Act of 1978:

> [Article 31(1)]: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, ...
>
> . . . .
>
> [Article 39(1)]: Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if

reasoned that the rule of international relations "restraining one sovereign state from sitting in judgment on the sovereign behaviour of another" clearly entitled Pinochet to immunity, even with respect to "criminal acts performed in the course of exercising public functions."[108] According to the Court, Pinochet should enjoy immunity from all acts performed in his public function because it would be difficult to "draw the line" of liability with respect to some crimes and not to others.[109]

B. First House of Lords Decision (November 1998)

The Court delayed enforcement of its order quashing the two warrants and granted Britain's Crown Prosecution Service leave to appeal the decision to the House of Lords.[110] In response to the Court's decision, Spain issued another extradition request which expanded the number and scope of the crimes committed by Pinochet, adding "among other things, a charge of genocide."[111] Finally, understanding the potential importance of this

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already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Vienna Convention on Diplomatic Relations, February 25, 1964, 500 U.N.T.S. 95, 112, 118 (quoted in *In re Pinochet*, 38 I.L.M. at 81). The Court read Section 20(1) of the State Immunity Act of 1978 and Article 39 of the Vienna Convention on Diplomatic Relations in conjunction with each other to confer on Pinochet immunity for public and official acts performed in his country. *See In re Pinochet*, 38 I.L.M. at 83.

108. *In re Pinochet*, 38 I.L.M. at 83. The Court cited to several authoritative sources for the proposition that Pinochet enjoyed total immunity with respect to acts performed in his official capacity. For example, the Court pointed out that according to Lewis's STATE AND DIPLOMATIC IMMUNITY "[t]he sovereign's personal immunity at common law, whereby he may not be directly impleaded, is total, though he may waive it by an actual submission . . ." *Id.* at 83 (quoting CHARLES J. LEWIS, STATE AND DIPLOMATIC IMMUNITY 125 (3rd ed. 1990). The Court also referred to Professor Brownlie's statements in PRINCIPLES OF PUBLIC INTERNATIONAL LAW, where he writes: "One form of the Act of State doctrine is the rule that municipal courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories." *Id.* at 83 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 507-08 (3d ed. 1979)). Pinochet was not charged with "personally torturing victims . . . or causing their disappearance." Instead, Pinochet used the authority and machinery of the State to carry out the crimes; as such, these crimes were committed under the authority of the government and were thus public or official acts. *See In re Pinochet*, 38 I.L.M. at 82.

The Court rejected the Crown Prosecution Service's argument that a former head of state can be held criminally responsible for serious crimes against the law of nations such as genocide and torture. The Court pointed out that the specific provision of the Genocide Convention conferring liability on rulers and public officials was not incorporated into the United Kingdom's Genocide Act of 1969, the Act that implemented the Genocide Convention in the United Kingdom. Furthermore, the Court noted that the second provisional warrant did not specify genocide as one of the offenses. *In re Pinochet*, 38 I.L.M. at 83-84.

109. *Id.* at 83.

110. *See* Bradley & Goldsmith, *supra* note 86, at 2136.

111. *Id.*

decision, the House of Lords granted leave for human rights groups such as Amnesty International to intervene in the appeal.[112]

On November 25, a five-member panel of the House of Lords, in a narrow three to two decision, held that Pinochet was not entitled to head of state immunity.[113] The majority did note that a former head of state was immune from criminal prosecution for acts performed in his official capacity as head of state.[114] The majority reasoned, however, that acts "condemned as criminal by international law"[115] cannot "amount to acts performed in the exercise of the [official] functions of a head of state."[116] Because hostage-taking and torture have been outlawed by international law, they cannot constitute official functions of a head of state for which Pinochet should be granted immunity.[117]

The dissent rejected the notion that certain crimes abrogate head of state immunity.[118] The fact that particular offenses were recognized as illegal

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112. *See id.*

113. *See* Regina v. Bartle, 37 I.L.M. 1302, 1334 (Lord Nicholls), 1338 (Lord Steyn), 1339 (Lord Hoffman) (1998).

114. *See id.* at 1337 (Lord Steyn).

115. *Id.* at 1333 (Lord Nicholls). Lord Nicholls noted that torture and hostage-taking were illegal under international law. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, J. HERMAN BURGERS AND HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 177 App. 1 (1988); Convention Against the Taking of Hostages, 18 I.L.M. 1456, 1456 (1979) (reproduced from U.N. Doc. A/C.6/34/L.23 (1979)). In reasoning that former officials should not be immune from prosecution, Lord Nicholls noted that these conventions obligated states to punish such crimes in their own courts even if the crimes were committed outside their own jurisdiction. *See Regina v. Bartle*, 37 I.L.M. at 1334. Finally, in underscoring that torture and hostage-taking cannot constitute official acts of a head of state, Lord Nicholls emphasized that "international law has made plain that certain types of conduct . . . 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." *Id.* at 1333.

116. *Id.* at 1337 (Lord Steyn). Lord Steyn disagreed with the decision in the Queen's Bench that no line could be drawn with respect to immunity for the commission of certain crimes. He noted that statutory immunity was not total and absolute, but required the existence of two factors: (1) the defendant is in fact a former head of state and (2) the defendant is charged with official acts performed by virtue of his functions as head of state. *Id.* According to Lord Steyn, the key question was whether the acts complained of in the warrant could constitute official or public acts performed in the exercise of the functions and powers of a head of state. Lord Steyn noted that municipal law did not govern the issue of whether or not certain offenses fell under the category of official acts. Rather, international law was decisive in determining whether certain offenses were official acts warranting immunity from prosecution. *Id.* at 1337. With respect to the crimes of torture and hostage-taking, Lord Steyn stated: "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." *Id.*

117. *Id.* at 1334 (Lord Nicholls). For the agreements outlawing torture and hostage taking, see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 115, at 177; Convention Against the Taking of Hostages, *supra* note 115, at 1456.

118. *See Regina v. Bartle*, 37 I.L.M. at 1312 (Lord Slynn), 1323-24 (Lord Lloyd).

under international law did not mean that all states would have the competence and jurisdiction to try those offenses.[119] To the dissent, head of state immunity was a well-established principle of customary international law which could only be abrogated by treaty or waived by the state of nationality.[120] Thus, a head of state that uses his public authority to engage in conduct proscribed by international law could still claim immunity with respect to that conduct.[121]

C. Second House of Lords Decision (March 1999)

The first House of Lords decision represented a momentous victory for human rights groups. That victory was short-lived, however, because the House of Lords vacated the judgment in light of an undisclosed conflict of interest of one of the Law Lords deciding the case.[122] A seven-member panel of the House of Lords reheard the appeal. Chile intervened to argue for Pinochet's release.[123]

Before addressing the issue of head of state immunity, the House of Lords

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119. *See id.* at 1313 (Lord Slynn).

120. *See id.* at 1313-14 (Lord Slynn), 1324-25 (Lord Lloyd). Lord Slynn established the following three elements which must be satisfied before head of state immunity can be expressly abrogated:

> (1) "[t]he convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; (2) it must make it clear that a National Court has jurisdiction to try a crime alleged against a former head of state, or that having been a head of state is no defense and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him; and (3) the convention must be given the force of law in the National Courts of the State.

Id. at 1313-14 (Lord Slynn).

Lord Slynn noted that the Genocide Convention did not expressly abrogate head of state immunity. When Britain enacted the Genocide Act of 1969 to implement the Genocide Convention, it did not incorporate Article IV of the Genocide Convention. Article IV states that heads of state and other public officials are individually responsible for committing acts of genocide. *See id.* at 1311-12 (Lord Slynn).

Lord Slynn argued that the Torture Convention did not expressly indicate that it applied to heads of state. Even though the Torture Convention does impute liability to public officials, Lord Slynn noted the absence of the term "head of state" or "ruler" is present in the Genocide Convention. Accordingly, the Torture Convention did not give enough guidance as to whether heads of state were to be regarded as public officials for purposes of the Convention. Therefore, head of state immunity was not expressly abrogated by the Convention. *See id.* at 1315 (Lord Slynn).

121. *See Regina v. Bartle*, 37 I.L.M. at 1309 (Lord Lloyd).

122. *See* Bhuta, *supra* note 42, at 519. Lord Hoffman failed to disclose that he was an unpaid director of one of Amnesty International's fund-raising arms. Amnesty International had intervened in the first case before the House of Lords. Although Lord Hoffman did not have any financial interest at stake in the case, the appearance of impartiality seemed tainted. As a result, the Lords dismissed the case as a matter of law. *Id.* at 519. *See generally In re* Pinochet, 38 I.L.M. 430 (1999) (decision to dismiss).

123. Bradley & Goldsmith, *supra* note 86, at 2137.

dismissed a significant portion of the extradition charges against Pinochet.[124] The House of Lords unanimously held that the extradition statute required the extraterritorial conduct to be illegal under British law at the time the alleged offenses took place.[125] Great Britain implemented the Torture Convention and made torture an extraterritorial crime in September of 1988.[126] Therefore, all charges concerning torture before this date could not serve as a valid basis for extradition.[127]

The House of Lords next considered the issue of immunity with respect to the remaining offenses, charges relating to torture and conspiracy to commit torture after September 1988.[128] The House of Lords recognized that under both British and international law, "Pinochet was generally entitled to immunity" for criminal acts undertaken "while carrying out his duties as head of state."[129] However, the Law Lords held that "former-head-of-state immunity did not cover acts of torture and conspiracy to commit torture committed after December 8, 1988, the date Britain ratified the Torture Convention."[130] Despite their holding, however, the Law Lords suggested that "the Home Secretary should reconsider . . . the extradition proceedings in light of the substantial reduction in [the number and] scope of the charges."[131]

VI. THE *PINOCHET* PRECEDENT AND HEAD OF STATE IMMUNITY

The House of Lords' holding that Pinochet enjoyed no immunity as a former head of state represents a significant "shift from a State-centered

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124. *Id. See also Ex Parte* Pinochet, 38 I.L.M. 581, 582-83 (Lord Browne-Wilkinson), 597 (Lord Goff), 621 (Lord Hope) (1999). As noted earlier, offenses under the British extradition statute must meet the double criminality requirement before they can constitute the basis for extradition. Double criminality means that the conduct complained of would have to constitute not only an extraterritorial offense against the requesting state, but also against the law of the United Kingdom. *See* Bradley & Goldsmith, *supra* note 86, at 2137-38.

125. *Id.* at 2138. *See also Ex Parte Pinochet*, 38 I.L.M. at 588 (Lord Browne-Wilkinson), 613 (Lord Hope), 627 (Lord Hutton). Both the divisional court and the first House of Lords decision concluded with minimal analysis that the double criminality requirement was met. They both concluded that the offenses alleged could constitute a basis for extradition as long as the conduct was considered criminal under British law at the time the extradition request was made. *See* Bradley & Goldsmith, *supra* note 86, at 2138.

126. *See id. See also Ex Parte Pinochet*, 38 I.L.M. at 618 (Lord Hope).

127. *See* Bradley & Goldsmith, *supra* note 86, at 2138. *See also Ex Parte Pinochet*, 38 I.L.M. at 618-19 (Lord Hope).

128. *See* Bradley & Goldsmith, *supra* note 86, at 2138.

129. *Id.* at 2138-39.

130. *Id.*

131. *Id. See also Ex Parte Pinochet*, 38 I.L.M. at 595 (Lord Browne-Wilkinson), 627 (Lord Hope), 643 (Lord Hutton), 652 (Lord Millett).

order of things."[132] The *Pinochet* decision could be interpreted to carve out a new exception to head of state immunity for criminal acts of a non-official character. This would mirror the distinction that is currently made with respect to the issue of immunity in civil and administrative proceedings. Thus, a new rule for criminal liability would give a head of state immunity for official acts performed in public capacity. The rule would further classify acts proscribed by international law as non-official acts to which immunity could not attach.

The House of Lords' rationale for denying Pinochet immunity, however, does not create such a clear-cut exception. The judgment denying Pinochet immunity could be narrowly limited to the specific terms and purposes of the Torture Convention.[133] In fact, a close reading of the decision seems to favor the latter interpretation instead of the view that head of state immunity is abrogated when certain international crimes are involved.

The *Pinochet* decision seems to have made the law more "open-ended and uncertain."[134] The best illustration of this uncertainty is the Law Lords' assertion that current heads of state would enjoy absolute immunity for acts of torture even after the implementation of the Torture Convention.[135] It is unclear why a former head of state's immunity should be abrogated for acts of torture and a current head of state's immunity should remain intact.[136]

Despite the lack of any clear rule emerging from the House of Lords' decision, the *Pinochet* case has already had a practical impact on the doctrine of head of state immunity. In the short period of time since Judge Garzon brought charges against Pinochet, Belgium[137] and France[138] have also instituted proceedings against Pinochet. The *Pinochet* prosecution has also inspired other countries to hold former dictators accountable for their crimes. For example, on February 3, 2000, the government of Senegal indicted Chad's ex-dictator on torture charges.[139]

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132. Fox, *supra* note 4, at 207 (footnote omitted).

133. Bhuta, *supra* note 42, at 530.

134. Bradley & Goldsmith, *supra* note 86, at 2140.

135. *See id.* at 2144.

136. *See id.* at 2144. In fact, the International Criminal Tribunal for Yugoslavia has made it clear that current heads of state are not immune from prosecution for serious international crimes committed while in office. In May of 1999, the Tribunal indicted Serbian President Slobodan Milosevic for crimes arising out of his treatment of the Kosavars in Kosovo. *Milosevic Indictment Makes History*, *at* http://www.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/ (visited Mar. 7, 2001).

137. For a short summary of Belgian proceedings against Pinochet, see Luc Reydams, In re Pinochet, 93 AM. J. INT'L L. 700, 700-03 (1999).

138. For a short summary of French proceedings against Pinochet, see Brigitte Stern, In re Pinochet, 93 AM. J. INT'L L. 696, 696-700 (1999).

139. Chad's former dictator, Hissene Habre, has been in exile in Senegal since he fled Chad in 1990 after his ouster. A commission established by the government of Chad has accused Habre's

The *Pinochet* decision has not established a clear exception to head of state immunity with respect to criminal proceedings. The decision does represent a significant and necessary first step in the establishment of a new rule of head of state immunity. As with any significant departure from existing law, future judicial decisions and state practice must establish and further refine the rule. In any event, the *Pinochet* decision will always be looked upon as the watershed decision that circumscribed the immunity of rulers accused of grave human rights violations.[140]

VII. EPILOGUE

In March of 2000, British Home Secretary, Jack Straw ruled that General Pinochet would not be extradited to Spain.[141] The Home Secretary's decision was based on medical tests indicating that Pinochet was unfit to stand trial.[142] As a result, Pinochet was allowed to return home to Chile after more than 500 days in detention.[143]

Despite his return to Chile, Pinochet has not escaped justice. In May of 2000, a Chilean Appeals Court stripped Pinochet of his immunity for crimes committed during his reign.[144]

Finally, in August of 2000, the Chilean Supreme Court upheld the appellate court decision to strip Pinochet of his immunity.[145] As a result of the removal of his immunity, more than 150 cases have been brought against Pinochet in Chile.[146]

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regime of committing 40,000 political murders and 200,000 cases of torture. Senegal cited the Pinochet prosecution and its obligation under the Torture Convention as support for its criminal complaint against Chad's former head of state. *See Senegal Indicts Chad's Ex-dictator on Torture Charges, at* http://www.cnn.com/20...RLD/africa/02/03/senegal.habre.apl (visited February 7, 2000); *Judge Hears Torture Charges Against Chad's Habre, at* http://www.cnn.com/20...a/01/28/bc.rights.chad.habre.reut/ (visited February 7, 2000); *Rights Groups Seek Speedy Trial of Chad's Habre, at* http://www.cnn.com/20...D/africa/01/27/bc.chad.habre.reut/. (visited February 7, 2000).

140. *See* Bhuta, *supra* note 42, at 530.

141. Desmond McCartan, *Straw Clears Way for Pinochet to Leave Spanish in Final Bid to Extradite Ex-Dictator*, BELFAST TELEGRAPH, Mar. 15, 2000, *available at* 2000 WL 16734723.

142. *Id.*

143. *Events Leading to Ruling Overturning Pinochet's Legal Immunity,* AGENCE FRANCE-PRESSE, Aug. 8, 2000, *available at* 2000 WL 24686722.

144. *Id.*

145. *Id.*

146. *Id.*

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