PINOCHET AND THE UNCERTAIN GLOBALIZATION OF CRIMINAL LAW

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I. INTRODUCTION

No case study reveals the growth in importance of international criminal law more dramatically than the prosecutions centered on the crimes of the Chilean dictatorship led by Augusto Pinochet Ugarte.1 Numerous books address the history and political implications of the Chilean government during the 1970s and 1980s,2 and various articles address the legal significance of the efforts to bring Pinochet and others to justice.3 Many legal analyses focus on

1. The investigations concerned both Argentina and Chile, with many potential defendants from each nation. There were also crimes committed in other nations, including the United States. This article refers to the collection of investigations and prosecutions as "the Pinochet case" to avoid unnecessary confusion and repetition, with more specific references where appropriate.


the extradition case brought by Spain in the United Kingdom and suggest that it represents a new and welcome paradigm in international criminal law—universal jurisdiction to bring state criminals to justice. One such analysis is *The Pinochet Effect*, by Hastings College of Law Professor Naomi Roht-Arriaza. This book traces the Spanish cases against Pinochet and others for crimes in Chile and Argentina to draw several conclusions about changes in international and transnational law that may result in greater protection of human rights.

The celebrations of greater international accountability are variations on a theme recently enunciated by Thomas L. Friedman in *The World Is Flat: A Brief History of the Twenty-First Century*. Friedman focuses on economic changes brought about by technological development, primarily in information technology. Now that communications around the world are instantaneous and inexpensive and transportation of goods and people is nearly as fast, even small businesses in remote areas can participate in international markets. The result is that the field of competition is close to level—the "flat world" of the title—and therefore success requires meeting international standards.

The criminal law and human rights worlds are also flattening. Various developments over the past fifty years, including the Nuremberg prosecutions, the creation of the United Nations, the development of activist private human rights organizations, the use of special international criminal tribunals for former Yugoslavia and Rwanda, and the recent creation of the International Criminal Court (ICC) all constitute forms of globalization. Crimes with some individual or collective international impact are no longer subject only to the jurisdiction of the nation in which they took place; nations and high-ranking officials may be prosecuted for international crimes and victims may seek redress in courts of other nations.

Professor Roht-Arriaza and other commentators rightly praise such developments. Their focus on the Pinochet case, however, leads to an unduly optimistic outlook—a good example of seeing a nearly dry glass as close to full. Celebrating the Spanish and British

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proceedings against Pinochet as representing a victory of international criminal law\(^6\) overlooks their ultimate failure. In any just world, Pinochet would have been subject to criminal prosecution in Chile many years ago, and if only a small portion of the allegations of his knowing involvement in murder, torture, and disappearances are true, he should have faced the harshest punishments allowed by law. The fact that he had lived out his life in comfort reveals that there is a long way to go in bringing international criminal law to maturity. The attempts to prosecute Pinochet in Spain led Chile to reopen investigations of the crimes committed by the Pinochet government, yet almost all state criminals of the period remain free. The minor successes of Chilean national criminal justice should not be allowed to obscure the fact that the international law aspects of the case failed.\(^7\)

This Article examines how the efforts to bring Pinochet to justice have affected international criminal law. Many things have changed in the six years since the international prosecution failed, not the least of which is a growing reluctance to trust the criminal justice systems of other nations. This Article revisits the human rights violations of both Chile and Argentina, for the military dictatorships of both nations worked together and were subjects of the Spanish criminal investigations. The Article then highlights two separate strains of international law that played roles in the Pinochet case. First, this Article argues that traditional international law in the end seems largely irrelevant because the paradigmatic crime of the Pinochet era was torture, which is now addressed primarily through the Torture Convention, and the most appropriate forum for prosecuting international crimes is the


\(^7\) See infra Part III. Pinochet has never been in custody to face charges other than house arrest in the United Kingdom and Chile. Furthermore, he was never extradited to face the Spanish charges even though only a handful of Chilean cases have ever gone to trial.
International Criminal Court rather than the national courts involved in the Pinochet case. This Article then examines international law as a manifestation of international politics. Here the Pinochet case reveals international gamesmanship, pragmatic maneuvering, political posturing, paternalism toward a former colony, and, in the end, an argument for reliance on international tribunals.

Part II surveys the history of Chile (and to some extent Argentina) from before the 1973 coup. Part III addresses the attempts to bring Pinochet and others to justice in Spain, the extradition proceedings in the United Kingdom, and ongoing cases in Chile and elsewhere. Part IV examines the law that came out of the case, including extraterritorial jurisdiction, double criminality, immunity, and the substantive law of torture and other human rights crimes. Part V then looks behind the law to politics and suggests that political realities dictated many of the developments in the case and prevented more prosecutions than they permitted. Part VI concludes by suggesting that Professor Roht-Arriaza and others are correct in recognizing the potential gains for society from the international criminal law developments of the Pinochet case. It emphasizes, however, the need to use international tribunals such as the ICC to help protect international criminal prosecutions from the kind of political erosion that left a very mixed record concerning Augusto Pinochet.

II. CHILE DURING THE LATE TWENTIETH CENTURY

A. The Allende Regime and the Coup

Chile has been a constitutional republic for most of the years following its independence in 1818, although there have been many violent clashes between the left and right as democratically elected governments alternated with dictatorships. In 1970 Chile was governed under a republican constitution enacted in 1925, which established a separation of powers among a civilian president, the national legislature Chamber of Deputies, and the judiciary.
Salvador Allende, a physician and democratic socialist, was elected president in 1970. Allende did not command a majority in the Chamber of Deputies and instead governed through a shaky coalition with other parties as the Popular United Coalition. In 1971 his government, resuming economic reforms that had begun under the previous Christian Democratic government, nationalized the largest copper firms (both U.S. corporations) and confiscated large estates and gave them to the resident workers. Both actions were popular with large portions of the population but not with the wealthier classes. Still, the economy was strong, and at first the Allende administration appeared to be fairly successful, especially given the weakness of its political footing and the power of its opposition.

An economic downturn began in September 1972, however, and some observers feared civil war. Things were even more polarized by early 1973 when the lower house in the Chamber of Deputies passed a resolution condemning Allende, and there also were severe disagreements about economic policy among the socialists themselves. Allende’s group favored achieving socialism through democratic processes while more radical groups within the coalition supported prompt action to redistribute property, through violence if necessary. National elections in March 1973 only aggravated the stalemate within the Chamber as additional conservatives adamantly opposed to Allende’s economic agenda were elected. Allende planned further elections to establish or end his socialist government.

Those plans changed on September 11, 1973, when the military executed a coup and took over the government for what turned belongs to the people, the “constituent power,” and is only delegated to the government. *Id.* The Junta later granted that power to itself.

10. Allende presided over an unruly party with a limited mandate. He received only a third of the popular vote in the general election, with his Christian Democratic opponent garnering nearly the same amount of support. Allende was elected by the Chamber of Deputies by a very thin margin after making firm commitments to limit the economic restructuring favored by most of his supporters. See generally *Ensalaco,* supra note 2, at 5–12; *Burbach,* supra note 2, at 11–12. For more information on the takeovers and ensuing controversy, see *Burbach,* supra note 2, at 13–15. Concerning the role of the United States in undermining Allende’s government and supporting the coup, see *Peter Kornbluh, The Pinochet File: A Declassified Dossier on Atrocity and Accountability* 1–160 (2003), which offers a compilation of U.S. government documents.

11. For a review of general political developments during the Allende administration, see *Andy Beckett, Pinochet in Picadilly: Britain and Chile’s Hidden History* 98–116 (2002); *Burbach,* supra note 2, at 1–2, 10–15; *Ensalaco,* supra note 2, at 2–3; *Truth and Reconciliation Report,* supra note 9, at 47.
out to be more than fifteen years. The coup's leaders announced that the commanders of the army, navy, air force, and national police would serve as a junta, or rotating leadership. Ignoring that military participation in government was a direct violation of the constitution, the Junta announced that it was acting to save the nation, which it claimed had fallen into civil war. Pinochet was to be the first leader, even though he had only recently become head of the army and was not believed to have been an active participant in planning the coup.

The Junta described its mission as restoring legitimacy, and some observers believe that it intentionally presented a moderate image at first to strengthen the impression that it was preserving order and would restore democracy. For example, the Junta emphasized that it acted to save the nation from what was becoming a civil war. Such fictions put a gloss of legitimacy on the Junta, provid-

12. The significance of September 11, 1973, has been acknowledged by some through references to "the first September 11." Burbach, supra note 2, at 1. Excellent accounts of the coup can be found in Arrigada, supra note 2, at 90-101 (describing military planning actions) and Beckett, supra note 11, at 112-27. See also International Commission of Jurists, Final Report of Mission to Chile, April 1974, To Study the Legal System and the Protection of Human Rights 1-8 (1974) [hereinafter ICJ Report]. The Spanish extradition request for Pinochet included specific descriptions of the military actions on that date, including bombardment and forced entry into the presidential palace where Allende was found after allegedly having committed suicide. The Spanish Extradition Request [excerpts], reprinted in The Pinochet Papers, supra note 6, at 203-04.

13. According to the ICJ Report, a "declaration of a state of siege is intended to apply to situations in which the country is threatened with attack from abroad, or is confronted with an armed uprising by organised rebel forces. There was, of course, no armed uprising before the military coup on September 11, 1973." ICJ Report, supra note 12, at 9-10; see also id. at 10 (describing the Junta's claim of a state of war as a fiction meant to increase the powers of the government). Arrigada notes that the Junta described its military overthrow of the elected government as a "democratic restoration" and a "moral duty." Arrigada, supra note 2, at 4; see also Burbach, supra note 2, at 44 (describing the coup's "twisted and distorted propaganda war" to defend its actions to the public).

14. Pinochet was in charge of the military in Santiago during the first part of the Allende administration. Allende later put him in charge of security during the state of emergency of 1971 and made him head of the army after General Carlos Prats resigned. Barros suggests that Pinochet had a small role in the coup but that his decision to join tipped the balance to make it work. Barros, supra note 2, at 52; see also Burbach, supra note 2, at 35-41 (concluding that Pinochet acted for pragmatic rather than political reasons).

15. See, e.g., Organization of American States, Report on the Situation of Human Rights in Chile 10 (1985) [hereinafter OAS Report] (the Junta claimed to act to restore legitimacy); Barros, supra note 2, at 52; Arrigada, supra note 2, at 5. A general description of the events of the coup can be found in Burbach, supra note 2, at 15-19 and Hugh Shaughnessy, Pinochet, the Politics of Torture 53-63 (2000).

16. The Junta's initial decree stated that it was taking "supreme rule over the nation with patriotic commitment to restore the Chilean way of life, justice, and institutional order." Truth and Reconciliation Report, supra note 9, at 73, 79-80 (quoting Decree
ing it with a rationale for the military operations it continued to direct against not only the leftists who supported violent redistributions of property but also against many other segments of Chilean society. Hopes that the Junta would preserve order or restore democracy were short-lived.

B. Chile Under Pinochet

1. The Early Years of the Junta

The Junta set a tone of violent repression from the beginning. In its first proclamation, the Junta stated that opponents who did not end their hostility to the new government and turn over all weapons would be shot.\(^\text{17}\) Pinochet promptly instituted a new security plan that established internment camps and called for raids directed at Allende supporters, unions, leftists, and even moderate protesters.\(^\text{18}\) Summary executions were conducted in both the National Stadium and Chile Stadium.\(^\text{19}\) In October 1973 Pinochet approved the “Caravan of Death,” a helicopter tour of military prisons and internment camps.\(^\text{20}\) It operated as a traveling military trial board, subjecting opponents of the Junta to trials with immediate executions in many cases.\(^\text{21}\) One estimate that


\(^{18}\) See generally \textit{Ensalaco}, supra note 2, at 27–30, 67–97. The OAS Report, supra note 15, at 48, discusses the initial proclamation, issued on September 13, 1973. The military understood the structures in Chile for mobilizing social movements, such as labor unions and universities, and set out to destroy them. It also began a long-term project of removing persons who were not full supporters of the Junta from the access points into the political process. Louis N. Bickford, \textit{Preserving Memory: The Past and the Human Rights Movement in Chile, in Democracy and Human Rights in Latin America 17–21} (Richard S. H Jillman, John A. Peeler & Elsa Cardozo Da Silva eds., 2002).

\(^{19}\) \textit{Ensalaco}, supra note 2, at 28; see also \textit{id}. at 27–35 (general discussion of military aggression in the first weeks of the Junta); \textit{Burbach}, supra note 2, at 48–55 (describing early Junta efforts to terrorize political opponents).


\(^{21}\) OAS \textit{Report}, supra note 15, at 51–57. The Organization of American States (OAS) later found that there had been numerous illegal executions, many of them without
claims to be conservative placed the number of murders in 1973 at 1,260, with tens of thousands arrested and tortured.\textsuperscript{22} Many of the murders conducted in secret were of “disappeared” persons, defined by the Truth and Reconciliation Commission as persons who were arrested or were seen in police custody before all reports of their whereabouts ended.\textsuperscript{23}

Many of the most repressive actions were taken by the Directorate of National Intelligence (DINA), a group of military officers led by General Manuel Contreras.\textsuperscript{24} One of its first acts was the murder of General Carlos Prats and his wife in Argentina.\textsuperscript{25} The DINA was reconstituted in 1977 as the National Information Center (CNI), a more effective structure for identifying and punishing dissidents.\textsuperscript{26} This period also witnessed Operation Condor, a cooperative venture by several repressive South American regimes that saw opponents “disappeared” into the prison camps or secret graves of neighboring countries.\textsuperscript{27} One of the Condor crimes was the murder of Orlando Letelier, Allende’s Ambassador to the United States, in Washington, D.C., in September 1976.\textsuperscript{28} Another

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\textsuperscript{22} ENSALACO, supra note 2, at 46; see also OAS REPORT, supra note 15, at 58–63 (describing accounts of torture); ICJ REPORT, supra note 12, at 19–29.

\textsuperscript{23} TRUTH AND RECONCILIATION REPORT, supra note 9, at 35–36. In the early days of the Junta, such actions were usually taken by uniformed police, while later the secret police were more likely to be involved. BARROS, supra note 2, at 128. The United States was apparently aware of many of these activities and may have participated in some. See KORNBLUH, supra note 10, at 160–207, 275–76 (concerning crimes against U.S. citizens).

\textsuperscript{24} Details about Directorate of National Intelligence (DINA) are included in BURBACH, supra note 2, at 49–55. See also TRUTH AND RECONCILIATION REPORT, supra note 9, at 61–64; ENSALACO, supra note 2, at 55–58.

\textsuperscript{25} Prats was Pinochet’s predecessor as head of the army. The Prats murders are addressed in numerous sources. See, e.g., ROHT-ARRIAGA, supra note 4, at 160–63. Together, they were one of the crimes charged in the Spanish Extradition Request, supra note 12, at 206–07.

\textsuperscript{26} See TRUTH AND RECONCILIATION REPORT, supra note 9, at 69, 87. The Spanish Extradition Request includes descriptions of both the DINA and the National Information Center (CNI). Spanish Extradition Request, supra note 12, at 205–06.

\textsuperscript{27} Operation Condor is addressed below in Part II.C. The U.S. government was aware of Operation Condor and seems to have provided support. See KORNBLUH, supra note 10, at 331–402.

\textsuperscript{28} Letelier’s assistant was also murdered and her husband was injured. The Letelier murder resulted in criminal charges against some of the individuals involved, but an eventual conviction was overturned on appeal. United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); see also Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (civil action).
international murder by the Junta was the “disappearance” of Spanish diplomat Carmelo Soria several months earlier.\textsuperscript{29} By mid-November 1973, the Junta had formalized its authority by (1) issuing a decree appropriating all executive and legislative powers, including the people’s constituent powers; (2) dissolving Congress; (3) dismissing the elected leaders of many local governments; (4) declaring some political parties unlawful; and (5) appointing supporters to important positions inside and outside of government.\textsuperscript{30} On September 11, 1974, exactly one year after the coup, the Junta reduced its state of war to a state of internal defense, although there was no perceptible change in behavior by the military.\textsuperscript{31} In November 1974 the rotating leadership experiment ended and Pinochet was named both president\textsuperscript{32} and commander in chief, with the other members of the Junta serving as both a cabinet and legislature.\textsuperscript{33} The Truth and Reconciliation Commission later described this period as one of enormous restrictions on personal and political freedoms.\textsuperscript{34} Corporations, however, enjoyed expansive economic freedom because the government espoused laissez-faire economics.\textsuperscript{35} The Junta reversed several of the collectivizations that had occurred in the Allende administration, a move that reduced some of the opposition to the Junta.\textsuperscript{36} In 1978 the Junta reduced the official state of siege to a state of emergency and lifted the dawn-to-dusk curfew that had been in effect throughout the Junta’s early years.\textsuperscript{37} In an action that was important legally in Chile and in later international legal actions directed against Pinochet, the Junta issued an order declaring amnesty for all crimes committed

\textsuperscript{29} Soria was a supervisor with a U.N. agency in Chile who held dual Spanish/Chilean citizenship. In 1976 he was kidnapped and murdered by DINA security agents. Charges were later dropped pursuant to the 1978 amnesty order. \textit{See infra} note 38 and accompanying text. A detailed account of the Soria matter can be found at Univ. of Minn. Human Rights Library, Carmelo Soria Espinoza v. Chile, http://www1.umn.edu/humanrts/cases/133-99.html (last visited July 24, 2006).

\textsuperscript{30} OAS \textit{Report, supra} note 15, at 11-12; ENsalaco, \textit{supra} note 2, at 50-51.

\textsuperscript{31} Barros, \textit{supra} note 2, at 159.

\textsuperscript{32} OAS \textit{Report, supra} note 15, at 10.

\textsuperscript{33} Id. at 10-11; \textit{see also} Library of Congress website, \textit{supra} note 2.

\textsuperscript{34} TRUTH AND RECONCILIATION \textit{Report, supra} note 9, at 80. While most European nations distanced themselves from the Junta throughout this period, the United States claimed neutrality and provided private support. \textit{See Kornbluh, supra} note 10, at 209 (discussing U.S. private support).

\textsuperscript{35} \textit{See, e.g.,} ArrIagada, \textit{supra} note 2, at 19-20; Beckett, \textit{supra} note 11, at 170-72.

\textsuperscript{36} \textit{See} ArrIagada, \textit{supra} note 2, at 18-27; Beckett, \textit{supra} note 11, at 173-76; \textit{see also} Library of Congress website, \textit{supra} note 2 (follow “Neoliberal Economics” hyperlink).

\textsuperscript{37} ENsalaco, \textit{supra} note 2, at 128.
by themselves or their agents from September 11, 1973, through March 10, 1978.\(^{38}\)

2. The New Constitution and the End of Pinochet's Rule

The Junta soon turned its attention to constitutionalizing the military-dominated government, resulting in the constitution of 1980, which was somewhat of a compromise between the democratic government of the 1925 constitution and a military government. Drafted in secret and announced by the Junta with no public input, the constitution was approved in a plebiscite by what the Junta later claimed was a 2-1 margin.\(^{39}\) The constitution (1) reinstated an elected president and legislature but limited individual liberties, particularly for persons arrested during the Junta; (2) guaranteed a role for the military in the government; and (3) included new anti-terrorism measures.\(^{40}\) Pinochet now became president of the republic and occupied the presidential palace for the first time.\(^{41}\) His term was to last until 1989, with a 1988 plebiscite to determine if he would remain as president for an additional eight-year term.\(^{42}\)

The approval of the 1980 constitution may have been intended to signify that Pinochet and the Junta were completely in control, but events soon changed the political landscape. Chile suffered a severe recession in 1982 that was accompanied by severe international debt problems.\(^{43}\) A series of political and economic crises from 1983 to 1986 exacerbated the situation. Opponents of the Junta declared May 11, 1983, a national day of protest, which received surprising support from Chile's middle class, and in 1984

\(^{38}\) See, e.g., TRUTH AND RECONCILIATION REPORT, supra note 9, at 89; BURBACH, supra note 2, at 126. Roberto Garreton, a Chilean attorney and the nation's ambassador to several human rights organizations in the early 1990s, submitted a statement to the House of Lords in connection with the extradition case that summed up the nature and extent of this amnesty decree. Statement of Roberto Garretón, Ambassador from Chile, to the House of Lords (Jan. 12, 1999), reprinted in THE PINOCHET PAPERS, supra note 6, at 211-17.

\(^{39}\) This assertion may have been correct, for no organized opposition was permitted. BARRIOS, supra note 2, at 168-72; see also Library of Congress website, supra note 2 (follow "The 1980 Constitution" hyperlink); TRUTH AND RECONCILIATION REPORT, supra note 9, 90-92 (generally discussing the 1980 constitution in general); ARRUGADA, supra note 2, at 44-45 (noting substantial fraud claims).

\(^{40}\) TRUTH AND RECONCILIATION REPORT, supra note 9, at 90-95. The Commission noted that the 1980 constitution used the language of human rights but authorized the state to define and protect national security interests broadly. Id. at 90.

\(^{41}\) BARRIOS, supra note 2, at 255.

\(^{42}\) Id.

the government declared another State of Siege. The Organization of American States (OAS) reported on a bleak civil rights situation in 1985, noting that any minor improvements since the terrorist raids of 1973 were outweighed by the 1980 constitution's permanent cutback in key civil liberties.

Relationships with the United States and other South American nations remained important throughout the dictatorship. The Carter administration had been hostile to the Junta but was not focused on reform in Chile and was unsuccessful in its limited efforts to reduce foreign aid to the dictatorship. The Reagan administration was more favorably disposed, at least initially. Support waned later in the Reagan administration, and the U.S. government began to favor a transition to democracy. Chile became more isolated diplomatically after Argentina's junta officially ended its reign in December 1983, beginning a period of transition in much of the Southern Cone.

Writing in 1988, Chilean author Genaro Arriagada described the political situation as in "catastrophic balance," with two opposing social forces approximately equal in power. Pinochet expected to win the plebiscite that year for a second term but was defeated by a ten percent margin. The military supported the result, so any thoughts Pinochet might have had of declaring the results invalid were unavailing. After the results were reported, Pinochet

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44. Arriagada, supra note 2, at 54–55; see also id. at 56–67; Ensalaco, supra note 2, at 137.

45. OAS Report, supra note 15, at 285–90 (emphasizing that power remained with the Junta even if now in constitutional form). The OAS concluded that it was essential to restore representative government and human rights to Chile. Id. at 290.

46. Ensalaco, supra note 2, at 161–62 (noting that the Carter administration's Latin American policies were more concerned with Nicaragua and the Panama Canal).

47. Burbach, supra note 2, at 70; see also Kornbluh, supra note 10, at 408–10. Reagan National Security Advisor Jeanne Kirkpatrick was a noted supporter of the Pinochet regime, a view consistent with her expressed distinction between "authoritarian" and "totalitarian" regimes. Burbach, supra note 2, at 70; Kornbluh, supra note 10, at 409.

48. Burbach, supra note 2, at 71–72 (observing that Reagan's withdrawal of support reflected a growing belief that democratic governments controlled by conservatives were more favorable to free enterprise than dictatorships); Kornbluh, supra note 10, at 415–20.

49. Barros, supra note 2, at 193. On the other hand, the British government became more favorable to Chile because Chile supported Britain in the Falklands War. See Beckett, supra note 11, at ch. 14. Pinochet's friendship with then-Prime Minister Margaret Thatcher lasted through 2000, when she helped him celebrate the decision to deny extradition.

50. Arriagada, supra note 2, at 170.

51. The plebiscite was held on October 5, 1988. Pinochet may have been willing to manipulate the results to assure victory but found himself unable to do so. Burbach, supra note 2, at 77–78. Human Rights Watch later described the count as fair. See When Tyrants
appeared on national television and reminded the nation that under the constitution he would remain president for another year and a half.\footnote{52}

The transition to a democratically-elected government did not end the crimes of the Junta. Within weeks of the referendum, two leftist guerrillas were tortured and killed.\footnote{53} Documents later submitted in the extradition proceedings indicate at least five and potentially over a hundred additional provable instances of official torture.\footnote{54} The existence of these crimes committed in the final days of the Pinochet administration became critical to the extradition decision of the House of Lords.

\section*{C. The Junta’s Allies in Argentina}

Chile’s most important neighbor has always been Argentina, with which it shares a border of 5,200 kilometers. In March 1976 the Argentine military overthrew the elected government of President Isabel Peron. A three-person junta took over, directing repressive measures at leftists and others associated with the Peronist government.\footnote{55} What followed was called the “Dirty War” in which the government “disappeared” thousands of persons using tactics similar to those of the Chilean government. One of its most notorious practices was taking children from their mothers and giving them to military families to raise.\footnote{56}

\begin{footnotes}
\footnotetext[52]{Barros, supra note 2, at 308–11. Pinochet wore his military uniform for this appearance, which was unusual at this point in his administration.}
\footnotetext[53]{See Chronology, in The Pinochet Papers, supra note 6, at 501–04.}
\footnotetext[56]{Roht-Arriaza’s book includes a section on the practice. Roht-Arriaza, supra note 4, at 108–16. When this practice became known, a group called the Mothers of the Plaza de Mayo protested despite the dangers and demanded accountability and return of the children. They later became influential in helping the Spanish authorities put together}
\end{footnotes}
The governments of Chile, Argentina, and several other Southern Cone nations worked together to punish dissidents and agreed to coordinate their domestic security operations. In Operation Condor, for example, numerous opponents of the Chilean Junta disappeared into Argentine detention camps. Execution squads traveled throughout the Southern Cone and elsewhere, killing refugees of the military governments. Among the victims were Chilean General Carlos Prats and Bernardo Leighton, the leader of the Christian Democratic Party during the Allende regime who was the target of an Operation Condor assassination attempt in Italy.

Several Argentine cases arising out of the coordinated efforts of the Southern Cone nations continue to receive attention from international courts. On the night of the coup, agents of the military government of Tucumán Province kidnapped and tortured Jose Siderman. After fleeing to the United States, Siderman sued Argentina and several officials for torture and expropriating the family's substantial properties. Former naval officer Adolfo Scilingo has admitted that he participated in kidnapping, torture, and disappearances, including throwing victims out of airplanes. He traveled to Spain voluntarily to testify, was arrested for his crimes, and was finally tried and sentenced in 2005 to 640 years in prison. Ricardo Cavallo, another Argentine torturer, was extradited from Mexico to Spain in 2003, where he now faces torture and murder charges arising out of the internment facility at the School of Naval Mechanics in Buenos Aires.

cases against Argentinean human rights violators. ROHT-ARRIAZA, supra note 4, at 9, 17, 122.

57. KORNBLUH, supra note 10, at 334-41, 356-94.
58. ROHT-ARRIAZA, supra note 4, at 150-69; see also supra notes 27-28 and accompanying text.
59. See supra note 25 and accompanying text.
60. This became one of the international cases because Italy prosecuted General Contreras, director of DINA and head of its overseas operations, in absentia in the 1990s. Contrera later implicated Pinochet in DINA crimes. Chile has not extradited the defendants to date. See ROHT-ARRIAZA, supra note 4, at 159-60.
61. Siderman v. Argentina, 965 F.2d 699, 702-03 (9th Cir. 1992). The actions against the Siderman family were plainly motivated by anti-Semitism, which was common to many of the Argentine crimes of the period. See generally JACOBO TIMERMANN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., 2002).
Argentina’s military government failed before that of Chile. The reasons were complex and included economic disappointments, increasing public opposition to human rights violations, and the failed military invasion of the Falkland Islands. A republican government was established in December 1983, and the new president, Raul Alfonsin, promised to prosecute the leaders of the Argentine Junta. Five military leaders were convicted, including the head of the Junta, General Jorge Rafael Videla, while four others were acquitted. Additional cases were stymied by national laws that had the effect of preventing the prosecution of anyone below high military rank. Those who were convicted were later pardoned by President Carlos Saul Menem.

D. Chile in the 1990s

The winner of the 1989 Chilean presidential election was Patricio Aylwin, who took office in March 1990. A Christian Democrat who had opposed Allende, Aylwin was expected to remedy the worst injustices of the Junta, but his options were limited because Pinochet was still commander in chief of the army and the 1980 constitution guaranteed the military a role in government policy is reputed to be the first formal extradition to another country for a crime committed in a third country. See Roht-Arriaza, supra note 4, at 148.


65. Upon taking office, Alfonsin issued decrees ordering an investigation and prosecution of crimes committed by the military government and by anti-government terrorists. Donald C. Hodges, Argentina 1943–1987, The National Revolution and Resistance 210 (1988); David Rock, Argentina 1516–1987, at 387–89 (1987); see also Martin Hunter, Argentina Now: A Democratic Revolution, Argentina’s future Who shall Prevail?, ZNET LATIN AMERICA WATCH, Feb. 9, 2002, http://www.zmag.org/content/LatinAmerica/hunter0209.cfm (“An important element of [Alfonsin’s] platform, strongly backed by the general public, was a promise to bring the military officers and leaders of the previous regime to justice, trying them for the human rights abuses perpetrated during their administration.”). Professor Roht-Arriaza reports that President Alfonsin later withdrew support for prosecuting the military out of political caution. Roht-Arriaza, supra note 4, at viii.

66. Alfonsin established the National Commission on the Disappearance of Persons (CONADEP) several days after his inauguration. As indicated, it did not have the effect of lessening interest in criminal prosecutions of state criminals. Professor Roht-Arriaza describes the “truth trials” in Argentina as somewhat of a compromise between criminal prosecutions and a “truth and reconciliation” process. Roht-Arriaza, supra note 4, at 101–08.

67. See Roht-Arriaza, supra note 4, at 97–98 (explaining punto final and due obedience laws).

68. Id. at viii, 98.
decisions. Furthermore, Junta appointees held most government positions, both in the career and political services. Aylwin, however, gave his inaugural address at the National Stadium, site of many of the summary executions of 1973, and apologized to the victims of the Junta while the names of the dead and disappeared were flashed on the stadium’s scoreboard.

One month after taking office, Aylwin established the National Commission on Truth and Reconciliation (Commission). He appointed as commission president Paul Rettig Guissen, a centrist and former Allende supporter, and named members from across the political spectrum, including several who had served with the military during the Junta. The charge of the Commission suggested the ambivalence underlying it—to find “truth and justice insofar as possible.” Moreover, the Commission’s powers were extremely limited. For example, it was not authorized to subpoena witnesses or to name wrongdoers. Despite its limited mandate and powers, the Commission’s report was detailed and strong, although it seemed at pains to be even-handed. It identified many serious human rights violations and noted undisputed evidence of hundreds of murders and disappearances. As instructed, however, it named no wrongdoers and instead offered a form of moral reparations and public exoneration for the victims.

Whatever the “justice” of Chile’s truth and reconciliation process, immunity for Pinochet and other Junta leaders was always part

69. For an analysis of the election and the delicate governance issues faced by Aylwin, see BURBACH, supra note 2, at 81–82; ENSALACO, supra note 2, at 178–80.

70. ENSALACO, supra note 2, at 182.

71. The Supreme Decree creating the commission is included in the final report. See TRUTH AND RECONCILIATION REPORT, supra note 9, at 5.

72. BURBACH, supra note 2, at 82.

73. Id.

74. TRUTH AND RECONCILIATION REPORT, supra note 9, at 7; see also ENSALACO, supra note 2, at 210; BURBACH, supra note 2, at 83.

75. See, e.g., TRUTH AND RECONCILIATION REPORT, supra note 9, at 3 (noting violence on both sides in the early days of the Junta).

76. TRUTH AND RECONCILIATION REPORT, supra note 9, at 2–3; see also ENSALACO, supra note 2, at 184. Still, the report has been criticized for its limitations. See, e.g., BURBACH, supra note 2, at 83; Bickford, supra note 18, at 11 (noting that “truth and justice” is insufficient and that real justice requires punishment as well as remembering); ENSALACO, supra note 2, at 213 (stating that although President Aylwin called for reconciliation and pardon, once the report was issued the “onus of accountability” was on him).

77. The report referred to “symbolic or cultural reparation,” TRUTH AND RECONCILIATION REPORT, supra note 9, at 23, and an attempt to “restore the dignity” of the Junta’s victims, id. at 5. The final portion of the report included a section titled “Recommendations for Restoring the Good Name of People and Making Symbolic Reparation.” Id. at 838–40.
of the price for the transition to democratic rule. Some criminal prosecutions, however, did result from the Commission’s work. About twenty-five low-level military officers were convicted of human rights violations, with critics charging that no higher-ups were prosecuted because this was all that the military would allow. Over time there were some signs of loosening the legal and practical restrictions on bringing additional prosecutions, at least in part because of turnover among the judiciary. One significant development was a 1998 decision by the Chilean Supreme Court in a disappearance case where the court held that the Geneva Conventions applied and prohibited the 1978 amnesty from preventing the prosecution of persons violating the conventions. This case, though, had limited effect. A second development was that, in a number of cases, the courts allowed investigations of disappearances to continue because the lack of proof that a crime was completed during the amnesty period meant it was still potentially a prosecutable offense. The ironic result was that cases could go forward, naming names and considering punishment, but only until the completed crime could be proven, at which point it would have to be dismissed as barred by the amnesty decree.

In 1995, President Eduardo Frei called for an end to the investigation of the Junta’s crimes. Three years later, Pinochet stepped down from the military to become a senator-for-life, a position that came with its own immunity from prosecution. In evaluating the first decade after Pinochet’s reign, most commentators agree that Aylwin and Frei favored constitutional reform and justice for Junta victims but were limited by a constitution that favored the military and a still-tense national atmosphere. After all, who could be certain that there would not be another coup?

78. See When Tyrants Tremble, supra note 51, at 3. Because of pressure from the United States, the 1978 amnesty specifically excluded the Letelier case. TRUTH AND RECONCILIATION REPORT, supra note 9, at 89 (noting the exclusion of the Letelier case).

79. See, e.g., Burbach, supra note 2, at 86.

80. For general information on this era, see id. at 86–88.

81. The case involved the 1974 disappearance of Pedro Poblete Cordova, a leftist. The court concluded that the conventions applied because the Junta had declared a state of war, which would be ironic if that fact undid the immunity for the Junta’s crimes. As Ambassador Garreton later stated to the House of Lords, however, the case was unique for its period because courts routinely applied the amnesty decree. Statement of Ambassador Roberto Garretón, supra note 38, at 214–15; see also Burbach, supra note 2, at 89–92.

82. See, e.g., Roht-Arríaza, supra note 4, at 77–78.

83. See, e.g., When Tyrants Tremble, supra note 51, at 9; Ensalaco, supra note 2, at 183.
III. THE PINOCHET LITIGATION

A. The Spanish Investigations

The Spanish investigations began with attempts by victims and human rights advocates to gain legal redress for human rights violations during the Chilean and Argentinean military dictatorships.\(^8^4\) Several aspects of Spanish law and culture helped them press their claims. First, the Spanish legal system allows cases to proceed on private complaints.\(^8^5\) Second, it allows investigating magistrates to press investigations even over the objection of the prosecutor, which provided the victims with a forum in which to present their evidence.\(^8^6\) Third, many Chileans and Argentineans also hold Spanish citizenship, making it likely that some victims of the crimes committed by those governments were Spanish citizens and providing a stronger legal basis for Spanish criminal jurisdiction.

The first of the investigations involved Argentina. A citizen's complaint, naming thirty-eight Spanish citizens as victims, was filed in March 1996 against General Videla and other high-ranking military officers.\(^8^7\) The case was assigned to Judge Baltazar Garzon, who was known nationally as an aggressive investigator.\(^8^8\) Several months later, a complaint was filed on behalf of Spanish citizens who were the victims of the Chilean Junta.\(^8^9\) The prime player in the Chilean cases from the beginning has been Joan Garces, a practicing attorney in Spain in the 1990s who had been an advisor to Allende.\(^9^0\) The two cases differed substantially. The Argentine

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\(^{8^4}\) The Pinochet Effect provides the most detailed factual treatment of the cases. Roht-Arriaza, supra note 4, at ch. 1; see also Richard J. Wilson, The Spanish Proceedings, in THE PINOCHET PAPERS, supra note 6, at 23–32; Beckett, supra note 11, at 223; Aceves, supra note 3, at 162–64.

\(^{8^5}\) Victims may present cases to investigating magistrates and are treated as parties throughout the proceedings. In addition, cases can be brought as “popular actions” by third parties. See generally Roht-Arriaza, supra note 4, at 5; Wilson, supra note 84, at 23; Aceves, supra note 3, at 162 n.185. The opportunities provided by the Spanish legal system worked to strengthen the investigations, as the cases were filed by victims and third parties.

\(^{8^6}\) The investigating magistrates found them justified and defended the actions against challenges by the public prosecutor.

\(^{8^7}\) Roht-Arriaza, supra note 4, at 2.

\(^{8^8}\) Garzon is a larger-than-life character who developed his national reputation through a lengthy series of successful prosecutions of Basque separatists. Roht-Arriaza, supra note 4, at 3–4; Beckett, supra note 11, at 223–25. More recently, he was assigned to investigate al-Qaeda operations in Spain. Roht-Arriaza, supra, at 4.

\(^{8^9}\) Roht-Arriaza, supra note 4, at 4–5. It was assigned to Judge Manuel Garcia-Castellon.

\(^{9^0}\) Garces escaped from the presidential palace on the day of the coup. Professor Roht-Arriaza reports that Allende told him to escape in order to tell the story to the world.
case was far-reaching, noting the murder and torture of thousands of people, the existence of 340 detention centers, and the kidnapping of 500 children. Argentinean exiles and Spanish human rights attorneys made the decision to limit charges to those involving victims who were Spanish citizens for strategic reasons. The judge overseeing the Chilean cases took a more limited approach. His theory was to go to the top of the chain of command, at least in part because the Chilean Junta was more centralized than the Argentine government. As the Chilean case wore on, it too became increasingly focused on those instances in which Spanish citizens were murdered or disappeared.

Investigations continued, and from mid-1996 on, the judges collected evidence from exiles, victims, family members, friends, and associates in other countries. In 1998 Judge Garcia-Castellon sought arrest warrants in the Chilean case for a number of military and civilian leaders, including Pinochet and Contreras. At approximately the same time, Judge Garzon also began to focus the Argentine investigation on Operation Condor. The evidence indicated that two of the leading figures were Pinochet and Contreras. Thus, connections between the two investigations began to emerge.

It is probably fair to say that few people expected either of the investigations to result in successful prosecutions. One commentator suggests that the victims acted without any real expectation that the cases would result in justice but simply sought opportunities to collect the evidence, to tell their stories, and to announce that what had happened was intolerable. Roht-Arriaza notes that it is sur-

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92. *See supra* note 85 and *infra* notes 147-152 (concerning the ramifications of this decision). They also involved Spanish political parties in the struggle to get and maintain public support. *See Roht-Arriaza, *supra* note 4, at 12.
93. The notion that “Pinochet equals Chile” reflects the more centralized and disciplined notion of the Chilean Junta. *See Barros, supra* note 2, at 3.
94. *Roht-Arriaza, supra* note 4, at 13-14. The strategic choices in each set of cases fostered the tension over jurisdiction. The following jurisdictional question arose: is it based on universal jurisdiction, in which the enormity of the crime allows Spain and, in theory, all other nations to investigate and prosecute, or is it based on passive personality jurisdiction, in which Spain acts to protect its citizens and has a greater justification to act than would most other nations? *See infra* Part IV.A.
96. *Id.* at 29-30.
97. *See Wilson, supra* note 84, at 23.
prising that the Spanish government did not step in and quash the investigations at an early stage.\textsuperscript{98} Although to some extent it was simply good fortune that the government had other priorities at this time, to a greater extent it was the careful efforts of the human rights groups and the investigating judges who kept public support for the cases high.\textsuperscript{99}

**B. The Extradition Proceedings**

1. The Arrest

In October 1998 Senator Pinochet traveled to London for a medical operation. Amnesty International advised the human rights lawyers in Spain, who immediately contacted the investigating judges.\textsuperscript{100} Garzon and Garcia-Castellon decided to try to question Pinochet in London and sought assistance from British authorities. After confirming that Pinochet did not have diplomatic immunity during this visit, the United Kingdom agreed to cooperate and warned the Spanish judges on October 16 that Pinochet was planning to return to Chile. Garzon decided that the only viable option was to seek an arrest warrant preliminary to a formal extradition request. He therefore prepared a request that Pinochet be arrested for genocide and terrorism, based on one specific disappearance of a Chilean leftist during Operation Condor, and faxed it to London where a duty magistrate issued a warrant. The British police served the warrant on Pinochet late that same night at the clinic at which he was being treated.\textsuperscript{101}

There were immediate strong reactions in both Chile and the United Kingdom. Chilean President Frei expressed outrage that Spain would interfere in Chilean affairs,\textsuperscript{102} forcing Spain to decide

\textsuperscript{98} ROHT-ARRIAGA, supra note 4, at 15. The Office of Public Prosecutor (OPP) never truly supported the investigations yet—for political reasons—acquiesced in them, at least as long as few people thought they would lead to anything. Later, after extradition proceedings began, the OPP sought to have the courts scuttle the cases. See infra Part III.B.

\textsuperscript{99} An example of good luck that affected public opinion was the decision of Fernández Torres Silva to voluntarily testify. His vehement defense of state murders shocked the public. ROHT-ARRIAGA, supra note 4, at 27–29. The same can be said for the voluntary appearance of Adolfo Scilingo. See supra note 62 and accompanying text.

\textsuperscript{100} ROHT-ARRIAGA, supra note 4, at 33–44. Amnesty International had tried to bring civil and criminal cases in the United Kingdom against Pinochet and knew about the outstanding warrant in Spain. \textit{Id}.

\textsuperscript{101} Excellent accounts of the events in the United Kingdom can be found in Byers, supra note 3, at 422–38, and BURBACH, supra note 2, at 98–121.

\textsuperscript{102} The Spanish government had been ambivalent about this case from the beginning. As illustrated in Part III.B.2, the Office of Public Prosecutor challenged the power of Garzon and Garcia-Castellon to bring these investigations. Although Spain came to lead
whether it truly wanted to handle these cases. In the United Kingdom, opinions at this stage tended to follow political allegiances: the Conservative Party, which had been in office throughout most of Pinochet's regime, was highly critical of the arrest while the relatively new Labour Government under Prime Minister Blair had no long history of dealings with the Chilean Junta and seemed more favorably disposed to the Spanish request. Secretary of State for the Home Department Jack Straw (Home Secretary), the one member of the cabinet with an official role in any extradition of Pinochet, had been a student in Santiago in 1973 and protested against the Junta.

2. Challenging the Arrest: Part One

Pinochet began formal and informal proceedings to quash the arrest warrant. He identified a flaw in the arrest warrant, so Garzon prepared a second warrant request. This warrant was far more detailed, charging Pinochet with torture offenses from 1988 to 1992, hostage-taking offenses from 1982 to 1992, and conspiracy to murder from 1976 to 1992. The magistrate issued a second arrest warrant on October 22, 1998, and Pinochet sought an immediate appeal. The Divisional High Court heard that appeal on October 28. It upheld the torture and hostage-taking charges, concluding that the problem in the first warrant had been corrected. The court held Pinochet immune from prosecution on those charges, however, because they had been committed while he was head of state.

the world in universal jurisdiction, it was (and still is) controversial in that nation. See ROHT-ARRIAGA, supra note 4, at 15, 45, 171-79 (discussing the Spanish cases).

103. The British reactions were inevitably complex. Not only had Pinochet been a strong ally of the United Kingdom during the Falklands War, but Chile and Britain had also been trading partners for many years. See, e.g., BECKETT, supra note 11, at 12-14, 44-46. Pressure was placed on the Blair government from the other direction as well, however, as victims of the Junta were brought to England to present their stories to the press and government. BURBACH, supra note 2, at 111.

104. The warrant problem was that the crimes specified were not crimes for which the United Kingdom exercised extraterritorial jurisdiction. Thus, there was a failure of double criminality, which is a rule of international law limiting extradition to offenses that can also be prosecuted in the requested state. This presaged what would become a problem with all of the offenses charged to Pinochet, other than torture committed after December 1988. See infra Parts III.B.3, IV.B.

105. In re Pinochet Ugarte, [1998] EWHC Admin 1013 (Q.B.D.) (Eng.), reprinted in THE PINOCHET PAPERS, supra note 6, at 71-94. There was still an opportunity for the British Department of Public Prosecutions, which was defending the extradition request, to appeal the decision. The department requested an order allowing an appeal to the House of Lords and, of enormous practical significance, a ruling that the detention warrant
Meanwhile, legal proceedings continued in Spain, where the Office of Public Prosecutor challenged Spanish jurisdiction over both the Chilean and Argentinean investigations on various grounds. On October 30, the Criminal Appeals Chamber of the Audiencia Nacional upheld Spanish jurisdiction on legal and policy reasoning that supported broad international authority to prosecute crimes against humanity.\textsuperscript{106} This allowed Garzon to proceed with a formal extradition request for Pinochet, which he submitted on November 3. It expanded on the earlier requests and charged Pinochet with genocide, terrorism, and torture, including forty instances of torture on the day of the coup, eighteen instances of genocide, ninety-four instances of Operation Condor crimes, and hundreds of DINA and CNI crimes.\textsuperscript{107}

Back in the United Kingdom, in late November the House of Lords panel decided by a vote of 3-2 that Pinochet did not have immunity for the offenses charged.\textsuperscript{108} Oversimplified, the lords denying the immunity argument concluded that conduct that is an international crime cannot possibly be an official function subject to international protection in the form of immunity from extradition.\textsuperscript{109}

Technically, Pinochet’s motion to dismiss the arrest warrant was only the beginning of the British proceedings. Before Pinochet could be taken to Spain, however, there were still the extradition proceedings themselves to conduct, and that would require a decision to move forward by the Home Secretary, a hearing before a magistrate, and an opportunity for further judicial review. On December 9, 1998, the Home Secretary issued a decision authorizing the extradition hearing.\textsuperscript{110} Before the hearing could be held, remain in force pending appeal. Thus, Pinochet could not moot the proceedings by returning to Chile.

\textsuperscript{106} For an unofficial English translation of the decision, see Order of the Criminal Chamber of the Spanish Audiencia Nacional Affirming Spain’s Jurisdiction, Nov. 5, 1998, \textit{reprinted in} \textit{The Pinochet Papers, supra} note 6, at 95–108. Roht-Arriaza also provides a good summary of the decision. \textit{See} Roht-Arriaza, \textit{supra} note 4, at 44.

\textsuperscript{107} Spanish Extradition Request, \textit{supra} note 12, at 203–06.


\textsuperscript{109} \textit{See} Brody, \textit{supra} note 6, at 10–11.

\textsuperscript{110} Letter from Jack Straw, Sec’y of State, to the Chief Metro. Stipendiary Magistrate or Other Designated Metro. Stipendiary Magistrate Sitting at Bow St. (Dec. 9, 1998) [hereinafter Letter from Jack Straw, Dec. 9, 1998], \textit{reprinted in} \textit{The Pinochet Papers, supra} note 6, at 181–83; \textit{see also} Reasons for Authority to Proceed by Secretary of State Jack Straw, Dec. 9, 1998, \textit{reprinted in} \textit{The Pinochet Papers, supra} note 6, at 183–87. In another example of the double criminality principle, Straw eliminated the genocide charges because genocide was not a crime in the U.K. penal code.
however, the House of Lords set aside its earlier decision denying head of state immunity because one of the members of the panel was a board member of an Amnesty International unit, and Amnesty International had intervened in the case. The Divisional High Court decision dismissing the warrant went back into effect, and any extradition of Pinochet was again on hold.

3. Challenging the Arrest: Part Two

The appeal to the House of Lords was assigned to a new panel which held twelve days of hearings in early 1999 and issued a ruling and a series of opinions on March 24. By a vote of 6-1 they upheld Pinochet's arrest and permitted extradition on a substantially reduced set of charges. The six lords who voted to uphold the warrant also agreed with the first panel that Pinochet was not immune as head of state with respect to torture committed on behalf of the government. A majority of the panel concluded, however, that only the torture charges were extraditable crimes and further limited those charges to instances of torture that occurred after the Torture Convention had gone into effect in the United Kingdom. In addition, immunity was rejected on the conclusion that, by ratifying the Torture Convention, Chile accepted the notion that even domestic torture was prosecutable in courts of other nations.

Part IV of this Article addresses the lords' opinions in terms of their technical validity and significance to international law. For purposes of understanding the rest of the Pinochet case, it is suffi-
cient to know that the House of Lords rejected any claim of immunity for official torture but at the same time took a strict view of double criminality. Pinochet could no longer rely on his status as a legal defense to extradition, which is why the case deserves to be celebrated today. On the other hand, the panel’s restrictions on extradition crimes seemed likely to limit Pinochet’s criminal prosecution to the relative handful of human rights crimes that occurred at the very end of his term in office following the plebiscite to elect a new president.

4. The Extradition Proceeding

Following the appellate decision by the House of Lords, the matter returned to the Home Secretary’s desk. Although few of the Junta’s crimes occurred after December 1988, the Home Secretary promptly reauthorized an extradition hearing, finding that despite the reduction of the charges, they remained serious. His efforts were complemented by Judge Garzon, who responded to the House of Lords decision by adding thirty-four new post-1988 charges to those against Pinochet. This underscored the Spanish claim that Pinochet was an international criminal who deserved to be extradited for crimes committed even during the brief period after implementation of the Torture Convention and before the end of his term as president. Moreover, Spain alleged that the kidnappings of the “disappeared” were presumptively continuing crimes and were therefore prosecutable unless and until it could be shown that the victim was murdered prior to the implementation date. Thus, at least in theory, Pinochet could remain subject to extradition to Spain for many pre-1988 kidnappings.

Several developments favored the Spanish request at the extradition hearing before British Magistrate Ronald Bartle. The magistrate noted that the function of the hearing was limited to determining if the requirements for extradition had been satisfied,

114. Letter from Jack Straw, Sec’y of State, United Kingdom, to the Chief Metro. Stipendiary Magistrate or Other Designated Metro. Stipendiary Magistrate Sitting at Bow St. (Apr. 14, 1999), reprinted in THE PINOCHET PAPERS, supra note 6, at 373–82; see also Reasons for Second Authority to Proceed by Sec’y of State Jack Straw, Dec. 9, 1998, reprinted in THE PINOCHET PAPERS, supra note 6, at 375–81.

115. Roht-Arriaza, supra note 4, at 59–60; Burbach, supra note 2, at 115–16.

116. In the Chilean investigations, the Amnesty date of March 10, 1978, obstructed the criminal charges. In contrast, the “extraditable offense” date in this case was December 8, 1988.

117. Not all Spanish authorities, however, agreed with this approach. Some expressed misgivings about serving as the primary forum for trials concerning crimes conducted in South America. See supra note 102.
which left most factual issues for Spain.\textsuperscript{118} He also strengthened Spain’s hand by permitting the newly-filed charges to be included and by approving evidence of pre-1988 crimes to support both the conspiracy counts and the prosecution theory that Pinochet established a state policy of torture.\textsuperscript{119} Extradition was ordered.\textsuperscript{120}

The Pinochet case again returned to Home Secretary Straw. Now, however, his action would be final, and this time he decided to terminate the extradition proceedings. The reason he gave was Pinochet’s health. Pinochet apparently suffered from serious medical problems, and his attorneys and supporters in the United Kingdom used this as a basis for convincing the Home Secretary (and presumably Prime Minister Blair) to reverse their support for extradition. On March 2, 2000, therefore, the Home Secretary issued a decision allowing Pinochet to return to Chile.\textsuperscript{121} Pinochet left as soon as possible and arrived in Santiago only hours later, walking unaided and appearing to be in robust health.\textsuperscript{122}

C. The Aftermath of the Pinochet Case

Pinochet returned to a different Chile, one that seemed more willing to acknowledge and correct the past. One commentator describes the response to Pinochet’s arrest as a “catharsis of remembering.”\textsuperscript{123} It now seemed possible, perhaps even likely,

\begin{itemize}
\item \textsuperscript{118} Roht-Arriaza, \textit{supra} note 4, at 61.
\item \textsuperscript{119} This was consistent with the theory of the House of Lords decisions. Failure to include the new charges in the extradition order, on the other hand, would prevent them from being included at trial in Spain under the specialty rule of international law. \textit{See infra} Part IV.B.
\item \textsuperscript{120} \textit{See} Kingdom of Spain v. Augusto Pinochet Ugarte, 38 I.L.M. 135, 140 (Mag. Ct. 1999) (Eng.) (committing Pinochet to await the decision of the Secretary of State pursuant to section 9(8) of the Extradition Act 1989), \textit{reprinted in} \textit{The Pinochet Papers, supra} note 6, at 397–403.
\item \textsuperscript{121} In January 2000, Straw announced he was inclined to dismiss the extradition request and allow Pinochet to return to Chile. He allowed public comment on his tentative decision, and received some harsh criticism from Judge Garzon and others who believed the medical evidence to be unconvincing. There were also substantial criticisms from officials and groups elsewhere in Europe and an unsatisfactory attempt to set it aside in the courts. Straw’s press statement, Garzon’s reply, and Straw’s letters announcing his final decision allowing Pinochet to leave freely are \textit{reprinted in} \textit{The Pinochet Papers, supra} note 6, at 411–12, 413–16, and 465–80, respectively.
\item \textsuperscript{122} Amnesty International, Belgium, and other supporters of the Spanish criminal prosecution failed in their attempt to have Straw’s decision reversed in the courts. \textit{See} \textit{R. v. Sec’y of State for Home Dept. ex parte} Kingdom of Belgium, (2000) 2000 W.L. 486 (Q.B.D.) (Eng.). The Spanish government did not support the attempt at judicial review, acquiescing in Straw’s decision and perhaps relieved at the prospect of losing their prize defendant.
\item \textsuperscript{123} Burbach, \textit{supra} note 2, at 105; \textit{see also} id. at 123.
\end{itemize}
that Chile would prosecute Pinochet. National loyalty may have led many Chileans to denounce England for meddling in internal Chilean affairs, but once Pinochet was back in Chile, he became Chile’s problem. The crimes of the Junta were now openly discussed, as were the ongoing investigations and ways to circumvent the 1978 amnesty.

Soon after Pinochet returned, the Chilean Supreme Court revoked his parliamentary immunity in connection with the 1973 Caravan of Death investigation. He also was indicted in 2004 on kidnapping and murder charges arising out of Operation Condor. He was regularly hounded by the press and the public while living in self-imposed house arrest most of the time since returning to Chile.

Pinochet’s name regularly appeared in international press reports as courts delayed proceedings due to his health or ordered them to resume because the health problems were not thought to be as severe as alleged. Other cases proceeded, however, without considering Pinochet’s health. The investigation into the Caravan of Death began before Pinochet’s arrest and continued despite

124. Professor Roht-Arriaza describes a range of opinions in Chile during this period, all leading to the previously unimaginable prosecution of Pinochet. Unofficial government promises to prosecute may have influenced Straw to revoke the extradition. ROHT-ARRIAZA, supra note 4, at 67. Pinochet’s apparently healthy condition upon return to Chile was seen as hurting the nation’s image. Id. at 68. Poll data some months later indicated that a majority believed that the Junta under Pinochet had committed human rights violations. Id. at 79. The public was increasingly uncomfortable with the notion that a foreign nation was handling a case that should have been Chile’s to resolve. Id. at 85–86.

125. See id. at 66–69; Brody, supra note 6, at 20.

126. The court reasoned that the offenses under investigation were not of maladministration, which are subject to impeachment rather than criminal prosecution. The court elided the amnesty issue by concluding that it could be applied only after all the facts were known. See ROHT-ARRIAZA, supra note 4, at 79–83.

127. See supra notes 19–20 and accompanying text. Pinochet was indicted and arrested, although he was given favored treatment as a result of his age, health, and status as a former president and sitting senator. ROHT-ARRIAZA, supra note 4, at 83–84.


129. BURBACH, supra note 2, at 132–45; ROHT-ARRIAZA, supra note 4, at 91–96.

his unavailability for trial.\textsuperscript{131} As of 2004, several hundred cases were actively under investigation in Chile.\textsuperscript{132}

A few investigations and prosecutions have continued in other countries. Argentina has experienced many of the same issues that have confronted Chile, from the effect of immunity to the meaning of "truth and reconciliation."\textsuperscript{133} In 2003 Argentina ended its policy of refusing to extradite Argentinean citizens and allowed General Videla and other senior officers of the military government to face charges filed by Judge Garzon in Spain.\textsuperscript{134} In addition, Argentina opened investigations of many of the Operation Condor participants, including Pinochet, under a variety of legal theories.\textsuperscript{135} While some participants have been brought to justice, further action appears unlikely. Finally, the United States insisted that Chilean amnesty not include the Letelier murders.\textsuperscript{136} Some of the participants were identified and prosecuted in the United States, and General Contreras was prosecuted in Chile.\textsuperscript{137} There were also proposals within the U.S. Justice Department to indict Pinochet for the murders, but Professor Roht-Arriaza suggests that the proposals were shelved after January 20, 2001.\textsuperscript{138}

While in some ways Spain seemed somewhat relieved to lose the extradition case, Spanish judges later brought additional charges against lower-ranked officials from both Chile and Argentina. Among the most noteworthy are cases against Ricardo Cavallo, who was the head of the "Fish Tank," a slave labor portion of the Argentine detention center at the Navy Mechanics School, and Adolfo Scilingo, convicted of murder by throwing people out of airplanes.\textsuperscript{139} The extent of Spanish jurisdiction over such cases remained unsettled until late 2005, when the Spanish Constitutional Court approved universal jurisdiction for crimes against

\begin{itemize}
\item \textsuperscript{131} Roht-Arriaza, \textit{supra} note 4, at 74–77.
\item \textsuperscript{132} \textit{Id.} at 94.
\item \textsuperscript{133} \textit{Id.} ch. 4.
\item \textsuperscript{135} The charges included disappearances, illegal deprivations of liberty, and criminal conspiracy. The amnesty laws did not prevent prosecution of the non-Argentinean defendants, and the courts agreed that these offenses were all "crimes against humanity," exempt under international law from amnesties or limitation periods. Roht-Arriaza, \textit{supra} note 4, at 152–53.
\item \textsuperscript{136} \textit{Id.} at 70.
\item \textsuperscript{137} \textit{Id.} at 157–59.
\item \textsuperscript{138} \textit{Id.} at 158–59.
\item \textsuperscript{139} See \textit{supra} notes 62–63 and accompanying text.
\end{itemize}
humanity in a case brought by Nobel Peace Prize recipient Rigoberta Menchu.140

IV. THE PINOCHET CASE AND INTERNATIONAL CRIMINAL LAW

There are good reasons to join those who take the position that the Pinochet case markedly improved international criminal law. The legal rulings that came out of the Spanish investigations and the extradition case are progressive in several respects and suggest new possibilities in others. Even accepting that progress in international criminal law is measured in small steps, however, there are also good reasons to question the legal significance of this case because there is simply less there than first appears. This Section addresses four areas of international criminal law affected by the Pinochet case: (1) extraterritorial jurisdiction, (2) double criminality, (3) head of state immunity, and (4) the law of torture.

A. Extraterritorial Jurisdiction

The Spanish investigations represent a broader concept of extraterritorial jurisdiction than has existed throughout most of the modern era of international law. Traditionally, extraterritorial jurisdiction has been reserved for those instances in which national interests of the forum nation are at stake.141 Here, however, Spain sought to exercise universal jurisdiction, which in principle would allow it to bring criminal charges with little or no Spanish nexus. By cooperating with Spain's exercise of universal jurisdiction in the Pinochet case, the argument goes, the United Kingdom accepted the broad use of universal jurisdiction as a tool to prosecute international criminals wherever they may be found. Both nations have


received great acclaim for doing so.142 Perhaps, however, this acclaim is exaggerated as Spain never succeeded in prosecuting Pinochet, and the United Kingdom failed to extradite him. More subtly, however, the legitimacy of universal jurisdiction was uncertain in this case and is arguably likely to be unnecessary in future cases.

In the latter part of the twentieth century, some nations extended their criminal jurisdiction to allow them to bring criminal actions based on the nationality of the victim. This “passive personality” jurisdiction has a relatively sparse history. It was approved in dicta by an evenly split Permanent Court of International Justice in *The Case of the S.S. Lotus*143 and is acknowledged in the Restatement of the Foreign Relations Law of the United States but only as a limited and largely disapproved jurisdictional theory.144 It has, however, become more widely used in recent years in the United States as part of the response to terrorism. For example, the crime of hostage-taking, wherever committed, may be prosecuted in the United States if a U.S. citizen was a victim.145 In the best known application of this statute, *United States v. Yunis*,146 one theory of the prosecution was passive personality. Few other


143. S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Turkey asserted criminal jurisdiction over a collision at sea based in part on the resulting death of several Turkish citizens).

144. The Restatement provides:

*g. The passive personality principle.* The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.


nations have followed the United States in using passive personality for criminal jurisdiction, at least on a wide scale.

Spain claimed to be exercising universal jurisdiction in the Pinochet investigations, but that claim is weak in several respects. First, Spain’s primary justification for acting was the fact that Spanish citizens had been victims of crimes in Argentina and Chile.\textsuperscript{147} Second, the Spanish courts are badly split on the issue. For example, the Audencia Nacional allowed universal jurisdiction in its 1998 decision upholding the Pinochet arrest warrant. It relied, however, on Spain’s unusually broad definition of genocide and found that jurisdiction over torture committed by the Junta was appropriate because the torture was an instance of genocide.\textsuperscript{148} The Spanish Supreme Court rejected universal jurisdiction in 2001 and limited jurisdiction to cases involving Spanish victims under the passive personality theory.\textsuperscript{149} While the Constitutional Court approved universal jurisdiction for genocide in 2005,\textsuperscript{150} it was a close decision in a legal system in which precedential effect is limited. Third, the Public Prosecutor opposes such cases, as indicated by the legal challenges to Garzon’s investigations.\textsuperscript{151}

\textsuperscript{147} See ROHT-ARRIAZA, supra note 4, at 11–13; Brody, supra note 6, at 8. Although Spain employed universal jurisdiction in its prosecution, the Audencia Nacional (National Court) noted in its 1998 decision upholding the charges that Spain’s legitimate interest in the case was premised on the fact that more than fifty Spaniards were among the victims in Chile. Audencia Nacional, Order of 5 November 1998 [hereinafter Nov. 5, 1998 Order], reprinted in THE PINOCHET PAPERS, supra note 6, at 107. Richard Wilson observes that the initial theory employed by Spain was in fact passive personality. Wilson, supra note 84, at 25.

\textsuperscript{148} Spanish law allows extraterritorial jurisdiction for genocide, terrorism, and other offenses where such jurisdiction is provided for in international treaties or conventions. L.O.P.J. arts. 23(4)(a), (4)(g). The jurisdictional provisions of the Torture Convention did not clearly allow Spain to act, which raised potential double criminality issues with the United Kingdom. See infra Part IV.B.; Brody, supra note 6, at 17 n.28. The Audencia Nacional concluded that the crimes of the Junta would constitute genocide of a “differentiated group,” a broader understanding of the target of genocide than acknowledged in most national laws. See Nov. 5, 1988 Order, supra note 147, at 100–04.


\textsuperscript{150} This was the Guatemalan case brought by Rigoberta Menchu. See Spain May Judge Guatemala Abuses, supra note 140.

\textsuperscript{151} Both of the appeals to the Audencia Nacional were taken by the OPP, which argued that Spanish law did not recognize jurisdiction over the offenses of the Chilean Junta or Argentinean military government. See Nov. 5, 1988 Order, supra note 147, at 96–97; Audencia Nacional, Order of 24 September 1999 [hereinafter Sept. 24, 1999 Order], reprinted in THE PINOCHET PAPERS, supra note 6, at 385–86. See generally ROHT-ARRIAZA, supra note 4, at 44–50.
complaint process of the Spanish criminal justice system renders this less than the absolute veto it would be in the United States or a nation with a similar criminal justice system, but even the Spanish process is limited to complaints by Spanish citizens, thereby backing into passive personality, at least as a practical basis for jurisdiction. Therefore, it would be a mistake to draw any grand conclusions about the new status of universal jurisdiction on the basis of Spanish actions in the Pinochet case.

Passive personality presents additional problems. For example, broad use of passive personality jurisdiction can impose substantial burdens on international relations. Even with an international double jeopardy principle, passive personality jurisdiction necessarily increases the chances that a crime may become the subject of prosecutions in multiple jurisdictions. This problem of multi-jurisdictional crimes can only grow with increased international trade and travel and would be exacerbated by the broad notions of nationality recognized by some nations. In addition, serious problems could arise to the extent that, perhaps due to cultural differences, behavior is a crime in the victim’s nation but not in either the place of the “crime” or in the nation of the “offender.” In addition, although the double criminality requirement could prevent extradition from the location where the act took place, it would not help if the accused traveled to a nation that shares the criminal law of the prosecuting state. Furthermore, double jeopardy can even work its own injustices. If a nation asserts passive personality jurisdiction but fails to convict in a worthy case or imposes light punishment in a serious case, other

152. Even a private complaint filed by a citizen seeking redress for non-citizen victims, as in the Pinochet case, will rarely succeed without the support of the Public Prosecutor. Due to limited resources and the need for active support from an investigating judge, the practical realities dictate that most of the cases investigated will be those of Spanish nationals.

153. The principle of *ne bis in idem* instructs that no person should face charges more than once for the same alleged criminal conduct. PAUST ET AL., supra note 141, at 559–61.

154. An example nation is Italy, which grants citizenship to persons whose grandparents emigrated from Italy. It asserted passive personality jurisdiction in the Chilean and Argentinian cases based on second- or third-generation ties to the victims. Other European nations that grant such rights include Spain, France, and Germany. ROHFF-ARRIAGA, supra note 4, at 121–22.

155. Possible examples include consensual sexual behavior and offensive speech permitted in Western nations but subject to harsh justice in some Eastern and African nations. Other potential crimes could be found in routine international business transactions. Citizens of nations with rigid usury or theft laws could file criminal charges in their home nations based on business practices that are legal where they take place. Such jurisdiction would plainly obstruct international trade.
nations with more appropriate jurisdiction may lose the power to prosecute under international law.

Passive personality jurisdiction tends to reify national boundaries, which leads to precisely the opposite of universal jurisdiction's globalization. While the passive personality theory expands criminal jurisdiction from the place of the crime to include the home nations of the victims, it does so by creating a system in which the citizens of powerful nations are protected by their national criminal justice systems while those from weaker nations lack similar protection but are vulnerable to prosecution in nations they have never entered. Moreover, victims of their own governments are largely excluded from passive personality jurisdiction, which is totally at odds with the key premise of the international law of torture: protecting people from their own governments. It is ironic, therefore, to see Spanish jurisdiction in the Pinochet case succeed because of quasi-passive personality jurisdiction over crimes committed against Spanish citizens in Chile.

To the extent that the Pinochet case and its progeny represent true notions of universal jurisdiction, many of these problems fade. Limiting universal jurisdiction in Spain and elsewhere to the most heinous of offenses, such as torture, makes it fit for international justice in ways that most crimes are not. The more salient question is whether crimes such as those of the Chilean and Argentinean dictatorships should be subject to universal jurisdiction everywhere or universal jurisdiction in the sense of an international court. Of course, there is now an ICC, which is predated by two

156. One of the premises of universal jurisdiction is that it is "based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 1.1 (2001), http://www.princeton.edu/~lapa/unive_jur.pdf. Torture is included as one of the serious crimes that can support universal jurisdiction. Id. princ. 2.1. Universal jurisdiction for torture is not certain, however, even though it was a premise of the House of Lords decision in the Pinochet case. See Submissions to the House of Lords, reprinted in THE PINOCHET PAPERS, supra note 6, at 120–21. Recall that Spain's assertion of universal jurisdiction was not based on the Torture Convention. See Brody, supra note 6, at 17 n.28 (noting the difficulty in basing Spanish jurisdiction for torture in South America on the Torture Convention).

157. See FROM NUREMBERG TO THE HAGUE, supra note 6, at 72 (observing that most nations will not properly investigate and prosecute their own war crimes); Byers, supra note 3, at 420 nn.20, 22 (discussing worthy universal jurisdiction cases). Spain's subsequent history either supports or weakens such claims, depending on how one views whether Spain should have jurisdiction over possible offenses by U.S. troops in Iraq or over the Chinese treatment of Tibetans. See, e.g., Giles Tremlett, Spain Orders Arrest of US Soldiers Over Death, GUARDIAN (London), Oct. 20, 2005, at 16; Lisa Abend & Geoff Pingree, Spanish Court Looks at Tibetan Genocide, CHRISTIAN SCI. MONITOR, Mar. 2, 2006, at 4.
ongoing international tribunals that prosecute criminal violations in the former Yugoslavia and Rwanda. In hindsight, Chile and Argentina would have made good candidates for such tribunals. If they had been utilized by the world community, there would be little need to debate the wisdom of passive personality jurisdiction disguised as universal jurisdiction or whether Spain’s jurisdiction was truly universal. Now that the ICC exists, however, the universal jurisdiction asserted by Spain in the Pinochet case is anachronistic and probably unwise.

B. Double Criminality

Concerning extradition law, the most notable feature of the Pinochet case is its treatment of double criminality. Double criminality is a simple concept that can be difficult in operation. Most extradition agreements provide that a person may be extradited only if the acts charged are crimes in both the requesting and surrendering nations. Spain’s assertion of extraterritorial jurisdiction raised a problem in this regard because U.K. extradition law generally authorizes extradition for extraterritorial prosecution only if the United Kingdom also asserts extraterritorial jurisdiction over the crime, and the United Kingdom does not assert extraterritorial jurisdiction over many crimes. The first warrant, charging Pinochet with murders occurring in Chile, was flawed in this respect. The second warrant corrected this flaw by charging torture and taking hostages after 1988, which was after the Torture Convention had been ratified in Spain, Chile, and the United

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158. There are also hybrid international tribunals for East Timor, Sierra Leone, Kosovo, and Cambodia. See generally Project on International Courts and Tribunals, http://www.pict-pcti.org/courts/hybrid.html (last visited Aug. 9, 2006).

159. On the law of extradition generally, see M. Bassiouni, International Extradition: United States Law and Practice (3d ed. 1996) and Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms (1998). The Pinochet case is a textbook example of the extradition process. It methodically addresses the factual issues often arising in the extradition process and is unusually accessible due to the paper trail of documents and press coverage. The formal aspects of extradition, such as the request for arrest and treatment of the magistrate’s inquiry, are a good model for study. In particular, Magistrate Bartle’s decision provides an especially clear statement of the laws governing extradition.

160. Double (or dual) criminality is the requirement common to most extradition treaties that provides that the “offense for which extradition is sought must be a serious crime punishable under the laws of both countries.” Brauch v. Raich, 618 F.2d 843, 847 (1st Cir. 1980).

161. See Extradition Act, 1989, ch. 33, § 2(2) (Eng.). U.K. extradition law also permits extradition for extraterritorial prosecutions where the requesting nation seeks one of its own nationals. Id. ch. 1, § 2(3).
Ordinarily, that would have resolved the question because the United Kingdom treats torture and taking hostages as extraterritorial crimes that satisfy the double criminality requirement even where the requesting nation is itself exercising extraterritorial jurisdiction. This was, in effect, the ruling of the first House of Lords panel. The second House of Lords panel concluded, however, that torture had not become an extraterritorial crime in the United Kingdom until 1988, and most of the law lords concluded from this that no acts of torture occurring before that time could support extradition.

This second ruling gutted the extradition request because most of the Junta's crimes took place in its early years, with only a few instances of torture occurring after the enactment of extraterritorial jurisdiction for torture in U.K. courts. Under the panel's limited view of double criminality, therefore, Pinochet could be extradited only for those few acts. Moreover, under the international law principle of specialty, Spain could only prosecute him on those charges.

While this is a credible synthesis of extradition law as applied to the facts of the Pinochet case, it is not the most convincing one, which lends force to the criticisms of the House of Lords' decision as laying the groundwork for the discretionary termination of extradition that eventually occurred. The pertinent language in the British statutory definition of an "extradition crime" is that "in corresponding circumstances equivalent conduct would constitute an extraterritorial offense against the law of the United Kingdom." This seems to require only that the crime charged by the
foreign nation be recognized by the United Kingdom as an extra­
territorial crime, which it assuredly was at the time of the 1998
request and the House of Lords' 1999 decision. Indeed, this was
the view expressed by the Divisional High Court panel, where Lord
Bingham stated the following:

I would however add on the retrospectivity point that the con­
duct alleged against the subject of the request need not in my
judgment have been criminal here at the time the alleged crime
was committed abroad. There is nothing in section 2 which so
provides. What is necessary is that at the time of the extradition
request the offence should be a criminal offence here and that
it should then be punishable with 12 months' imprisonment or
more. Otherwise section 2(1)(a) would have referred to con­
duct which would at the relevant time 'have constituted' an
offence, and section 2(2) would have said 'would have consti­
tuted.' I therefore reject this argument.\footnote{In re Pinochet Ugarte, [1998] EWHC Admin 1013 (Q.B.D.) (Eng.), reprinted in
The Pinochet Papers, supra note 6, at 71, 81. Justices Collins and Richard expressed
agreement with Lord Bingham's opinion.}

The House of Lords panels were cryptic on this issue. The first
panel largely ignored it by holding that double criminality was sat­
sified without referring to the enactment date of British extraterri­
torial jurisdiction,\footnote{The opinions in Pinochet No. 1 largely ignore the issue. Lord Nichols stated that
"[i]t is conceded that both offenses [torture and hostage-taking] are extradition crimes." Lord Slynn noted that the Divisional Court was aware of the ratification date issue and
rejected the argument. Meanwhile, the remaining lords said nothing about the issue. Pinochet No. 1, supra note 108.}
 and the second panel's analysis was essentially
\textit{ipse dixit}.\footnote{This can be seen in the speeches to the House of Lords on March 24, 1999. The
core analysis was that torture outside the United Kingdom was not a crime in the United
Kingdom until 1988 and, therefore, the double criminality requirement was not met. Lord
Browne-Wilkinson's lead opinion agrees that the more logical reading of the text from a
language usage basis is that of Lord Bingham in the Divisional High Court decision, but
the opinion then fashions a more limited reading. See Ex parte Pinochet Ugarte No. 3,
[2000] 1 A.C. at 193–96.}

There is, moreover, no consistent practice in interna­
tional law of requiring that the conduct be prosecutable in the sur­
rendering nation \textit{at the time when the crime occurred}. The purpose
underlying the double criminality requirement is that the surren­
dering nation shares the public policy that the conduct at issue
constitutes a serious crime.\footnote{Ratner, supra note 165, at 36–40. Ratner uses the example of money laundering. Suppose that a person commits the crime of money laundering in Nation One and flees to
Nation Two. Several years later, Nation One locates the person and makes an extradition
request. Money laundering is now an offense in Nation Two as well. Nation Two has no
reason to deny extradition based on double criminality because the issue is not whether
the person violated Nation Two's laws but whether prosecution in Nation One is appropri­

may prosecute, as the majority of law lords on the second panel seemed to assume, but to limit extraditions to cases in which the surrendering nation agrees that the behavior should be treated as criminal. 173 This is unmistakably true of torture, and it was true long before December 1988.

An additional problem with the application of double criminality in the Pinochet case is that the courts seemed to be confused about how to compare the crimes in the two nations. This may have resulted in an unnecessary emphasis on the defined statutory offense of torture in the United Kingdom, which led to the problematic conclusion that acts of torture committed before the September 1988 enactment of the statute were not extradition crimes. The double criminality rule does not require that the corresponding criminal offenses be identical, and it is not unusual for different nations to treat the same harmful conduct as criminal but to call it by different titles and to require different elements. For example, in United States v. Saccoccia, 174 the court upheld a criminal forfeiture and conviction for racketeering following an extradition from Switzerland. The predicate offenses for the racketeering charge included interstate transportation in aid of racketeering, and extradition was approved notwithstanding the fact that Switzerland obviously has neither a racketeering offense as defined in the U.S. criminal code nor any criminal offense based on crossing state borders in the United States. 175 The essential criterion was simply that the offenses be "substantially analogous." 176

Spain investigated Pinochet’s human rights violations in Chile and Argentina under its own criminal code. It found that the most applicable offense was genocide, which was the basis of the extradition request and the 1998 and 1999 Audencia Nacional decisions

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173. This is particularly pertinent to the facts in the Pinochet case. Under the second panel’s reading of the statute, the United Kingdom must have jurisdiction to prosecute the illegal conduct to extradite for prosecution in another nation. This would likely eliminate extradition in most cases, as the United Kingdom would presumably only prosecute cases sufficiently serious to warrant extraterritorial jurisdiction. It therefore seems more logical to interpret the law as permitting extradition where the United Kingdom cannot itself bring charges but agrees with the requesting nation that the crimes are substantial enough to deserve prosecution.


175. Id. at 765.

176. Id. at 766; see also United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987) (concerning fraud in surrendering nation and wire fraud in the United States); In re Extradition of Russell, 789 F.2d 801, 803 (9th Cir. 1986).
upholding Spanish jurisdiction. Spain also charged murder, unlawful detention and kidnapping, terrorism, and torture. The British decision makers filtered these charges through U.K. criminal definitions and ended up with hostage-taking and torture. The Home Secretary eliminated genocide as an extradition crime, apparently because the Spanish and British definitions differed to such an extent that he could not be certain that there was a sufficiently analogous offense. Hostage-taking failed as an extradition crime in the second House of Lords decision, seemingly because the panel took the unusual step of assuming that the motive of all of the Chilean kidnapping was at odds with the purpose element of the U.K. hostage-taking statute.

Other than to determine whether the facts alleged would support criminal charges in the United Kingdom, there was no need in international law to look at the title given to the offense or even the elements of the Spanish crimes charged in the warrant request. Pinochet's crimes were torture, but they were also murder, genocide, terrorism, kidnapping, taking hostages, assault, battery, and probably many other things, depending on the available evidence and theories of the prosecutors in each of the several jurisdictions where the Junta committed its crimes. The facts underlying these prosecution theories all constituted serious offenses in the United Kingdom before, during, and after the Junta's reign. Accordingly, there was no need to conclude that the only extradition crime was torture and therefore no reason to find the 1988 date significant for applying the double criminality rule.

177. See Spanish Extradition Request, supra note 12, at 203–04; Nov. 5, 1988 Order, supra note 147, at 107; Order of Sept. 24, 1999 Order, supra note 151, at 385–86.
180. Lord Hope wrote the most complete analysis on this point. He noted that the extraterritorial offense of hostage-taking includes as an element the specific intent to compel a third party to act or abstain from an act, which is clear from the U.K. criminal statute and the international convention that preceded it. This is followed by a statement that the hostage charges in this case arose from the Junta's terror campaign and an assertion that this does not meet the statutory specific intent requirement. Ex parte Pinochet Ugarte No. 3, [2000] 1 A.C. at 230–31. This rationale is wholly unconvincing. While the Junta's use of hostage-taking was not identical to the paradigmatic examples of kidnapping for ransom or forcing the government to give in to demands, the entire premise of the terror campaign was to scare potential opponents of the Junta into silence. This goal certainly seems to satisfy the specific intent requirement, as the Junta's opponents included third parties scared into submission. The willingness of the second House of Lords panel to dismiss the charges before Spain could make its showing before the magistrate underscores the panel's eagerness to end the extradition case.
Moreover, however it was characterized under domestic British law, the Junta's conduct constituted serious international crimes. Such charges should have supported extradition from the United Kingdom regardless of the details concerning the ratification of the Torture Convention and enactment of its implementing legislation. This was the position of Lord Millett on the second House of Lords panel, who argued that the Torture Convention was essentially a way station in the development of international customary law and that those who commit human rights violations are international outlaws, subject to the jurisdiction of all other nations for even their domestic acts. He cited the universal acceptance of Israel's power to try Nazi war criminals, as well as the extradition from the United States to Israel of the alleged prison camp war criminal John Demjanjuk. Pinochet's crimes, he argued, similarly constituted crimes against humanity on a scale warranting international jurisdiction.

There is still the problem that British domestic law limited extradition for extraterritorial prosecutions to those that would also be subject to U.K. extraterritorial jurisdiction. At least one of the crimes included in the Spanish extradition request, however, was a territorial one—conspiracy to murder a person in Spain—in which Pinochet was alleged to have furthered the conspiracy while in Spain. That should have taken the issue out of the "extraterritorial" category and placed it in the general category of extradition.

181. Ex parte Pinochet Ugarte No. 3, [2000] 1 A.C. at 276-79; see also Ratner, supra note 165, at 49-51. This was also the premise of the opinions of Lords Nichols and Steyn on the first panel in rejecting immunity.

182. In re Extradition of Demjanjuk, 603 F. Supp. 1468 (N.D. Ohio 1988). Demjanjuk was found not guilty in Israel, but there has been no suggestion that it was inappropriate to send him to Israel for trial. See generally Attorney General of Israel v. Eichmann, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961). Israel's jurisdiction to try Adolf Eichmann is accepted even though he was forcibly taken from Argentina rather than accorded the protections of extradition law. In this case, Spain's position as the ancestral homeland to so many of the Junta's victims makes it analogous to Israel as the nation founded by and for survivors of the European holocaust.

183. In this sense, Britain's failure to authorize extradition even for those acts occurring before final implementation of the Torture Convention may well be a violation of its duties under international law. See infra Part IV.D.

184. See Ex parte Pinochet Ugarte No. 3, [2000] 1 A.C. at 193 (Opinion of Lord Browne-Wilkinson); Id. at 227 (Opinion of Lord Hope). Lord Hope acknowledges that Spain accused Pinochet of being party to a conspiracy in Spain to commit murder in Spain and that it was not a claim for extraterritorial jurisdiction. Id. at 232-33. The panel apparently swept this charge under immunity, creating the negative implication that the charge was not an international crime for which immunity was waived. Under the entire rationale of this decision and the immunity doctrine, however, it would seem that the decision to recognize act of state immunity for murder should belong to the nation where the crime occurred. In this case, of course, that would be Spain.
crimes, which plainly includes conspiracy to murder. The failure of the second panel to do so supports the conclusion that, by this stage of the proceedings, they were looking for an easy way out.

As a result, the second panel set a hard path for any prosecution of Pinochet in Spain. Under the doctrine of specialty, Pinochet could be prosecuted only for those crimes approved by the United Kingdom in its extradition order. While Garzon and Magistrate Bartle did a careful salvage job to build a post-1988 case against Pinochet, any prosecution resulting from this extradition would necessarily have been artificial and limited as it could not present the full range of the Junta’s crimes over the sixteen years that it was in power. In the end, the rule of specialty might have forced Spain to reconsider its prosecution strategy. Even had the Home Secretary decided to go ahead with the extradition, it might have made sense for Spain to withdraw its request and seek to bring Pinochet to justice through other means in order to present a more complete set of charges.

In any event, it seems unlikely that the Pinochet case will be an important precedent on double criminality. The problems discovered by the second panel were largely those of British domestic law, which was given an unnecessarily narrow meaning. Furthermore, due to the widespread adoption of the Torture Convention, most future acts of torture will be subject to extradition to and from nations asserting universal jurisdiction or other forms of extraterritorial jurisdiction. Still, the Pinochet decision constitutes a potential obstruction for requests under future conventions, especially if other nations follow the United Kingdom’s lead in applying a rigid characterization approach to determining if another nation’s crime is mirrored in their own criminal code.

C. Immunity

The ramifications of the Pinochet case on the international law of immunity are more favorable, although here, too, an apparent

185. Obviously, the U.K. Extradition Act permits extradition of a person to face murder charges. Section 1(a) of the act is the basic double criminality rule, which permits extradition for crimes punishable by one year or longer.

186. See supra notes 116–120 and accompanying text.

187. This was hinted at in the Audiencia Nacional decision issued after the second House of Lords decision. The court considered the full range of charges pending against Pinochet rather than the sharply limited ones approved for extradition, noting that it might obtain Pinochet through a different mechanism. Order of September 24, 1999, supra note 151, at 386.
urge to find a compromise prevented a strong human rights ruling. Although the outcome seems to be a victory for human rights because Pinochet was denied immunity on some charges, as with the ruling on double criminality, the impact was that only a few crimes were declared subject to extradition, making any additional charges barred by the specialty doctrine.

Immunity law provided several theories favorable to Pinochet. For example, heads of state are immune from legal process in other nations.\(^{188}\) Pinochet’s status as a former head of state and incumbent senator-for-life with Chilean amnesty and parliamentary immunity complicated matters, as it required consideration of whether immunity continued after he stepped down as president. In addition, act of state immunity\(^{189}\) raised separate issues, such as the extent to which acts contrary to a nation’s laws count as official acts of state accorded international immunity and whether such immunity applies to international crimes.

Pinochet argued for the broadest application of immunity. In the House of Lords, his counsel argued that British statutory and common law and customary international law all require immunity both because of Pinochet’s status and because his acts were official.\(^{190}\) The underlying premise was that Pinochet had complete immunity. Because he was only a former head of state, and therefore seemed unlikely to receive immunity for personal acts, his counsel had to argue that act of state immunity covered this

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\(^{189}\) Specifically, immunity applies to “public acts, political acts, or acts done *jure imperii*.” Hasson, *supra* note 141, at 139; see generally id. at 139–141; Rodley, *supra* note 6, at 4–5.

\(^{190}\) See Submissions to the House of Lords, *supra* note 156, at 116–20 (arguing for person and subject matter immunity); Excerpts of Proceedings Before the Appellate Committee of the House of Lords (second panel) [hereinafter Appellate Committee Proceedings], in *The Pinochet Papers*, *supra* note 6, at 229 (“We make a series of submissions, the first of which is that states and organs of state, which will include for these purposes both heads of state and a former head of state, are entitled to absolute immunity from criminal proceedings in the national courts of other countries.”) (argument of Barrister Montgomery for Pinochet).
case.\textsuperscript{191} Such immunity is rooted in both comity and practicality.\textsuperscript{192} The comity rationale—that no nation should sit in judgment of another—is based on national sovereignty. The practical reason is that if nations and their leaders are subject to foreign judicial power, international relations would become more difficult to conduct. The notion of absolute immunity for all criminal acts of state can contain some exceptionally unpleasant components: the worst abuses of power can be considered to be the same as great achievements of statesmanship, and torture can become just another vehicle for dealing with the public. In the House of Lords, Pinochet argued that Operation Condor was a paradigmatic act of state—international cooperation to serve multilateral national security.\textsuperscript{193}

There are strong arguments against so robust a notion of immunity. No international agreement obligated the United Kingdom to grant immunity and the trend in international law for many years had been to cut back on the doctrine.\textsuperscript{194} Moreover, immu-

\textsuperscript{191} Pinochet's counsel, relying on the legal opinions of former U.K. State Department Legal Advisor Sir Arthur Watts, quoted Watts' assertion that "[t]he critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority." Appellate Committee Proceedings, supra note 190, at 233; Submissions to the House of Lords, supra note 156, at 119 (quoting Watts, supra note 188, at 56). Pinochet's point was that, at least with respect to acts taken under the authority of the Chilean government, "[s]uch acts are acts of the State rather than the Head of State's personal acts, and he cannot be sued for them even after he has ceased to be Head of State." Submissions to the House of Lords, supra note 156, at 119 (quoting Watts, supra note 188, at 89).

\textsuperscript{192} Professor Rodley describes Lord Goff's opinion for the second panel as reflecting the classic view of international law in this area. See Rodley, supra note 6, at 4. The opinion, by defending act of state immunity because former senior officials would be fearful of facing "unfounded allegations emanating from states of a different political persuasion," explicitly raises the specter of U.S. sympathies for Irish Republican Army terrorists as a reason for U.K. officials to favor a broad view of immunity. \textit{Ex parte} Pinochet Ugarte No. 3, [2000] 1 A.C. at 220; see also Hasson, supra note 141, at 142.

\textsuperscript{193} Barrister Montgomery stated:

\begin{quote}
We will argue that the conduct with which your Lordships' House is concerned in this case are archetypical acts of government or sovereign power. They are acts in relation to the internal security of a nation involving its police force, its military, and its secret services. They are acts in relation to agreements reached with other sovereign states. The so-called Condor Plan is just a name for an international agreement reached between Chile, Uruguay, Paraguay, and Argentina and are archetypal acts of a sovereign nature, we submit.
\end{quote}

Appellate Committee Proceedings, supra note 190, at 230.

\textsuperscript{194} See, e.g., Submissions to the House of Lords, supra note 156, at 111–13 (noting that recent developments in international law prevent former heads of state from pleading immunity for violating most serious international norms) (Crown Prosecution Service); Appellate Committee Proceedings, supra note 190, at 221, 223 (Spain). According to Barrister Greenwood for Spain:

\begin{quote}
The reality, I suggest to your Lordships, is that the international law on this matter, as Sir Arthur Watts said, was unsettled, that old certainties about the position of the personal monarch were giving way to newer conceptions and, in particular,
nity that may seem appropriate for governmental actions that transgress another nation's laws in a minor or technical fashion makes less sense when applied to international crimes occurring over nearly twenty years. Furthermore, new treaty obligations appear not only to permit prosecution but also to require states to assert jurisdiction.

For every argument that seemed to require a decision in one direction, there was a reason to hesitate, to consider an exception, or to doubt the application of the argument in this particular setting. For example, the various arguments favoring immunity inevitably came up against the fact that the Torture Convention is specifically limited to crimes committed under color of governmental authority, thereby making immunity for acts of state seem totally at odds with the point of the Torture Convention's obligations. From the other direction, however, the implication that immunity would mean that no one would face criminal charges was met by the logical argument that immunity merely prevents the
courts of other nations from passing judgment on the actions of foreign governments.\textsuperscript{198}

As with double criminality, the United Kingdom had a statute that partially answered the question of Pinochet's immunity but left sufficient ambiguity to add to the confusion.\textsuperscript{199} This statute grants to heads of state the protections of the Diplomatic Privileges Act of 1964, subject "to any necessary modifications."\textsuperscript{200} Applying that statute requires analysis of the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention)\textsuperscript{201} as well as a healthy willingness to debate the nature and extent of "any necessary modifications." Addressing the issue of former diplomats, the Vienna Convention provides that when diplomatic status ends, the former diplomat retains immunity "with respect to acts performed by such a person in the exercise of his functions as a member of the mission."\textsuperscript{202} By analogy, the Diplomatic Privilege Act provision was read to mean that a former head of state would retain immunity with respect to acts performed as acts of state. This essentially returns to the beginning of the discussion—the scope of immunity for acts of state.

The biggest problem facing Judge Garzon and the supporters of the extradition request was that the Junta's crimes were, in a very real sense, acts of state. The premise of Pinochet's liability for the acts of the Junta was that they were crimes of the state, meaning that a successful prosecution would depend on proving both that Pinochet ordered torture and other criminal acts in an effort to

\textsuperscript{198} This is repeated several times in Barrister Montgomery's presentation on behalf of Pinochet. \textit{See, e.g., Appellate Committee Proceedings, supra} note 190, at 230, 232, 233, 235. Even though it was highly unlikely given the Chilean amnesty and immunity, Pinochet technically remained subject to prosecution in Chile or an international tribunal.

\textsuperscript{199} \textit{See State Immunity Act, 1978, ch. 33 (Eng.).} It may have been reassuring to have a statutory answer to judges who felt uncomfortable in the spotlight and somewhat at sea in considering these issues. \textit{See Roht-Arriaza, supra} note 4, at 51 (noting that the first panel decided the case in a packed courtroom and in front of television cameras, including a "TV announcer who breathlessly narrated the scene as though it were a question of penalty kicks at a soccer match"). Concerning the questions presented during the appeal before the second panel, Lord Browne-Wilkinson stated:

\begin{quote}
I was afraid that this was going to happen, Professor Greenwood, but at some stage, and I am not suggesting at all that it should be now, you are going to have to tell me when things do become part of international law and when they do not. It is a point I have never understood since I was at Oxford, but this case is going to turn, as far as I can see, more and more on that point.
\end{quote}

\textit{Appellate Committee Proceedings, supra} note 190, at 223.

\textsuperscript{200} \textit{State Immunity Act, supra} note 199, § 20(1)(a).

\textsuperscript{201} \textit{Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.}

\textsuperscript{202} \textit{Id.} art. 39(2).
destroy opposition to the Junta, and that he was able to command obedience because he was president. Thus, a necessary element of the prosecution’s case could have the collateral effect of establishing Pinochet’s entitlement to immunity. The theory that the official nature of the crimes made him permanently immune was pressed by his attorneys in the days immediately after his arrest and was adopted in substance by the Divisional High Court in its decision to quash the arrest warrant. On this point, Justice Collins stated: “Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. . . There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.”

A more elaborate but essentially impenetrable conclusion on this issue came from the opinions of the twelve law lords who sat on the two panels. While a majority on each panel declined to accept immunity as a basis for invalidating the arrest, there was no consensus hostile to freeing former heads of state with a history of torture or other crimes against humanity. For example, on the first panel, Lord Nichols supported extradition, asserting that torture and hostage-taking cannot be regarded by international law as state functions justifying official immunity as a matter of law, although he acknowledged the propriety of executive discretion to deny extradition for foreign policy reasons. The second panel, although supporting the arrest and initiation of the extradition proceedings by a 6-1 vote, was far from unanimous in its reasoning. Four justices concluded that immunity did not apply to the torture charges only because of the approval of the Torture Convention by some or all of the three nations involved, two justices found no immunity at all for torture, and one justice concluded that Pinochet was immune from all charges on traditional international


205. The votes on the first panel can be interpreted as two supporting immunity (Lords Slynn and Lloyd), two supporting executive discretionary immunity (Lord Nichols and probably Lord Hoffman), and one opposed to immunity for both torture and hostage-taking because each is an international crime (Lord Steyn).
law principles. This decision, therefore, could reasonably be interpreted as meaning that those who commit crimes in an official capacity are immune from prosecution in courts of other nations unless and until all interested nations officially disavow such conduct in international conventions. Thus, rather than rejecting immunity for former heads of state or even other state criminals, the decision only carved out a limited exception.

The international history of prosecuting former heads of state for crimes committed during their administrations is poor. Quite a few notorious dictators have lived out their days in comfort, some of them in the United States or other nations that have ratified the Torture Convention and purport to both follow it and to use international law to punish those who violate it. The most noteworthy attempt to challenge immunity in a somewhat analogous situation was Belgium’s attempt to prosecute Abdualaye Yerodia Ndombasi, minister for foreign affairs of the Democratic Republic of the Congo. In that case, the International Court of Justice (ICJ) reaffirmed international immunity for Yerodia, an incumbent high national official, and in doing so acknowledged in dicta the immunity of former officials for acts of state.

As in Pinochet, however, there is no clear or lasting explanation of which criminal acts are sufficiently official to warrant immunity, or from the other direction, which criminal acts are sufficiently heinous to undo immunity even if done through official acts of state.

206. See Summary of Report of the Appellate Committee, supra note 165, at 251–54; see also WISE ET AL., supra note 141, at 383–85.

207. Ferdinand Marcos is among the foreign dictators who have lived in the United States after leaving office, which led to civil litigation in this country concerning torture and other crimes committed in the Philippines during his rule. E.g., In re Estate of Marcos, 978 F.2d 493 (9th Cir. 1992); In re Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994). General Manuel Noriega was prosecuted in the United States for narcotics trafficking. United States v. Noriega, 117 F.3d 1206, 1211–12 (11th Cir. 1997), and several of the judges in Pinochet referred to the Noriega court’s reasoning concerning the immunity claims in that case. It is difficult to include narcotics trafficking within the concept of state functions; torture, despite its universal condemnation, is a tool of executing state policy, as the High Court and dissenting law lords concluded, to their discomfort. Most other cases have been unsuccessful. See, e.g., WISE ET AL., supra note 141, at 388–89 (noting that Charles Taylor and Slobodan Milosevic are the only two sitting heads of state to be indicted by an international tribunal).


209. The case can, though, be read to rule out one arguable reading of Pinochet, which is that violations of serious international crimes undo immunity. In fact, Belgium claimed that Foreign Minister Yerodia had committed grave breaches of the Geneva Conventions. Id. ¶ 15.
Despite its amorphous analysis, the Pinochet case remains important in the area of immunity. Law school authors certainly think so, as the House of Lords opinions are addressed in many of the international law casebooks in use in 2006.\textsuperscript{210} Certainly in terms of the development of general principles such as immunity for heads of state, the limitation of immunity for former heads of state, and the ways in which immunity can be waived, this seems appropriate. At least in a limited sense, the case extended international criminal jurisdiction by allowing the United Kingdom and Spain to determine whether Chile's policies from 1973 to 1989 are to be recognized as official acts of state deserving of immunity. Still, it seems very far from a victory for human rights.

D. \textit{The International Crimes of Torture and Genocide}

The Pinochet case may also represent a step toward establishing international authority against torture and genocide, although there are limitations in this area as well. Both torture and genocide are the subject of major international conventions. Torture is the subject of a relatively recent convention,\textsuperscript{211} while genocide has been banned since 1948.\textsuperscript{212}

The Torture Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him . . . , or intimidating or coercing him . . . , or for any reason based on discrimination . . . , when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.\textsuperscript{213}

Although they differ in style, the Spanish and British statutory definitions of torture include the key elements of the Torture Con-

\textsuperscript{210} \textit{See, e.g.,} Wise \textit{et al., supra note 141, at 370; Paust \textit{et al., supra note 141, at 34; Lori Darnosch \textit{et al., International Law} 1276 (4th ed. 2001).}

\textsuperscript{211} \textit{See} Torture Convention, \textit{supra note 196. At the time of the Pinochet case, the treaty had 118 parties. As of September 2006, it had 141 parties. Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://www.ohchr.org/english/countries/ratification/9.htm (last visited Sept. 27, 2006).}


\textsuperscript{213} Torture Convention, \textit{supra note 196, art. 1(1).}
vention’s definition.\textsuperscript{214} Taking these provisions literally, one act of torture would be enough to bring this crime within universal jurisdiction.\textsuperscript{215} The horrible facts of the Junta’s actions\textsuperscript{216} would seem to prevent any credible defense. This may prevent the case from being much of a precedent on the meaning of the torture convention, as there could be no ambiguity about its application to hundreds of allegations concerning the Junta’s actions.

Three other aspects of the Pinochet case may, however, influence future international torture prosecutions. Justice Richard Goldstone, former chief prosecutor for the U.N. International Crimes Tribunals, praised the Pinochet case for endorsing universal jurisdiction over torture,\textsuperscript{217} and the approval of such jurisdiction by the House of Lords panels for the period after ratification of the Torture Convention suggests that this principle is now well established. Similarly, although the House of Lords may have backed into this position through its focus on the enactment of the Torture Convention and implementing legislation, its decisions support the notion that the torture prohibition is now \textit{jus cogens}, a fundamental norm of international law that all nations are compelled to follow.\textsuperscript{218} On the other hand, the result of the case

\begin{itemize}
\item \textsuperscript{214} Torture is included in Article 174 of the Spanish criminal code, Código Penal [C.P.] art. 174 (Spain), and Section 134 of the U.K. criminal code, Criminal Justice Act, 1988, ch. 33, § 134 (Eng.). Both statutory offenses are somewhat broader than the convention definition. Spain, for instance, charged torture as acts of genocide and terrorism. \textit{See supra} notes 148, 151, 177, 179, 180 and accompanying text; \textit{see also} Nov. 5, 1988 Order, \textit{supra} note 147, at 105; Wilson, \textit{supra} note 84, at 29. The British law is consistent with the House of Lords decisions in establishing universal jurisdiction with no textual limitation.
\item \textsuperscript{215} \textit{See Appellate Committee Proceedings, supra} note 190, at 225 (Professor Greenwood for Spain). This can be inferred from the outcome of the second panel’s decision, as there was only one chargeable act of torture occurring after December 1988.
\item \textsuperscript{216} The facts concerning torture are recounted in multiple sources. In terms of documents, examples are included in the Spanish Extradition Request, \textit{supra} note 12, at 208–09, the HRW Representation to Jack Straw, \textit{supra} note 54, at 365–70, and in two annexes concerning torture from 1988 to 1989.
\item \textsuperscript{218} \textit{See, e.g.,} Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 32 (Feb. 5) (Second Phase). The International Court of Justice stated that “[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” \textit{Id.} at 32; \textit{see also} \textsc{Ian Brownlie}, \textit{Principles of Public International Law} 488–90 (6th ed. 2003) (discussing \textit{jus cogens} generally). Professor Brownlie appeared in the Pinochet case for Amnesty International.
\end{itemize}

The phrase \textit{jus cogens} was used in a number of materials related to the case, and Chile admitted that the prohibition of torture was now \textit{jus cogens}. Appellate Committee Proceedings, \textit{supra} note 190, at 238 (Barrister Collins for Chile); \textit{see also} Submissions to the House of Lords, \textit{supra} note 156, at 124 (amicus curiae). The awkward relationship between the
undermines the principle of "extradite or prosecute," a Torture Convention obligation that received only lip service in the Home Secretary's final actions. The Home Secretary made a decision not to extradite and referred the case for prosecution to the Crown Prosecution Service, which made a prompt decision not to prosecute. It is hard to see how discretionary decisions not to prosecute and not to extradite despite overwhelming evidence of guilt constitute good faith compliance with the international obligation to do one or the other, especially in a case serious enough to call for universal jurisdiction. 219

In the end it is likely that the Pinochet case is less significant concerning international justice for torture than the U.S. case of Filartiga v. Pena-Irala. 220 Though only an appellate court decision and addressing only civil liability, Filartiga built on a series of international documents to reach strong human rights conclusions nearly twenty years before the Pinochet case:

We conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens . . . . The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. 221

convention and the status of torture as jus cogens is illustrated by this passage from Lord Browne-Wilkinson's opinion:

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.

Ex parte Pinochet Ugarte No. 3, [2000] 1 A.C. at 204.

219. See infra Part V. The claim that the convention deprived Straw of discretion to deny extradition was raised in a 1998 action for mandamus filed by Amnesty International before Secretary Straw made his initial decision. See R. v. Sec'y of State for the Home Dep't, ex parte Amnesty International, Queen's Bench Division, (1998) The Times CO/4869/98 (Q.B.D.) (Eng.). The court dismissed the application, suggesting that he retained discretion in the matter but also noting that the Torture Convention had not been incorporated into British law. See generally HRW Representation to Jack Straw, supra note 54.

220. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). By its reliance on private complainants, U.S. tort law is somewhat analogous to the Spanish criminal complaint system. This may explain why such cases are more likely to succeed than criminal cases, which are more subject to bureaucratic and political pressures.

221. Filartiga, 630 F.2d at 884-85. By accepting extraterritorial jurisdiction for torture that occurred long before the adoption of the Torture Convention, the Second Circuit Court of Appeals recognized a greater human right to be free from torture than either the House of Lords or Secretary Straw recognized in the Pinochet case.
Although *Filartiga* has been followed in a number of other U.S. decisions and was cited by advocates in the Pinochet case, there was no discussion in the opinion of *Filartiga*'s recognition of universal jurisdiction for pre-convention torture. In a world of judicial adherence to the principles of *Filartiga*, universal jurisdiction of torture cases would mean far more than the grudging opinions and premature termination of the Pinochet case.

One aspect of the case that has been overlooked in the commentary is that genocide, rather than torture, was the centerpiece of the Spanish investigations. The Genocide Convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

The term *genocide* first came into common usage after World War II to characterize the Nazi attempts to destroy the Jewish population. Genocide charges were part of the two ad hoc international criminal tribunals of the 1990s in the former Yugoslavia and Rwanda. Genocide is also one of the four crimes within the jurisdiction of the new ICC.

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223. See *Submissions to the House of Lords*, supra note 156, at 125 (amicus curiae); *Ex parte Pinochet Ugarte No. 3*, [2000] 1 A.C. at 159 (Barrister Greenwood).


225. *Roht-Arriaza*, *supra* note 4, at 46. It was also used to describe the Turkish slaughter of the Armenians. *Id.*


Charging genocide in the Pinochet case was more controversial than applying the Torture Convention. While it is clear that acts under the Genocide Convention's "a," "b," "c," and "e" occurred, there are few indications that the Argentinean or Chilean juntas acted on the basis of national, ethnic, racial, or religious identity. Spain applied a variation in its version of the Genocide Convention that was in effect during the 1970s and 1980s, which defined genocide to include acting with "the intent to destroy a national ethnic, social or religious group." The argument made by the investigating judges in these cases, therefore, was that the military governments identified persons that disagreed with national political, social, or economic policies, and that the governments then tried to exterminate "social groups" by torturing and murdering such persons. This aggressive use of the genocide ban was discussed in the 1998 Audencia Nacional decision upholding Spanish jurisdiction, where the court stated:

[An effort was made to destroy a differentiated national group, those who did not fit in the project of national reorganization, or those who the persons who carried out the persecution considered did not fit. The victims included foreigners, among them Spaniards. All the victims, real or potential, Chileans or foreigners, made up a differentiated group, in the nation, that was targeted for extermination.]

There are good reasons to be concerned about so expansive a notion of genocide. Part of the universal abhorrence of genocide is that the criminal intention is not just to punish political opponents, but rather to terminate a part of the population that can be defined by other characteristics, such as race, religion, gender, or ethnic identity. While political opponents are in one sense a group, their characteristics are not immutable, and nothing in the attempted elimination of "socialists" or "trade unionists" or "professors" can have the permanence of something such as the Holocaust or the massacre of the Tutsis in Rwanda. A civil war between people of different religions differs significantly from a civil war between people of different ideologies. In short, it is not just the total number of victims that creates the horror of genocide—it is the reason that the victims are selected and their

228. There were certainly examples of anti-Semitism, which may be more related to the bigotry of the actors rather than the military governments. See, e.g., supra note 61; see also Spanish Extradition Request, supra note 12, at 209 (providing examples of racial and religious animus in torture and killings).
229. ROHT-ARRIAZA, supra note 4, at 47-48.
attempted permanent exclusion from society. If all massive violent crimes by governments directed at political opponents could be characterized as genocide, this unique aspect that makes genocide one of the few crimes subject to ICC jurisdiction may become forgotten.

The fact that the theory of the Spanish investigations was based on a specific definition of genocide in Spain’s criminal code, however, makes the “dilution of genocide” less of a problem. There is nothing inappropriate about a nation making a mass crime directed at political opponents a particularly serious offense, and that is in effect what Spain did here. Unless and until the ICC becomes a more effective vehicle of enforcing international criminal law, it is necessary to accept minor variations in how different nations define crimes.

Some of the opponents of extradition in the Pinochet case have overlooked one other point: the limitations of the Torture Convention and British extradition law provided only technical obstacles to extraditing Pinochet. There were never any doubts that he, his subordinates, and their counterparts in Argentina violated national and international criminal law on too many occasions to count. Since Pinochet prevailed largely because of legal technicalities analogous to statutes of limitations, no one should condemn artful lawyering by human rights advocates to discover equally technical loopholes that may make it possible to prosecute some of the criminals.

V. The Continued Reign of Politics

Defenders of international law greatly fear the dismissal of the subject as politics rather than law with the implication that the rules of international law are really just playing pieces for national leaders and a few others who exercise discretion in foreign policy and call it law. A more realistic description of the sensitive relationship between international law and politics might be that international law describes a variety of agreements that range from multi-lateral treaties to understandings developed over many years, and they have been reached by sovereign nations to allow more efficient and just international relations. In a larger sense, the

231. There are other serious international crimes that seem to have taken place in Chile and Argentina, such as war crimes under the Geneva Convention.

decisions of individual nations to enter into those agreements necessarily reflect their own political choices. In a smaller sense, the vehicles of international law often appear to be more political than many domestic controversies because international legal disputes are less likely to be resolved by a body of enforceable, and at least facially apolitical, domestic laws. The Pinochet case illustrates both of these political aspects of international criminal law.

The Junta might not have come into being without the support of the United States (at least in the sense of its strong aversion to Allende and his government's economic policies). Chilean political history from 1973 to the late 1980s reveals that the dictatorship was at its strongest when it had the greatest U.S. support and that its most egregious violations of human rights occurred when the leaders seemed to have at least the tacit approval of the United States. Pinochet himself was an accomplished bureaucratic politician, adept at recognizing and using the perceptions of others to achieve his ends. The Junta certainly recognized the value of manipulating public perceptions in Chile and elsewhere. For example, it fabricated evidence of a leftist plot to overthrow the elected government in an apparent effort to convince the middle class that a military government was needed to protect individual property. The Junta consistently used euphemisms to describe its actions and repeated patriotic platitudes to hide its activities behind an image of "defending the constitution" while violating it and imposing torture as state policy. Moreover, showing a high degree of sophistication concerning appearance and reality, the Junta allowed the courts to remain open. When the courts then acquiesced in the Junta's actions and failed to grant habeas corpus or other judicial remedies on behalf of its pris-

233. See supra notes 46–48 and accompanying text.
234. See generally Burbach, supra note 2, at 35–77; Kornbluh, supra note 10.
235. Burbach describes Pinochet's decision to join the Junta as a pragmatic and careerist decision. Burbach, supra note 2, at 41–42. Whether Pinochet joined the coup simply as a career measure or was able to fool Allende into believing he was a general committed to civilian rule remains uncertain.
236. See Ensalaco, supra note 2, at 45 (discussing a White Paper concerning "Plan Zeta," an alleged plot to assassinate senior military leaders); Beckett, supra note 11, at 178.
237. See, e.g., Barros, supra note 2, at 119 (discussing the fictional civil war following the coup); id. at 159 (describing the great concern over the appearance of the coup in other nations); ICJ Report, supra note 12, at 3 (noting that the Junta tried to justify its actions by talking of illegallities under the Allende government); id. at 40 (describing the "state of war" as a fiction to justify expanded governmental powers).
oners, the Junta was able to claim that the courts had found the Junta's actions to be both necessary and legal.\footnote{238}

The Truth and Reconciliation Commission itself avoided making judgments about the 1973 coup even though it was plainly unlawful under Chile's constitution.\footnote{239} This was responsive to the mood of Chile immediately after the restoration of free elections and may have been politically necessary to end the Junta without additional violence. President Aylwin's charge to the commission was to find "truth and justice insofar as possible," which was recognized to mean \textit{politically} possible rather than a reference to the difficulties of proof. Over time political views changed and allowed prosecution of some crimes committed by troops during the Junta, a process that was eased as judges appointed by the Junta retired and were replaced by judges appointed by the elected government.\footnote{240} Still, even after Pinochet returned from England and the courts stripped him of immunity, the president tried to prevent the prosecution from going forward.\footnote{241} Pinochet's status remained a political football, with Pinochet's medical condition serving as a metaphor for the shifting views about whether his prosecution would be good for Chile.\footnote{242}

\footnote{238. Ensalaco describes this as a calculated move because the Junta understood the courts to be deferential to the national government and inclined to use legal formalism to deny relief in meritorious cases. \textit{Ensalaco}, supra note 2, at 52–53; \textit{see also OAS Report}, supra note 15, at 78–80. The Truth and Reconciliation Commission was also highly critical of the courts during the Junta, noting that the president of the Chilean Supreme Court went so far as to deny the existence of disappearances. \textit{Truth and Reconciliation Report}, supra note 9, at 117–26.}

\footnote{239. \textit{See Truth and Reconciliation Report}, supra note 9, at 2–3, 29. It also states that only hindsight could determine that leftist revolutionaries lacked the military capability to overthrow the elected government. \textit{Id.} at 47.}

\footnote{240. \textit{See generally Burbach}, supra note 2, at 82, 88–89. Aylwin seemed to believe that his acknowledgment of, and formal apology for, the crimes of the Junta at his inauguration were necessary but as far as he could go in challenging the past.}

\footnote{241. \textit{Burbach}, supra note 2, at 129–37. Here the politics of the criminal justice system played an important role. In Chile, as in Spain (but not the United States or United Kingdom), prosecutions are independent of the executive branch and not governed by the same electoral concerns.}

This is all "garden variety" politics in one sense—governments putting the best public relations face on their most controversial actions and accepting that their options are limited when public support is weak. It affects international criminal law, however, because Chile’s inability or unwillingness to provide legal remedies for the Junta’s victims or to impose legal punishments for its criminals left those processes to other nations. Until recently, those other nations would have had little authority to act, at least in the absence of a war and ad hoc military tribunals. With the growing acceptance of extraterritorial jurisdiction, however, other nations can become, in effect, world policemen. Some argue, for example, that the United States thinks of itself as the world’s policeman for terrorism and that Europe seeks to become the world’s policeman for human rights.


Europe can become the world’s policeman only to the extent that it has the political will to do so. Spain became the nation that sought to bring the Chilean and Argentinean state criminals to justice because it had a system that encouraged private complaints, investigative judges willing to punish human rights violations, and a large number of victims resident in Spain. Furthermore, successful prosecutions would have required access to witnesses, which was more likely in Spain than anywhere else outside of the Southern Cone because of the large number of Chilean and Argentinean expatriates in Spain. Successful prosecution would also have required a certain level of public support, which was built and maintained through the efforts of human rights groups in Spain to use the press and other public relations techniques to keep the government supportive of the case. But Spain faltered just when it looked as if Pinochet might be extradited, with the government seemingly grateful that it would not have to be Chile’s policeman. Other European nations then acted as free riders, allowing Spain to bear the many political costs of prosecuting a former head of state for human rights violations but then loudly proclaiming their support for such prosecutions at precisely the moment that it became clear that Pinochet would be returned to Chile and safe from trial in Europe.

The treatment of the Pinochet case in the United Kingdom reveals a clear marriage of politics and law. Extradition law is necessarily political in nature, as it involves the executive branch at a much higher level than in most criminal cases, and other government departments with international responsibilities play important roles. Under the British system, which is similar to that of the United States, extradition proceedings in the courts must be approved in advance by the Home Department of State (Home Department) and, if they result in judicial orders to extradite, are again subject to revocation by the Home Department. This means that extradition cases inevitably receive close political oversight both before and after the legal process of evaluating criminal


245. See Brody, supra note 6, at 19; ROHT-ARRIAZÁ, supra note 4, at 58–60 (discussing Spain’s reservations), 118–38 (discussing Europe’s late participation).

246. A good explanation of the British system is included in the Divisional Court’s opinion. See In re Pinochet Ugarte, [1998] EWHC Admin. 1013 (Q.B.D.), reprinted in THE PINOCHET PAPERS, supra note 6, at 72–77. For more information on the U.S. system and international practices generally, see WISE ET AL., supra note 141, ch. 14, and supra Part IV.B.
charges and compliance of the request with domestic and international law.

In the Pinochet case the Home Department became involved on at least six occasions, which may not be surprising in a case involving a former head of state. Initially, the Home Department was contacted about whether Pinochet had diplomatic immunity when the initial requests from Spain were received. After the arrest, Pinochet’s attorneys asked the Home Secretary to quash the warrant because of legal deficiencies in the request from Judge Garzon. The Home Secretary participated again by authorizing judicial extradition proceedings after each of the two House of Lords decisions upholding the arrest. After the extradition was ordered, the Home Secretary acted on two occasions, first by raising concerns about Pinochet’s health and then by issuing the decision to deny the extradition request and allow Pinochet to return to Chile.

It is hard to imagine that a member of Parliament and high cabinet official in the British government could not be influenced by politics or foreign policy in such a case. At the outset, the conflict in the United Kingdom seemed to follow party loyalties. The human rights community weighed into the political process, showing its public relations skills by marshaling the Chilean community to lobby the British government and by publicizing the nature and extent of the Junta’s crimes to the British public. It is no surprise, therefore, that Secretary Straw’s initial actions supported Pinochet’s extradition to Spain. The atmosphere, however, became less favorable for extradition over time. In limiting the extradition crimes to those that occurred after 1988, the decision of the second House of Lords panel was either a cause or a result of a decline in public and governmental support for the extradition.

247. The developments in the United Kingdom are set out in Roht-Arriaza, supra note 4, ch. 2, Beckett, supra note 11, passim, and supra Part II.C.

248. See supra notes 103–104 and accompanying text. Labour Prime Minister Blair and Secretary Straw were both anti-Junta; the Conservatives, especially former Prime Minister Thatcher, supported Pinochet, their ally from the Falklands. See, e.g., Brody, supra note 6, at 9; Roht-Arriaza, supra note 4, at 36; Beckett, supra note 11, at 228–40. Michael Byers suggests that the Blair government did not favor extradition from the start and that politics dictated aspects of the Home Department’s arguments at the Divisional Court. Byers, supra note 3, at 424–26. He also argues that the Blair government had concluded that Pinochet would likely prevail in the courts and therefore it could avoid antagonizing its political base by letting the courts take the heat. Id. at 426.

249. See Roht-Arriaza, supra note 4, at 37–41. It also brought torture victims to the United Kingdom to speak with journalists and the broadcast media. Burbach, supra note 2, at 111.
tion, and it may have been both. Whatever its motivation, the ruling was the narrowest possible way to reaffirm the principle of the earlier decision, and in doing so, it cut the heart out of the prosecution's case. By this time the Blair government was engaged in discreet talks with Chile concerning ways to allow Pinochet to return.

The Home Secretary has been criticized as acting solely for political reasons in denying extradition based on "exaggerated" medical claims. Perhaps it was analogous to the second panel's decision—a way to rationalize the principle of the nation's commitment to international justice with the reality of a naked political decision to allow one of the worst international criminals of the twentieth century to remain free from prosecution. Whatever it was, it was not a great victory for justice or the opening of the new age for international criminal law.

VI. CONCLUSION

The Pinochet case is a dramatic story. There are already books, the BBC has aired a series concerning the extradition proceedings, and there may be a movie or two. The Pinochet case, however, does lack two things nearly essential to contemporary entertainment in the United States: a protagonist-hero and a happy ending.

The Pinochet case also provides some lessons about international criminal law. On its face, at least, the Pinochet case seems to have had only a marginal impact, certainly nothing deserving the encomiums that have been bestowed on it by several of the commentators. Few criminals have been brought to trial and few victims have seen any justice. Argentina and Chile now have elected governments that do not rely on torture, but that is a result of elections, not of international law or criminal cases against the military.

250. See ROHT-ARRIAZA, supra note 4, at 57-58; Byers, supra note 3, at 434-37.
251. BECKETT, supra note 11, at 240-41. Professor Roht-Arriaza notes that former prime minister Thatcher gave Pinochet a silver plate originally made to celebrate the British victory over the Spanish Armada in 1588. ROHT-ARRIAZA, supra note 4, at 67.
252. See, e.g., BURBACH, supra note 2, at 121. Byers is more forgiving, contending that Pinochet was quite ill and unlikely fit to stand trial. Byers, supra note 3, at 438. As illustrated in Part II.D., the extent of Pinochet's health problems continues to be debated in Chilean courts.
254. There are many minor heroes, such as Judge Garzon, other judges and lawyers who pressed the investigations in Spain and Chile, and the victims and their families who often risked their lives to prevent the world from forgetting what happened.
255. See, e.g., supra note 6.
dictatorships and their henchmen. The use of torture as state policy is now an issue in the United States, but international law is playing little role in the debate.

The developments in international law also seem trivial in most respects, at least in hindsight six years later. Universal jurisdiction was involved only in an abstract sense, and even if such jurisdiction remains valid in Spain, it is the Menchu case rather than the Southern Cone cases that provides the legal precedent. Immunity for former heads of state took a well-deserved blow, but even total abolition would add only a few names to the roster of potential criminal defendants. Furthermore, the reliance on the explicit limitation of the Torture Convention to crimes of state raises doubts that the Pinochet case will have much effect on immunity law in general. Two of the most significant tools for prosecuting international criminals were undercut by the House of Lords decisions. First, the rigid application of the double criminality rule suggests that future international prosecutions may be prevented due to minor technical differences in national criminal laws. Second, one of the key components of modern international crime conventions, the "prosecute or extradite" requirement, was ignored by both the courts and the Blair government. "Prosecute or extradite . . . or perhaps not, as the government sees fit" would more accurately describe the meaning they gave to this international legal obligation.

The fact that the Pinochet case involved a head of state rather than a prison guard or abusive military officer made it particularly susceptible to undue political influence. The Pinochet case itself has survived through a fortuitous confluence of politics and luck that included the failure of Spanish politicians to end the investigations before it was too late politically to do so, the assignment of an unusually aggressive investigating judge, Pinochet's choice of England for medical care, and the fact that Labour had won the preceding general election in the United Kingdom. The role of the executive branch in both managing international policy and prosecutorial discretion is also problematic. The fact that Pinochet's extradition from the United Kingdom seemed to depend on which political party was in power is also troubling. Anglo-American notions of due process hold that the decision to file criminal charges must be solely on the merits, regardless of the prosecutor's or defendant's party affiliation. While that is undoubtedly naive, it is apparent that politics had too much to do
with the early success and late failure of the extradition process in the Pinochet case.

An additional political aspect of the Pinochet case that recommends caution is the underlying odor of colonialism.\textsuperscript{256} Although there were practical reasons for Spain rather than another nation to become the primary forum against the Chilean and Argentinean criminals, there were other possible locations for these investigations. Moreover, Spain never prosecuted the criminals of its own forty-year dictatorship under Francisco Franco, which arguably makes it hypocritical as well as arrogant for Spain to assert jurisdiction over its former colonies in these investigations. In short, it should be more difficult for civil libertarians and human rights activists to celebrate as a victory a case so deeply enmeshed in political wrangling, especially because it ended without prosecution, despite apparently undisputed evidence of thousands of instances of torture.\textsuperscript{257}

The universal jurisdiction that Spain sought to exercise in the Pinochet case is not a good solution. What purports to be international justice turns out to be an expansion of national authority and seems as likely to exacerbate international hostilities as to result in the enforcement of universal legal norms. While it would have been just for Pinochet to face criminal charges, it is not worth the cost of giving hundreds of states (some of which violate international criminal law themselves as a routine matter) the power to try persons on criminal charges with which they have no direct connection. The ability of such nations to obtain custody of the defendants through extradition multiplies the dangers here.\textsuperscript{258}

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\item \textsuperscript{256} See Roht-Arriaza, supra note 4, at 179–98. Professor Roht-Arriaza concludes that an increased use of the ICC would help in minimizing this concern.
\item \textsuperscript{257} An additional, if lighter, lesson is that the arcane games of legal formalism live on in international criminal law. The extradition proceedings were in some ways a parody of both legal minutiae and English courts. If Pinochet had actually faced criminal charges in Spain, it would have been easier to tolerate the technicalities that so trimmed the extradition order. Since he did not, and many observers credit the trimming of the extradition request with making it easier for Straw to release Pinochet to return to Chile, it is fair to accuse legal formalism, at least unnecessary legal formalism, of obstructing international criminal justice in this case.
\item \textsuperscript{258} Thus, it is not just the Augusto Pinochets and Henry Kissingers of the world who would be exposed in this fashion, but all ranks of soldiers and even international business persons who participate in some fashion or degree in an action deemed criminal by one nation asserting extraterritorial jurisdiction. In November 2005, Spain asserted jurisdiction over the April 2003 shelling of the Palestine Hotel in Baghdad, issuing an international arrest warrant for three U.S. soldiers. See generally Spain Orders Arrest of U.S. Troops, BBC News, Oct. 19, 2005, http://news.bbc.co.uk/2/hi/middle_east/4357684.stm.
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The strongest argument that the Pinochet case makes is for greater use of the ICC, which would constitute globalization in a way that universal jurisdiction can never do. The ICC has jurisdiction over genocide, crimes against humanity, and war crimes.\textsuperscript{259} Torture is subject to ICC jurisdiction if “widespread,”\textsuperscript{260} which could easily have been proven in the Chilean and Argentinean cases. Although the ICC is only in its infancy and will probably present many profound difficulties in operation,\textsuperscript{261} its basic structure seems better suited to successful prosecutions of state criminals than the erratic system that now exists. Perhaps if victims of state terrorism, such as victims of the Chilean and Argentinean military governments, were to go to the ICC, and if capable, honest prosecutors such as Judge Garzon were to work for the ICC, future investigations and prosecutions could result in trials and punishments rather than in politics and cover-ups.

The Pinochet case tells a story of “quasi” universal jurisdiction with mixed results. It may be a precedent for believing that anything is possible, but in the end Judge Stuart-Smith was correct when he wrote:

“[I]t is all past history now. It is all water under the bridge. General Pinochet has gone back to Chile. It is a matter for the Chileans to decide whether they are going to try him or not. The courts will not make declarations of legality or lawfulness which can have no bearing on tangible events.”\textsuperscript{262}

This is a story about a big fish that got away, and its moral is that international criminal law has a long way to go.

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\item \textsuperscript{259} ICC Statute, \textit{supra} note 227, art. 5.
\item \textsuperscript{260} \textit{id.} art. 7, § 1(f) (“Crimes Against Humanity”).
\item \textsuperscript{261} \textit{See, e.g.,} Goldstone, \textit{supra} note 217, at 563. One problem is the reluctance of the United States and other nations with a major international presence to participate. \textit{See id.} at 563–64; \textit{Wise et al.}, \textit{supra} note 141, at 787.
\item \textsuperscript{262} Transcript of Hearing, R. (on the application of Barnes) v. Sec'y of State for the Home Dept', Court of Appeal (Civil Division), Dec. 18, 2000 (refusing application by Barnes for judicial review of the Secretary of State's decision to release Pinochet).
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